

*The Hon ~~The~~ Mr Justice
BANDA*

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 38 OF 1988

BETWEEN

ARNOLD KHONDIWA (ON HIS OWN AND ON PLAINTIFF
BEHALF OF HIS WIFE AND HIS DECEASED
SON'S WIFE & CHILDREN)

AND

UNITED TRANSPORT (MW) LIMITED DEFENDANT

RULING

This is a summons under section 11(a)(i) of the Courts Act, Cap 3:02 of the Laws of Malawi, for appointment of a guardian to four infants, Fanny Khondiwa, Arnold Khondiwa, Selina Khondiwa and Kenneth Khondiwa. The infants' father, according to the affidavit, died in June, 1985 and the widow is in South Africa where she has found a job. The application was made in chambers and was made to a Judge/Registrar. When the matter came up for the first time on 10th October, 1990, I was apprehensive that I had jurisdiction and the case was adjourned so that counsel could address me on the point. Mr Chatsika, who appeared before me on the 10th of October, did not appear on the 16th of October, 1990 to address me on the point. Instead, it was Mr Chikopa who did. I have looked at the particular provision in the Act. There are no corresponding rules either in the Rules of the Supreme Court or the Rules of the High Court - and I am of the view that the Registrar has no jurisdiction on appointment of guardians. The power can only be exercised by a Judge and, in my view, in open Court, of course subject to the Judge's power to transfer the matter to chambers.

Section 11(a)(1) reads as follows:

"Without prejudice to any jurisdiction conferred on it by any other written law the High Court shall have (a) jurisdiction (i) to appoint and control guardians of infants and generally over the persons and property of infants..."

The words "the Court" or "the High Court" in an Act of Parliament mean the court sitting in banc, that is to say a Judge or Judges in open court, they exclude a Judge at chambers (Baker -v- Oakes (1877) 2 Q.B. 103 and Clover -v- Adams (1881) 6 Q.B.D. 622. Equally the words "the Court" or "the High Court" if used in a statute do not include a Master or Registrar, albeit the exercise of

the powers or the jurisdiction of "the Court" or "the High Court" may be conferred on a Master or Registrar by a Rule of the Court (compare Lord Denning's decision in Firman -v- Ellis (1978) Q.B. 886 which was replaced by Order 32, rule 9A). In section 11(a)(i) the power has been given to "the High Court" and, in the absence of a Rule of Court conferring jurisdiction on a Master, I do not have jurisdiction on the matter.

Mr Chikopa relied heavily on Order 32, rule 11 of the Rules of the Supreme Court. He argued that the power to appoint guardians has not been specifically excluded by Order 32, rule 11. He went on to argue that under Order 32, rule 11(1)(h) a Master or Registrar could hear any matter that could be heard by a Judge. Order 32, rule 11 is very clear. It refers to authority and jurisdiction as may be transacted by a Judge in Chambers. I have shown that in an Act of Parliament, a power to be exercised under the Statute, unless the statute says otherwise, (see rule 2 of the Statute Law (Miscellaneous Provisions) Act, Cap 5:01) by "the High Court" cannot be exercised in Chambers. A Judge exercising the power under section 11(i) of the Courts Act would exercise it in open court. I, therefore, even on the generality of Order 32, rule 11, cannot exercise the power because the Judge cannot exercise it at chambers.

Mr Chikopa further suggested that if I had no jurisdiction and the Judge has I should refer the matter to a Judge in chambers under Order 32, rule 12. Order 32, rule 12 provides that any Master of the Queens Bench Division or Registrar of the Family Division may refer to a Judge any matter which he thinks should properly be decided by a Judge, and the Judge may either dispose of the matter or refer it back to the Master or Registrar, as the case may be, with such directions as he thinks fit. The power to transfer, in my opinion, only applies where the Registrar has jurisdiction in chambers. I would go further and say that reference under Order 32, rule 12 is possible if the Judge has also got jurisdiction in Chambers. The Judge has no jurisdiction to hear this matter in Chambers.

I do not think that Order 2 of the Rules of the Supreme Court applies here because the issue here is not the form of commencing proceedings nor non-compliance with the Rules of the Supreme Court. The issue here is of jurisdiction and the practice of the Courts is to look into jurisdiction at an early stage. In any event this is not a question of non-compliance with the rules, it is violation of a statute and the Courts do not violate a statute. In Regent United Service Stores (1878) 8 Ch.D. 75, 80 Baggallay J. said:


"I think that the general tendency of all the authorities is to the effect that if there is such service as gives full and complete information to whom information ought to be given, it is sufficient, although provisions and rules of this kind which are not part of the Act of Parliament, but are merely made for the purpose of carrying it into effect, may not

have been literally complied with."

The power to appoint guardians is one conferred by statute, it is not in the Rules of the Court. The Statute cannot be circumverted by relying on Order 2, rule 11 and (2) of the Rules of the Supreme Court.

I dismiss the summons with costs. The applicant can appeal to a Judge in chambers against this ruling.

Made this  day of  October, 1990 in Chambers.


D F Mwaungulu
ACTING REGISTRAR