19-02-1991

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 641 OF 1990

BETWEEN:

ANNIE DAMBO ..... PLAINTIFF

and

LUSITANIA LTD. ..... DEFENDANT

Coram: D F Mwaungulu, Registrar of the High Court
Mwafulirwa, of Counsel for the Applicant/Defendant
Chiume, of Counsel for the Respondent/Plaintiff

RULING

On December 18, 1990 I set aside judgment entered against the applicant on the 13th of August 1990. The applicant applied to have it set aside on the grounds of irregularity. The irregularity disclosed in the summons is that judgment was obtained before the expiry of the time within which to acknowledge service. The farce here was created by enthusiasm on the plaintiff.

The writ of summons, which was specially endorsed, was taken out on the 16th of July, 1990. On the 10th of August the plaintiff's solicitors lodged an affidavit of service which in its material part said:

> "That I did on Monday the 23rd day of July 1990 at Lusitania Limited, P.O. Box 996, Blantyre, personally serve on Mr. Waya of the above named company with a true copy of writ in this action which appeared to be issued by the High Court of Malawi against the above named company...."

On the 13th of August the plaintiff entered Judgment in default of notice of intention to defend.

Before this, on the 2nd of August, 1990 the defendant, through its legal practitioners, lodged a notice of intention to defend. I minuted on that that that the fact should be entered on the register. I do not know whether the register or record was checked before entering the judgment.

In fact much earlier than this, on the 24th of July, the plaintiff wrote a letter to the defendant in which he was serving the writ of summons.

The first point taken by Mr. Mwafulirwa is that since the writ was served by post the last date on which judgment

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should have been entered is 14th August 1990. Where service is by post, service is deemed to be effected seven days after the date of the letter (Order 10, rule 3). Assuming the letter was sent on the 25th of July, the defendant had up to the 14th of August to serve notice of intention to defend. Mr. Chiume, appearing for the plaintiff did not refute this but said the Judgment was based on the personal service of the writ on the company. Of course if it is based on personal service of the writ the judgment here would not be irregular. If we go by the personal service on the company the affidavit of service is irregular. The defendant is a Limited Company. The affidavit of service on a company according to the prescribed forms (Queens Bench Masters Practice Forms, PF 127, paragraph 337, Vol. 2 of The Supreme Court Practice I must state that the service was at the company's registered office. (T.O. Supplies (London) vs. Jerry Geighton 1952 1 K.B. 42). The affidavit here does not state that the place was the company's registered office. In fact the affidavit says that the writ was served on Mr. Waka. Service on a company is governed by Section 137 of the Companies Act. Subsection 3 provides:

> "If a company has no registered office or registered postal address, service upon any director or the Secretary of the company has no director or secretary or if no secretary or director can be traced in Malawi, upon any member of the company ....."

I do not know in what capacity Mr. Waka was served.

I do not want to distend the point beyond this because Mr. Mwafulirwa never took issue with it. Assuming there was personal service, Mr. Mwafulirwa argued that he had already lodged a notice of intention to defend on the 2nd of August. This is a valid point. There probably was inadvertence on putting the acknowledgement on the file, but the notice of intention to defend was lodged with the appropriate court and no proper search was made by the plaintiff and the Court. The judgment could therefore, only be entered in default of defence. Since this was in the month of August, the defendant had up to 15th of September to serve defence. A judgment could not be obtained in default of notice of intention to defend or defence.

Even accepting these proclivities from the court staff, the defendant's arguement that the judgment here was obtained before time is valid because of the plaintiff's resort to two ways of effecting service at once. The wording of Order 10, Rule 1 makes it clear that there should be a choice between the two; so that the use of both must be deplored and depreciated. Order 10, Rule 1 provides:

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> "(1) A writ must be served personally on each defendant by the plaintiff or his agent. (2) A writ for service on a defendant within the jurisdiction may, instead of being served personally on him, be served - (a) by sending a copy of the writ by ordinary first-class post to the defendant at his usual or last known address, or (b) if there is a letter box for that address, by inserting through the letter box a copy of the writ enclosed in a sealed envelope addressed to the defendant."

When the plaintiff resorts to both, the method of service least favourable to him or more favourable to the defendant must be adopted. In this case it is service by post as opposed to personal service which must be regarded. This means that the defendant had up to 14th August to file notice of intention to defend. A judgment entered on the 13th of August was entered before the expiry of time in which to acknowledge service. A judgment entered before actual default is made by a defendant, either for acknowledgement of service or defence is irregular and should be set aside ex debito justitiae .

The plaintiff can appeal against this ruling to a Judge in Chambers.

Made in Chambers this 19th day of February 1991.

D F Mwaungulu
REGISTRAR OF THE HIGH COURT