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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 242 OF 2000

BETWEEN:

PRIVATISATION COMMISSION ..... PLAINTIFF

AND

NORTHERN DAIRIES LIMITED ..... DEFENDANT

MZUZU PRIVATE DAIRY LIMITED ..... 3RD PARTY APPLICANT

CORAM : POTANI, REGISTRAR
Mlele, Counsel for the Plaintiff
Kachlka, Counsel for the 3rd Party

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RULING

This is an application taken by Mzuzu Private Dairy Limited, as 3rd party applicant. It is an application for leave to give notice of intention to defend out of time under Order 12 Rule 6 of the Supreme Court Practice. In the alternative, the 3rd party applicant seeks the default judgement herein to be set aside.

There is an affidavit deponed to by Kamuzu Kabotchwe Walter Chibambo, of counsel for the 3rd party applicant, in support of the application. Also there is the affidavit of Mercy Thandi Mulele, legal practitioner for the plaintiff, in opposition.

It is the 3rd party applicant's story that having been served with writ of summons and the judgement and noting that the documents were not issued against it, but the defendant, Northern Dairies Limited, it caused a search at the companies Registry. The 3rd party applicant found it necessary to

conduct such a search inorder to verify whether indeed the action whose process was served on it was intended against Northern Dairies Limited and not itself bearing in mind that it had dealings with the plaintiff. It is deponed to in paragraph 6 of the affidavit in support that as in turned out, the search revealed that no company exists in the name of Northern Dairies Limited.

It has been submitted on behalf of the 3rd party applicant that the writ herein and service thereof are irregular in that the writ was issued against a non existent party and service effected on a party against whom no proceedings had been commenced. Such being the position, the 3rd party applicant desires to invoke order 12 rule 8(1) by making an application to set aside the writ of summons and service thereof on the ground of irregularity. Further, it is the 3rd party applicants submission that such an application can only be made after a notice of intention to defend has been given hence the application for leave to give such notice out of time.

On its part, the plaintiff argues that the 3rd party applicant has no ***locus standi*** to bring this application as it is only a defendant who can take recourse to order 12 rule 6 and 8. I am inclined to to agree with the plaintiff on this submission. It is clear from the reading of order 12 rule 6 and 8 that it is only a defendant who can make an application under such provisions. I make this finding in the light of the fact that the words used is these provisions are ' a defendant' and nowhere do the words "any other party" appear. On that score, the 3rd party applicant's application be for leave to give notice of intention to defend out of time cannot be entertained.

However, my attention has been drawn to practice note 12/1/11 which empowers the court, of its own motion, to set aside a judgement entered in default of acknowledgement of service against a company non-existent at the time of the judgement. In this case, the plaintiff, in the affidavit in opposition, does not at all dispute the averment and allegation by the 3rd party applicant that the defendant herein does not exist according to a search conducted at the Companies Registry. It should also be mentioned that the wording of Practice Note 12/1/11 is such that any interested party can be heard for purposes of invoking the court's powers conferred under the practice note. In this case, I have no doubt in mind that the 3rd party applicant has sufficient interest in this case in it was served with the writ and judgement, albeit not

being a party and also it has had dealings with the plaintiff. I therefore order that the judgement herein be set aside for having been obtained against a non existent party.

Let me mention that it is open to the plaintiff to regularise the action by amending the writ and statement of claim inorder to indicate the proper defendant.

The question of costs has greatly exercised my mind. I exercising my discretion as to costs, I take cognisance of the fact this application has been triggered by the irregular writ and service thereof initiated by the plaintiff. I therefore order that costs be borne by the plaintiff.

Made in Chambers, this day of August 15, 2000, at **BLANTYRE.**

H S B Potani
REGISTRAR

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