IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CASE NO. 253 OF 2004

BETWEEN

FAR DISTRIBUTOR .....PLAINTIFF

-AND-

YEREMIA CHIHANA.....DEFENDANT

CORAM: MANDA**, SENIOR DEPUTY REGISTRAR**

Anwar Abdullah (*appearing in person for the Plaintiff Company)*

Chilenga for the defendant

RULING

This is an application to set aside default judgment which is taken out under Order 13 rule 9 of the Rules of the Supreme Court. The application was supported by an affidavit sworn by Mr. Marshal Chilenga, who is representing the defendant. There is an affidavit in opposition which was sworn by Anwar Abdullah, the Managing Director of the Plaintiff Company, who attended the proceedings in that capacity.

In his submissions, Mr. Chilenga proffered two grounds for his application. The first was that the judgment was irregular in that it was never served on the defendant. The second limb of counsel's argument was that (and this is in the event that the court should find the judgment to be regular) the defendant has a meritorious defence.

Mr. Chilenga informed the court on the first ground that the defendant was never served with the summons. That the only thing the defendant received was a visit from the Sheriff, who went to the defendant to execute the judgment in this matter. Counsel further observed that since

service of the summons was effected at the National Assembly, where the defendant's wife used to work as a Member of Parliament, the same cannot be deemed to have been effective because the National Assembly, in Counsel's view, was not the defendant's address for purposes of service of documents. It is therefore on this ground that Counsel argued that the judgment obtained by the plaintiff was irregular.

In looking at this case, I felt that I should first deal with the issue of whether judgment was regular or not. This is in view of the principle that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow rules of procedure. This is also in view of the fact that where a judgment is irregularly obtained, the defendant is entitled **as of right** to have it set aside. Indeed the question I did ask myself in this instance is whether the defendant can be said to be entitled to have this judgment set aside as of right.

Order 10 rule 1 does provide that a writ must be served personally on each defendant by the plaintiff. Nevertheless, and as an alternative to personal service, the writ of summons and other originating process may be served on a defendant by post. According to the Rules of the Supreme Court, this can be done by ordinary first class post sent to the defendant's usual or **last known** address. According to Order 10 rule 2(b) the words first class post means post which has been prepaid or in respect of which payment is not required. And in ***Austin Rover Group Ltd v Crouch Butler Savage Associates (a firm)*** [1986] 3 All. E.R**.**, L.J. May held that the words "***last known***" mean last known to the plaintiff.

Having thus stated the law, I will now direct my attention to the facts in this case which were briefly that the defendant and his wife, the then Hon. Loveness Gondwe, went to the plaintiff's shop to buy some 30 bags of cement, for which purchase they issued a cheque which they both singed. According to the plaintiff the cheque that was issued by the defendant and his wife, was not honoured by the bank apparently because the account had been closed. Indeed, from the plaintiff's perspective, this is the whole reason why he took out these summons against the defendant. Indeed because the defendant went to the plaintiff's place of business with his wife and introduced her as a member of parliament, the plaintiff said he sent the summons to the National Assembly. This fact was stated by the plaintiff in his affidavit in opposition to the defendant's application.

Now directing my mind to the facts and the law the question that I did for the view that there was effective service of the summons. I do say this

in consideration of the fact that when the defendant was purchasing the cement, he was together with his wife and that they jointly signed the cheque. In this regard, and in view of the fact that the defendant's wife was working at the National Assembly, information which the defendant himself volunteered to the plaintiff, it was the finding of this court that the defendant's last known address, if as far as the plaintiff was concerned was at the National Assembly. I believe that it will be expecting too much for litigants to go around hunting for addresses of defendants when the latter do not volunteer them in the first place. Indeed I would think that courts will be defeating the interests of justice if we are to be allowing defendants to simply argue that service was not effected because the address used for service belongs to the spouse. This is especially when we consider the fact that there are some defendants do not have addresses and actually use their spouse's addresses. In my view then, the pertinent question should be whether service was effected or not. In this sense the courts, in my view, should be interested with the possibility of the defendant having been made aware of the process pending against him/her and what he did upon being so aware. In the circumstances, it is the view of this court that defendant was made aware of the process and never acted on the same promptly. Had it been that the defendant was saying that the process never got to Parliament then I would have been inclined otherwise, but as the circumstances are in this case, I do not envisage a situation where the defendant's wife would have received mail through her address and not take to him for his attention.

Having said all this then it is the view of this court that the judgment that was obtained by the plaintiff on the 12th day of July 2004 was a regular one. In fact this was the view of the Assistant Registrar when he heard and granted the application for stay of execution on the 24th day of September 2004. Indeed when making the order for stay, it was also ordered that the defendant should pay sheriff fees and expenses within fourteen days, which would not have been the case if the judgment was irregular. I will therefore proceed to reiterate that the defendant should pay the sheriff fees and expenses if the same was not done.

Having found that the judgment was regular, I should now move to consider the second ground of the application by the defendant, which was that he has a defence on the merits. In this regard, I do concede to the fact the issue regarding whether the 30 bags of cement were delivered or not is one that requires admission of evidence on oath, in a formal trial. Indeed the defendant could succeed in his defence should it turn out that the plaintiff failed in his contractual obligations by not supplying the 30 bags of cement as per the agreement between the parties. So in as far as the defendant says that his defence is that he

never took delivery of the goods, I would say that the same could have prospects of success. It is therefore on this basis that I do accordingly grant the defendant's prayer that the default judgment obtained on the 12th day of July be set aside and order that the matter should take the normal course of a trial. Costs will be in the cause.

Made in Chambers this……day of……2004

K.T. MANDA
SENIOR DEPUTY REGISTRAR