



**IN THE HIGH COURT OF MALAWI**  
**LILONGWE DISTRICT REGISTRY**  
CIVIL CAUSE No.820 OF 2000

BETWEEN

MALAWI INSTITUTE OF MANAGEMENT .....1<sup>ST</sup> PLAINTIFF

AND

W.S.J. KADAMMANJA ..... DEFENDANT

**CORAM : T.R. Ligowe : Assistant Registrar**

Kumange : Counsel for the Defendant

Nkhutabasa : Counsel for the plaintiff

**RULING**

This is an application by the defendant to set aside a default judgment the plaintiff obtained herein. Mr. Kumange appears for the defendant on a brief by Mr. Maulidi of counsel for the defendant.

The plaintiff obtained a default judgment on a claim of (a) K102 825.98; (b) interest at 15% thereon or any rate the court may deem fit; and (c) 15% Collection Costs. The judgment was entered on 19<sup>th</sup> December 2000. A warrant of execution was issued on 24<sup>th</sup> August 2001. It was stayed on application by the defendant on 23<sup>rd</sup> April 2002 on condition that he applies to set aside the judgment within 14 days of that order. That condition was not complied with and the plaintiff issued another warrant of execution on 27<sup>th</sup> April 2006. To this one the defendant obtained

another order of stay on 13<sup>th</sup> October 2006 on condition that he files the application to set aside the judgment within 14 days of that order. That application was filed on 7<sup>th</sup> November 2006. I first heard it on 18<sup>th</sup> January 2007 when it was adjourned, for counsel for the defendant to file a notice of his appointment as legal practitioner for the defendant.

The application is on grounds of irregularity and that the defendant has a defence on the merits. He argues that originating process in this case was sent by post to him on 24<sup>th</sup> July 2000 at C/O National Roads Authority, P/Bag B127, Lilongwe when his last known address was C/O National Roads Authority, P/Bag B346, Lilongwe. That he was at the material time out of the jurisdiction in the United Kingdom pursuing a Masters Degree Course. He was only made aware of the action when sheriffs visited him. That the judgment having been obtained on 19<sup>th</sup> December 2000 could not be enforced in 2006 without leave of the court. The defendant further argues that he has a meritorious defence, in that the statement of claim discloses no cause of action and is vague frivolous and an abuse of the process of the court.

Counsel for the plaintiff contends that despite the originating process having been addressed to P/Bag B127 instead of P/Bag B346, service was due. He argues that it is common practice at the Post Office that a letter can still reach its destination even if it has been improperly addressed somehow. That in this case the writ was not returned to the sender undelivered. That by alleging that he was out of the jurisdiction the plaintiff admits the originating process would have reached him had he been within the jurisdiction. Counsel further argues that the defendant made the application to set aside the default judgment out of time having been ordered by the court to make it 14 days from the order

of stay of execution thus delaying the matter with an aim to frustrate the plaintiff's claim.

There is one basic issue to this application. Whether the writ of summons was duly served in the circumstances. If service was due then the judgment is a regular one and so we can proceed to consider the other issues. If not then the judgment is irregular and the defendant is entitled to have the judgment in question set aside as of right.

Order 10 rule 1(2)(a) of the R.S.C. is the best starting point. It provides as follows:

- “(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.”

This mode of service is only authorised if the defendant is within the jurisdiction. The words "within the jurisdiction" in r.1 (2) apply to the defendant and not the service of the writ by post or by insertion through the letter-box, so that unless the defendant is within the jurisdiction at the time of such service, the service is invalid. Hence where there had been letter box service at the defendant's residence whilst he was out of jurisdiction but the defendant had returned to the jurisdiction and the writ had come to his knowledge, the date of deemed service under O.10, r.11 (2) was the date when the defendant had knowledge of the writ whilst he was within the jurisdiction. (***Barclays Bank of Swaziland Ltd v. Hahn*** [1989] 1 W.L.R. 506; [1989]2 All E.R. 398, HL).

The words "last known" in this provision means known to the plaintiff (per May L.J. in ***Austin Rover Group Ltd v. Crouch Butler Savage Associates (A Firm)*** [1986] 1 W.L.R. 1102; [1986] 3 All E.R. 50). Proof

that a letter has been properly addressed, pre-paid and posted to the proper address of the person to be served and not returned through the Post Office undelivered to the addressee affords *prima facie* evidence that it has been duly delivered to the addressee (see **A/S Catherineholm v. Norequipment Trading Ltd** [1972] 2 W.L.R. 1242; [1972] 2 All E.R. 538, CA; On the other hand, if the letter, although properly addressed, pre-paid and posted to the proper address of the person to be served, is returned through the Post Office undelivered to the addressee, it will be treated as not having been duly served (see per Lord Denning L.J. in **R. v. London County Quarter Sessions Appeals Committee, ex p. Rossi** [1956] 1 Q.B. 682 at 694.

With this exposition of the law one finds that service of the originating process was not valid in this case. The letter was not properly addressed to the defendant and it was sent while he was out of the jurisdiction. The default judgment is therefore irregular and it is hereby set aside *ex debito justitiae*. Consequently execution was unlawful, and the plaintiff must reimburse the defendant the sheriff fees and expenses he paid.

The defendant must serve his defence within 14 days from the date hereof.

Costs will be in the cause.

Made in chambers this 7<sup>th</sup> day of June 2007.

T. R. Ligowe

**ASSISTANT REGISTRAR**

