



HIGH COURT
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29/03/14

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CASE NUMBER 834 OF 2009

BETWEEN:

ISHMAEL CHIRWA

PLAINTIFF

AND

AXA BUS AND COACH SERVICES LIMITED

1st DEFENDANT

CITIZEN INSURANCE COMPANY LIMITED

2nd DEFENDANT

Coram: M.A. Tembo, Deputy Registrar

Mpaka, Counsel for the Plaintiff
Kalua, Counsel for the 2nd Defendant

ORDER

This is this court's order on the 1st defendant's application for an order setting aside the judgment entered herein against the 1st defendant for the 1st defendant's failure to comply with the Courts (Mandatory Mediation) Rules. The 1st defendant has taken out the application under Order 2 rule 2 (2) and Order 19 rule 9 Rules of Supreme.

The application is supported by the 1st defendant's affidavit as well as skeleton arguments. The plaintiff opposes the instant application and also filed two

affidavits as well as skeleton arguments. Both parties are commended for their skeletal arguments that have afforded much guidance to this court.

The plaintiff commenced the present action on 4th May 2009 claiming damages for loss of expectation of life and loss of dependency arising out of the death of Ulemu Chirwa. The 1st defendant contends that it was not served with the writ of summons that commenced this action and therefore that it never instructed any counsel to act on its behalf in this matter. In accordance with Order 2 rule 2 of the Rules of Supreme Court the 1st defendant claims that the plaintiff's proceedings are irregular for want of service. The 1st defendant claims to have become aware of this case on 30th July 2010 when its bank accounts were garnisheed.

The plaintiff contends that he served the writ of summons on the 1st defendant personally by leaving it with the 1st defendant's secretary, at the 1st defendant's head office, who refused to sign an acknowledgment for the same. Further, the plaintiff contends that the 1st defendant was aware of the proceedings because Winlaw and Nda, a law firm, filed an acknowledgment of service form that it was acting for the 1st defendant in this matter. The 1st defendant contends that the firm of Winlaw and Nda acted without authority and that the 1st defendant has never ratified the actions of Winlaw and Nda.

The 1st defendant also seeks to set aside the judgment herein, under Order 19 rule 9 Rules of Supreme Court, on account of the fact that it has a defence on the merits to the claim herein which it seeks to take to trial.

The finding of this court in this matter is that the 1st defendant has failed to show that it was not served with the writ of summons in this matter. The law on service on a company, such as the 1st defendant, is as rightly submitted by the 1st defendant as contained in section 137(1) of the Companies Act which provides that a document may be served by leaving the same at a company's registered office. See also *Addis Limited v Berkely Supplies Limited* [1964] 1 WLR 943. It is therefore sufficient to prove that the writ of summons was left at a company's registered office. See *Note 65/3/7* to *Order 65 rule 3* Rules of Supreme Court. Service can also be effected on the company's solicitor.

In the present case we have an affidavit of service which shows that the writ of summons was, on 8th May 2009, left with a secretary of the 1st defendant, at the 1st

defendant's head office, who refused to sign acknowledging service of the same. We also have the 1st defendant's lawyers, Winlaw and Ndaou, acknowledging the service of the writ of summons herein on 11th May 2009. In fact Winlaw and Ndaou took several other steps in this matter including attempting to appeal against the order striking out the 1st defendant's defence by notice of appeal dated 11th November 2009. This clearly shows that the 1st defendant was aware of the proceedings herein or that it was served with the writ of summons.

The 1st defendant has alleged that Winlaw and Ndaou acted without authority. If this court were to uphold such an allegation, Winlaw and Ndaou would be slapped with an adverse costs order. The gap in that connection is that this court has not heard from Winlaw and Ndaou because the 1st defendant has not taken any step to bring in Winlaw and Ndaou in this matter to give them a chance to contest and verify the allegation that Winlaw and Ndaou never had instructions from the 1st defendant. It is indeed very difficult for the plaintiff to ascertain whether the 1st defendant gave instruction to Winlaw and Ndaou or not. The issue of authority of Winlaw and Ndaou to act herein would have best been sorted out by the 1st defendant bringing in Winlaw and Ndaou in some way, by either summons or motion and not by simply alleging that Winlaw and Ndaou had no authority to act. In these circumstances, it can be safely assumed that Winlaw and Ndaou acted with the 1st defendant's authority.

In such a case where the 1st defendant's counsel not only acknowledged service of the writ of summons but also took several steps in this matter this court fails to appreciate the 1st defendant's contention that it was never made aware of the proceedings herein. This court cannot therefore set aside the proceedings impugned by the 1st defendant herein on account of want of service on the 1st defendant.

On the issue of defence on merits this court's view is that the default judgment herein was entered under the Mediation Rules, not because the 1st defendant had not entered a defence but rather because the 1st defendant did not comply with the Mediation Rules in that it failed to attend a mediation session without good cause. That issue of non-compliance by the 1st defendant was closed before the Registrar, as rightly submitted by the plaintiff. If the 1st defendant finds that decision of the Registrar to be erroneous on that point all that has to be done is to appeal to a Judge in chambers.

This court shall therefore not belabor the point raised by the plaintiff about the 1st defendant not making the instant application promptly.

In these premises, the 1st defendant's application is dismissed with costs to the plaintiff.

Made in chambers at Blantyre this 29th March 2011.

A handwritten signature in black ink, consisting of a large, stylized 'S' shape with a horizontal line across the middle and a small flourish at the end.

M.A. Tembo
Deputy Registrar