



MALAWI JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 34 OF 2018**

BETWEEN:

**MR. GUSTAVE KALIWO.....1ST CLAIMANT
MR. TONNY KANDIERO.....2ND CLAIMANT
HON. RICHARD MSOWOYA, MP.....3RD CLAIMANT
HON. JESSIE KABWIRA, MP.....4TH CLAIMANT
HON. JAMES CHATONDA KAUNDA.....5TH CLAIMANT**

-AND-

**HON. LAZARUS CHAKWERA, PRESIDENT OF THE MALAWI
CONGRESS PARTY.....1ST DEFENDANT
HON.EZEKIEL CHING’OMA, MP REPRESENTING ALL MEMBERS OF
THE NATIONAL EXECUTIVE COMMITTEE OF THE MALAWI
CONGRESS PARTY.....2ND DEFENDANT**

CORAM: THE HON JUSTICE HEALEY POTANI

Mr. Kaphale and Kaliwo, Counsel for the Claimants

Mr. Nthewa, Counsel for the Defendants

Mr. Mathanda, Court clerk

RULING

The issue that requires resolution by the court is whether the notice of preliminary objections served on the claimants by the defendants on February 28, 2018, at 4.35 pm satisfies the 2 clear days' notice requirement stipulated in Order 10 rule 6 of the Courts [High Court] [Civil Procedure] Rules [CPR].

It is the contention of counsel for the claimants that the service having been done after 4.30 pm would be deemed to have been effected on the next day being March 1, which was a Thursday and reliance is placed on Order 4 rule 3 of the CPR which stipulates Court business hours to be from 8.30 am to 4.30 pm. Thus, according to counsel, the 2 clear days would be Friday, March 2 and Tuesday, March 7, the day the matter was called for hearing since the other intervening days being weekend days and a public holiday would not count.

The position taken by counsel for the defendants is that since service was done on February 28, the 2 clear days' notice requirement was satisfied by the 2 intervening days of March 1 and 2. It has been argued by counsel for the defendants that the provision relied on by the claimants on the contention that the stoppage time for service of documents is 4.30pm is in relation to Court Registry business hours and not hours for service of documents. It is the submission of counsel for the defendants that the claimants having not cited any provision specific to the effect that service done after 4.30 pm would be deemed to have been done on the next day, there is no basis to support the claimants' position and contention.

The court has taken time to read through the CPR with a view to spot any provision specifically on the hours for service of court process. Particularly, the court has looked at Orders 3, 4, 8 and 10 which appear to be relevant to the issue at hand.

There is no stipulation the court has come across on the hours for service of court process unlike in the Rules of the Supreme Court [RSC] which under Order 65 in Practice Note 65/2/7 has the following provision:

In strict theory, all pleadings, notice or other documents may be served at any time before midnight on all weekdays, except Saturdays, but if such service is effected between 12 noon on a Saturday and midnight on the following day or after 4 in the afternoon of any other week day, such service will, for the purpose of computing any period of time after service of the document, be deemed to have been served on the Monday following that Saturday or on the day following that other weekday

It has been argued and submitted by counsel for the claimants that in the absence of any specific provision on the hours for service in the CPR, a cue or guidance can be sought from Order 4 rule 3 which stipulates the Court business hours, that is 8.30 am to 4.30 pm. The court would tend to be very persuaded by this argument as it would make no sense to leave the hours for service of documents open ended. That would be chaotic. Therefore, the court in the present case would go along with the position of the claimants that the service of the notice of preliminary objections effected on February 28, 2018, would be deemed to have been effected on March 1 for purposes of computation of the 2 clear days' notice requirement. This would mean that the 2 clear days would be Friday, March 2 and Tuesday, March 6 as the other intervening days are weekend days and a public holiday. It therefore means that when the matter was called for hearing on March 6, the 2 clear days' notice requirement had not been satisfied. The all important question is whether the notice of objection should not be heard on that account as counsel for the claimant beseeches the court?

In answering the question, the court is mindful that the purpose of the 2 clear days' notice requirement is to ensure that the respondent to an application has proper notice

of both the hearing and the material upon which the applicant intends to rely. In other words, it is to avoid taking the respondent by surprise or ambushing him as it were. It is also to afford the respondent ample time to prepare his case in response. That said, it should be noted and recalled that the issues contained in the notice of the preliminary objection were first raised by the defendants on February 26, 2018, *abait* through an oral representation to the court. This was in the presence of counsel for the claimants. It is therefore the considered view of the court that the claimants having been made aware of the intended objections on February 26, they have not suffered serious prejudice by the service of the formal written application which missed the 2 clear days' requirement by a bare 5 minutes. It is the court's strong inclination that the circumstances of the present case are such that to insist on strict compliance with the 2 clear days, notice requirement would be a pedantic approach which would defeat the justice of the case. It is hereby accordingly ordered that the notice of preliminary objection should be heard notwithstanding that strictly speaking the 2 clear days' notice requirement was not satisfied.

Made this day of March 7, 2018, at Blantyre in the Republic of Malawi.


HEALEY POTANI
JUDGE