REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 36 OF 2018

BETWEEN

MACDONALD MOSE.....CLAIMANT

AND

PETER MASINGA.....1st DEFENDANT

REUNION INSURANCE COMPANY LIMITED.....2nd DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA**

Malijani- of Counsel for the plaintiff

Katuya- of Counsel for the defendant

Chitsulo- Court Clerk and Official Interpreter

RULING

The claimant in this matter took out a writ of summons which was issued on 29th of January 2018 against the defendants claiming damages for pain and suffering, loss of amenities, special damages and costs of this action. The said summons was served on the defendants on the 10th of September 2018. This is an application by the defendants (hereinafter the applicants) to set aside the service of the summons for irregularity. The application is supported by a sworn statement by **Andrew Dowell Katuya** of Counsel.

The applicant depones that pursuant to Form 1 under the First Schedule to the Courts (High Court) (Civil Procedure) Rules, 2017 (hereinafter CPR, 2017), the summons is supposed to be served within 4 calendar months from the date of its issue by the court. He points out that the summons stipulates that service must

be done within 4 calendar months. He depones that having been issued by the Registrar on the 29th of January 2018 the summons' 4 calendar months validity expired on the 28th of May, 2018. He further avers that the claimant served the summons on the defendants on 10th of September 2018, that is, 3 months and 10 days after it had expired. He contends that the summons was not renewed and in the premises the summons was fatally irregular and he prays that the same be set aside with costs to the defendants.

The claimant through a sworn statement by **Aiman Mtanga Malijani** of Counsel admits that the service was done after its validity period. It is averred that upon getting hold of the summons the claimant inadvertently proceeded to have it served on the defendants without proper scrutiny of the date on which it was issued. He further depones that the overriding the objective of the court rules is ensuring that matters in a proceeding are settled justly and fairly. He further depones that while acknowledging the irregularity it is the claimant's prayer that the same is not fatal as it can be remedied by the court allowing service out of time. He contends that the defendants duly accepted service of the summons out of time and are estopped and precluded from contending that the same should be set aside. He further contends that the defendant would not be prejudiced in anyway by service out of time. It is his prayer that the court refuses the defendant's application to set aside service as fatally irregular and to make an order regularizing the same despite being served out of time.

I have carefully considered the submissions of both counsel. I must start by stating that the CPR, 2017 were introduced as part of measures taken to allow more expedient justice for those with legitimate claims. Form 1 under the First Schedule to the CPR, 2017 provides as follows;

> This Summons is to be served within 4 calendar months (or, permission is required to effect service out of the jurisdiction, 6 months) beginning with that date unless renewed by order of the Court.

In my view, this provision automatically invalidates summonses which may have been issued and are not served within four months of issuance. I wish to believe that it is meant to eliminate suits which are filed for the sake of achieving collateral objectives other than the genuine determination of justiciable disputes and as a means of expeditiously disposing of frivolous or speculative suits. In my opinion, the provision is mandatory and should be complied with. I am aware that a claimant, who fails to serve within the stipulated four months from the date of issuance of the summons upon him or her for service, will not *ipso facto* lose the right to do so beyond that period, provided the Court permits him or her to do so. In this matter, the summons were issued to counsel for the claimant for service on 29th January 2018. Consequently they should have been served on the defendants latest 28th May 2018 and failure of which the extension ought to have been sought.

In opposing the application herein, the defendants wish to place reliance on order 2 rule 2 of the CPR 2017 which is to the effect that an irregularity in a proceeding, or a document, or a step taken, or order made in a proceeding, shall not render a proceeding, document, step taken or order a nullity. It is argued that the court could order remedies provided for under order 2 rule 3. They suggest that the court should award costs to the party aggrieved by the irregularity. The question is whether the defendants can avail themselves to the remedies under rule 3 in the light of order 2 rule 4 of the CPR, 2017. The same is to the effect that an application be made within a reasonable time upon setting out details of the failure to comply with these Rules or a direction of the Court. In this case, the summons issued in respect of the claimants expired on 28th May 2018 and no action was taken by the defendant and his counsel to extend its validity. Essentially, there is no application was made in this case. It is rather moot for the claimant to resort to order 2 rule 3 of the rules.

It is also argued by counsel for the claimant that the court should in the interests of justice disregard these irregularities. The submission is apparently inspired by one of the overriding principles of the CPR (2017) to deal with proceedings justly. I am aware that the rules of procedure are "intended to serve as the hand-maidens of justice, not to defeat it." (See **Iron and Steel Wares Limited v. C.W. Martyr and Company (1956) 23 E.A.C.A. 175 at 177**). In a deserving case, the court may rightfully exercise its discretion to overlook the failure to comply with rules of procedure, upon such conditions as it may deem fit intended to guard against the abuse of its process. However, in the instant case, the court is mindful of the mischief sought to be cured by the requirement for strict compliance with the periods of time stipulated in the summons. It is not sufficient for a claimant to institute suit against a party and not take steps to effect service of summons. A defendant must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The Summons must be served in the manner provided for in the rules to enable the defendants to submit to the jurisdiction of the court. (see **Mobile Kitale Station v. Mobil Kenya Limited & Another [2004] 1 KLR 1**). It therefore follows that their knowledge of the existence of the suit is dependent on proper service of the summons. In my view, it is not enough to argue that the other party was not prejudiced.

The defendants also argue that the claimant waived his right to insist on proper service having accepted service of the contended summons. They claim that the claimant in full knowledge that the summons had been served out of time proceeded to accept it. On this regard, they sought to rely on the case of **Wilson Kamwendo v Reunion Insurance Company Limited Civil Cause 913 of 2009** in which it is stated that:

> But even if I am wrong in my decision, it is also my considered view in the premises obtaining that the plaintiff would be estopped and precluded from contending that the amended defence should not be considered by this court as the defendant's pleadings in

the cause. This is because the plaintiff with full knowledge that the period during which the said amended defence ought to have been served had elapsed proceeded to accept the service of the same as evidenced by the plaintiff's legal practitioner's stamp of acceptance of the service of the said defence affixed thereon. The reasonable inference to be drawn from the acceptance of the same, as aforesaid, is that the defendant's legal practitioners had been given the impression that the plaintiff's legal practitioners had no issues with the late service of the amended defence. For the reason aforesaid, I am again not inclined to sustain the contention of the plaintiff's counsel herein.

Counsel for the defendants was of the view that the position would be problematic if applied to a layman accepting service. All the same, the issue in this case is that by accepting service of the summons the claimant took a step in the proceedings which precludes them from challenging the service of summons out of time. I agree with Counsel for the claimant in that accepting service can never be taken as having taken a step in the proceedings. In my view, where the defendants on their own motion proceed to file a defence to the suit, it becomes superfluous to insist that the summons was served out of time.

The question is whether failure to adhere to such clear procedural requirement on the validity of and service of summons outside the stipulated time periods is a mere procedural technicality. As aforementioned, a summons is a judicial document calling upon the defendant to submit to the jurisdiction of the court. This rule therefore cannot be mere procedural technicality. The timelines in the rules are intended to make the process of judicial adjudication and determination swift, fair, just, certain and even-handed. Indeed, public policy demands that cases be heard and determined expeditiously since delay defeats equity, and denies the parties legitimate expectations (see **Fitzpatrick v. Batger & Co. Ltd [1967] 2 All ER 657**). It is for those reasons that non-compliance with the requirements of service of summons is considered a fundamental defect rather than a mere technicality and it cannot be cured in the manner suggested.

I am of the considered opinion that the defendants' application be allowed. Consequently, Civil Cause 36 of 2018 is struck out as against the defendants. The applicants are awarded the costs of this application.

MADE IN CHAMBERS THIS 28th DAY OF FEBRUARY 2019

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR