



REPUBLIC OF MALAWI
 IN THE HIGH COURT OF MALAWI
 PRINCIPAL REGISTRY
 CIVIL DIVISION
 CIVIL CAUSE NO. 330 OF 2021
 (Before Honourable Justice Mambulasa)

BETWEEN:

MALAWI COMMUNICATIONS REGULATORY AUTHORITY.....
**CLAIMANT**

-AND-

JONATHAN PINIFOLO..... DEFENDANT

CORAM: HON. JUSTICE MANDALA MAMBULASA

Mr. Madalitso M'meta, Advocate for the Claimant

Defendant, not present, unrepresented

Mr. Obet Chitatu, Court Clerk

RULING

MAMBULASA, J

Introduction

- [1] On 19th October, 2021 the Claimant filed a without-notice application for a judgment in default of response and or defence against the Defendant under Order 12 of the Courts (High Court) (Civil Procedure) Rules, 2017.
- [2] The application was supported by a Sworn Statement made by Advocate Mr. Madalitso M'meta. He also filed Skeleton Arguments.
- [3] The file was brought to the attention of this Court in the late afternoon on 21st October, 2021.

Issue for Determination

- [4] The only issue falling for determination before this Court is:
 - Whether or not judgment in default either of response or defence should be entered for the Claimant against the Defendant?

The Law

- [5] Order 12, rule 6 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides as follows:
 - Where a defendant-
 - (a) does not file and serve a response or a defence within 14 days after service of the summons; or

(b) files a response within the time under paragraph (a) but does not file and serve a defence within 28 days after the service of the summons, the claimant may file a sworn statement as a 'proof of service' that the summons and response in Form 2 **was served on the defendant as required by Order 5 rule 7**, and he may-

(i) apply to the Court for a judgment in default to be entered under this Order against the defendant; and

[6] Order 12, rule 7 of the Courts (High Court) (Civil Procedure) Rules, 2017 states as follows:

(1) An application for a judgment in default for liquidated claims, unliquidated monetary claims, including claims for damages, the detention of goods, the recovery or delivery of possession of land in an application for possession of land, may be made by filing a draft of the judgment together with a sworn statement in support of the application.

(2) The draft of the judgment in default and the sworn statement under sub-rule (1) need not be served on any person unless the Court otherwise orders.

[7] Order 12, rule 8 of the Courts (High Court) (Civil Procedure) Rules, 2017 is couched in the following terms:

(1) The Court may enter a judgment in default for the claimant under rule 7 without a hearing for liquidated claims, unliquidated monetary claims, including claims for damages, the detention of goods, the recovery or delivery of possession of land in an application for possession of land, interest from the date of filing the application at a rate fixed by the Court, and costs.

[8] Order 5, rule 7 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides as follows:

(1) A summons shall be served on the defendant **personally**, at his last known address **or by other alternative mode as the Court may order** (*Emphasis supplied*).

[9] Order 8, rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017 states that:

A copy of the summons, which has been sealed, and the response in Form 2 referred to in Order 5 rules 4 and 7 respectively, shall be served on the defendant **personally**, unless-

(a) Rule 20 applies; or

(b) **the Court orders that the summons and the response in Form 2 may be served in another way** (*Emphasis supplied*).

[10] Order 8, rule 8 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides as follows:

Subject to any specific provision in these Rules or any other written law, a document, **other than a summons and a response**, may be served-

(a) on a party personally;

(b) by leaving it at the party's address for service; or

(c) by sending it to the party's address for service by prepaid post, registered mail, courier service, facsimile, or, if the party has given an address for service by electronic mail, by electronic mail (*Emphasis supplied*).

[11] Order 8, rule 20 of the Courts (High Court) (Civil Procedure) Rules, 2017 is couched in the following terms:

(1) Where it is not practical for a party to serve a document personally and an alternative way of serving the document is reasonably unlikely to bring the document to the attention of the person to be served, the party may apply to the Court for an order that the document be served by other means (the 'substituted service').

(2) The Court may order that a document be served-

(a) on a village or a faith community leader who lives in the area where it is believed the person to be served is living;

(b) on a spouse, parent or sibling of the person to be served;

(c) by putting a notice in a newspaper circulating in the area where the person to be served lives; or

(d) by arranging for an announcement about the document to be broadcast on the local radio in the area where the person to be served lives;

(e) by leaving the document with an adult person at the last known address of the person to be served; or

(f) in any other way that the Court is satisfied will ensure that the person to be served knows about the document and its contents.

(3) A notice in the newspaper, or an announcement on the radio shall-

(a) be addressed to the person being served;

(b) give the name and last known address of the person being served and the name and address for service of the claimant;

(c) state where a copy of the document can be picked up by the person being served; and

(d) where the document requires the person to go to a court, state the time, date and the place of the Court where the person being served is to go.

[12] Order 2, rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017 is to the effect that the failure to comply with these Rules or a direction of the Court shall be an irregularity.

[13] Order 2, rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides as follows:

Where there has been a failure to comply with these Rules or a direction of the Court, the Court may-

(a) set aside all or part of the proceeding;

(b) set aside a step taken in the proceeding;

(c) declare a document or a step taken to be ineffectual;

(d) declare a document or a step taken to be effectual;

(e) make an order as to costs; or

(f) make any order that the Court may deem fit.

Analysis and application of the law to the facts

[14] Order 5, rule 7 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 is very clear that a summons **shall** be served on the defendant personally.

[15] Similarly, Order 8, rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017 also provides that a copy of the summons, which has been

sealed, and the response in Form 2 **shall** also be served on the defendant personally.

[16] Again, Order 12, rule 6 (b) of the Courts (High Court) (Civil Procedure) Rules, 2017 buttresses the point that a summons and a response in Form 2 must have been served as required by Order 5, rule 7 and that if it was, then, the claimant may apply to the Court for a judgment in default to be entered under the Order against the defendant.

[17] In view of the foregoing, it is fair to state as a matter of law that all things being equal and subject to any specific provision in the Courts (High Court) (Civil Procedure) Rules, 2017 or other written law, the scheme under the Courts (High Court) (Civil Procedure) Rules, 2017 is primarily that a summons and a response in Form 2 shall be served on the defendant or defendants, as the case may be, through personal service. The rationale is to minimize undue delays in the administration of justice that were being experienced under the old regime of Rules of the Supreme Court whereby defendants would bring applications to set aside judgments in default on the ground that they were not served with the then, Writ of Summons, possibly because claimants would serve using any mode that they deemed fit and proper.

[18] The law however is alive to the fact that it may not always be possible to serve a summons and a response in Form 2 on a defendant through personal service. In that regard, Order 5, rule 7 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 states that a summons shall be served on the defendant personally, at his last known address **or by other alternative**

mode as the Court may order. Similarly, Order 8, rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017 is to the same effect that a summons and a response in Form 2 shall be served on the defendant personally, unless, **rule 20 applies; or the Court orders that the summons and the response in Form 2 may be served in another way.** Rule 20 herein is on substituted service, which also requires the sanction of the Court, through an application.

[19] It appears to this Court therefore that a claimant does not seem to have much choice as to what mode of service he or she or it is going to employ where a summons and a response in Form 2 is concerned - at least within the jurisdiction and perhaps with the exception of foreign States and diplomatic missions.¹ The default mode of service is that of personal service.

[20] However, where personal service of a summons and response in Form 2 is not possible, then, any other mode of service to be used by the claimant, must invariably be sanctioned by the Court through an application brought for that purpose. That seems to be the import of Order 5, rule 7 (1) and Order 8, rule 3 (b) of the Courts (High Court) (Civil Procedure) Rules, 2017. The application for service by an alternative mode must be supported by a sworn statement that must show why the order is necessary, the steps already taken to try and serve the summons and the response in Form 2 and why the method of service that is being suggested by the claimant will result in the summons and the response in Form 2 coming to the attention of the party being served.

¹ See generally section 14 of the Immunities and Privileges Act, Cap. 16:01 of the Laws of Malawi.

[21] Order 8, rule 19 of the Courts (High Court) (Civil Procedure) Rules, 2017 is an interesting rule. It provides as follows:

(1) All documents required to be served on the Government for the purpose of, or in connection with, any proceeding by or against the Government shall be served on the Attorney-General or upon another public officer or Government department, expressly authorized by a written law to institute or defend the proceeding in question on behalf of the Government.

(2) All documents required to be served on the Government under sub-rule (1), shall be served on the Attorney-General or upon another public officer or Government department-

(a) personally; or

(b) by sending it to the Attorney-General or upon another public officer or Government department through the address for service by prepaid post, registered mail, courier service, facsimile, or if the party has given an address for service by electronic mail, by electronic mail.

[22] The above rule is open to two interpretations. The first interpretation is that one may understand it in the context of what we have already looked at and considered which is that if a claimant has to serve a summons and a response in Form 2 on Government, just like any other defendant, he or she or it, is to do so through personal service. This understanding would ensure that this rule is in harmony with Order 5, rule 7 (1) and Order 8, rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017.

[23] The second interpretation that may be attached to the rule is that it was intended to make Government to be in a class of its own and to be treated differently from the rest of the other defendants. That understanding is

inferred from the use of the words, “all documents” by the draftsman in the rule which would catch ‘a summons and a response in Form 2’. In which case, a claimant would seem to have some latitude as to what mode of service he can employ to serve a summons and a response in Form 2, whether to proceed by way of personal service or indeed the other methods stated in sub-rule (b). If the claimant would opt to use the other methods stated in sub-rule (b), then, there does not appear to be a requirement for him or her to bring an application before the Court to sanction service through or by means of any of these different methods. To state the obvious, this particular understanding would put Government in its own class to be treated differently, just as it is done in other areas of the law, for instance, the regime of enforcement of judgments.² The lingering question is: Why would Government want to expose itself to a situation that was so problematic in the past in the same Rules? For now, this Court will not express its views on an interpretation that it subscribes to, as it is not a matter in issue in the present proceedings.

[24] Reverting to the issue of service of a summons or a response in Form 2 on a defendant, other than Government; by stating that a claimant cannot just proceed to use an alternative mode other than personal service without the sanction of the Court through an application brought for that purpose, this Court is not making light of the innovation brought about by the Courts (High Court) (Civil Procedure) Rules, 2017 that requires the use of

² See for instance, *The Sheriff of Malawi & The Attorney General -vs- Universal Kit Supplies, Ex-Parte Universal Kit Supplies* MSCA Civil Appeal No. 6 of 2017.

technology.³ Far from it. Rather, it is just to make the point that the use of technology, good as it is, has to be employed within the scope permitted by the Rules themselves.

[25] Where a claimant decides to serve a summons and a response in Form 2 using any other mode other than personal service on a defendant, other than Government, and without the sanction of the Court through an application as the law suggests, he does so at his or her own peril and a Court will be entitled to treat it as ineffective, improper and irregular service. The end result is that we will slowly, but surely, be returning to a situation that we were trying to avoid in the first place when we moved to the new regime of Rules, namely, that of undue delays and escalating costs and expenses, as Courts will be declining applications based on such ineffective, improper and irregular service. It is important that the Courts (High Court) (Civil Procedure) Rules, 2017 are read and followed religiously to avoid such undue delays and unnecessary incurrence of costs and expenses in the administration of justice.

[26] Order 8, rule 8 of the Courts (High Court) (Civil Procedure) Rules, 2017 is to the effect that subject to any specific provision therein, or any other written law, a document, **other than a summons and a response in Form 2**, may be served on a party personally; by leaving it at the party's address for service; or by sending it to the party's address for service by prepaid post, registered mail, courier service, facsimile, or if the party has given an address for service by electronic mail, by electronic mail. Here, there is no

³ See for instance, Order 1, rule 5 (5) (j); Order 8, rule 1; Order 17, rule 3 of the Courts (High Court) (Civil procedure) Rules, 2017 among many others. See also generally, Kasambara, Raphael, *SC New Landscape and Waves in High Court Civil Litigation in Malawi*.

requirement to apply to the Court to sanction service of a document, other than a summons and a response in Form 2, using any of these methods. With the exception of the summons and a response in Form 2, there is otherwise harmony between rules 8 and 19 of Order 8 of the Courts (High Court) (Civil Procedure) Rules, 2017.

[27] In the present case, the defendant was served with the summons and the response in Form 2 through e-mail and the learned advocate depones in his Sworn Statement in Support of the Application that service was accepted by the Defendant on 1st September 2021. As proof of service, there is a *Sworn Statement of Personal Service* made by one, Andrew Emmanuel, of Messrs M & M Global Law Consultants which has been exhibited as “MM1”. The exhibit does not provide details of the email address to which the summons and response in Form 2 were sent. There is not even a print-out of the e-mail that was sent to the defendant as an exhibit. Service of the summons and response in Form 2 through or by email in this case, is contrary to the requirements of Order 5, rule 7 (1), Order 8, rule 3 (b) and Order 12, rule 6 (b) of the Courts (High Court) (Civil Procedure) Rules, 2017. The claimant ought to have made an application to the Court that it had challenges to serve the defendant using personal service and that it wanted to use an alternative mode of service, namely, electronic mail, the steps it had already taken to try and serve the summons and the response in Form 2 and why the preferred method is being suggested. In the circumstances, this Court determines that there was ineffective, improper and irregular service of the summons and response in Form 2 on the defendant by the claimant. Consequently, an application for judgment in default either of response or defence by the claimant cannot be granted. It is denied.

[28] The present action was commenced by the claimant on 24th August, 2021. The claimant is still within the 3 calendar months of the date endorsed by the Registrar under Order 5, rule 4 of the Courts (High Court) (Civil Procedure) Rules, 2017 by which the summons may be effectively and properly served.⁴ The ineffective, improper and irregular service of the summons and response in Form 2 being an irregularity, this Court invokes Order 2, rule 3 (f) of the Courts (High Court) (Civil Procedure) Rules, 2017 and orders that the claimant should first comply with the requirements of the rules governing service before its application may be entertained by this Court.

Finding and determination

[29] In view of the foregoing, it is this Court's finding and determination that there was no effective and proper service of the summons and response in Form 2 on the defendant by the claimant in this case. The service was clearly effected in breach of the requirements of Order 5, rule 7 (1); Order 8, rule 3 (b); Order 12, rule 6 (b) of the Courts (High Court) (Civil Procedure) Rules, 2017 as the discussion has shown.

[30] The application for judgment in default either of response or defence by the claimant against the defendant is therefore declined. The same will only be re-considered by this Court, if at all, once it is satisfied that there has been effective, proper and regular service of the summons and response in Form 2 on the defendant by the claimant that complies with the requirements of

⁴ Order 7, rule 25 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017. *See also John Suzi-Banda -vs- Malawi Housing Corporation*, Commercial Case No. 233 of 2018 (High Court of Malawi) (Lilongwe District Registry) (Commercial Division) (Unreported).

Order 5, rule 7 (1); Order 8, rule 3 (b) and Order 12, rule 6 (b) of the Courts
(High Court) (Civil Procedure) Rules, 2017.

[31] Made in Chambers this 27th day of October, 2021 at Blantyre, Malawi.


M. D. MAMBULASA
JUDGE