

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MATRIMONIAL CAUSE NO. 1 OF 2001

BETWEEN:

SUSAN CHABUKA BANDA.....PLAINTIFF

and

THOKOZANI MANYIKA BANDA.....DEFENDANT

CORAM: HON. JUSTICE A.C. CHIPETA

Mr Kasambara/Jumbe, of Counsel for the Plaintiff

Mr Msisha, SC, of Counsel for the Defendant

Mrs Katunga, Official Interpreter

RULING

On 9th January, 2001 the plaintiff took out an Originating Summons against the defendant seeking, apart from the costs of the action, custody of Manyika Thokozane Banda. Attached to the Originating Summons was a form of acknowledgment of service and a petition. There is an endorsement on the Originating Summons showing that service of the same was effected on 12th January, 2001.

The record also bears an undated acknowledgment of service signed by M/s Nyirenda and Msisha on behalf of the defendant including the defendant's intention to defend the action. On 26th January, 2001 the matter was set down for 15th February, 2001 for hearing in Chambers and service of this notice was effected on the defendant's lawyers on 2nd February, 2001.

On the appointed day only Mr Kasambara and his client, the plaintiff, were present. On basis of proof of service on the defendant's lawyers I proceeded to hear the Originating Summons in the absence of the defendant. After hearing Mr Kasambara's arguments in the matter and after recording viva voce testimony from his client I adjourned the matter to 12th March, 2001 for ruling.

Eight days after this hearing and well before the ruling on it was due the defendant's Legal Practitioners filed a Notice supported by an affidavit. The aim of this process was to apply to the court that the defendant's Legal Practitioners be allowed to file an affidavit in opposition to the Originating Summons and that they be there heard prior to the ruling of the court on the matter.

When this Notice came up for hearing Mr Msisha, SC, began by confessing that he failed to attend court because he inadvertently overlooked the appointment for 15th February, 2001. He however argued that despite this procedurally there ought not to have been any hearing on that day. Referring to Order 28 rule 1 of the Rules of Supreme Court it was Mr Msisha's stand that following acknowledgment of service, the plaintiff was supposed within 14 days thereof to serve an affidavit in support of her application and that hereafter the defendant would have had 14 days within which to file an affidavit in response before the Originating Summons could be set down for hearing. Mr Msisha, SC, thus submitted herein in the absence of compliance with the mentioned intermediary steps was out of line with procedure. The plaintiff, he said, upon keeping the appointment, should have asked for an adjournment of the case so as to allow for the filing of the relevant affidavits on the basis of which the court could either base its decision or issue directions as to the further conduct of the case.

Mr Msisha, SC, did however go much further than this with his arguments. I do feel, however, that the extent he went to was not quite necessary for purposes of his Notice. He touched on the customary law governing the marriage the parties herein had contracted, proceeded to raise questions concerning the propriety or otherwise of taking out the Originating Summons in this court when the parties divorced in a subordinate court, and queried whether this court would not need expert testimony on the material customary law before it could determine the issue herein. These arguments, it appeared to me, were more in line with the substantive hearing of the Originating Summons than with an application to file an affidavit in opposition and an applicant to be heard thereafter. Thus, save for mentioning that these arguments came up, I do not think I need consider them any further. What I need to focus on is whether the hearing I had on 15th February, 2001 was a legitimate one so that I should proceed to ruling on it or whether it was indeed unprocedural as complained herein so that I should allow time for filing of affidavits and then arrange for a fresh hearing date so as to accord the defendant the opportunity he missed to be heard on the matter.

On the plaintiff's part, Mrs Jumbe, of Counsel who in place of Mr Kasambara appeared at the hearing of the Notice, challenged the defendant's application on the basis of Order 2 rule 2 of the Rules of Supreme Court. She took the stand that an application to set aside for irregularity, such as this one, ought to be by summons or motion and that the grounds of objection must be stated within the summons or the Notice of motion itself. She wondered whether the defendant's notice complied with this procedure. Her observation was that the application of the defendant was neither a Summons nor a Notice of Motion and that it bore no irregularity on the faces of it. She further observed that even the supporting affidavit does not spell out the irregularities to entitle the defendant to the relief sought. She indicated that although exchange of affidavits is referred to them, it is not specifically pointed out that non-service of the same is the irregularity complained of. Mrs Jumbe hereafter proceeded to try and answer the questions of jurisdiction and of customary law raised by Mr Msisha, SC, apart from seeking some interim relief for her

client in even of the defendant's application succeeding.

I have already observed, however, that in raising these issues Mr Msisha was actually, so to speak, abandoning his application and delving in presenting substantive arguments against the Originating Summons in that in so doing he was going beyond theof merely praying to be given opportunity to file an affidavit in opposition so that he could then be heard at a later date. I will accordingly save myself the trouble of further reference to these excess arguments which were not necessary for purposes of determining the Notice filed on behalf of the defendant.

Let me confess that when the Originating Summons herein was called for hearing what was foremost in my mind were the provisions of Order 32 rule 5 of the Rules of Supreme Court. As will be noted under that provision a court is free to hear a matter in chambers in the absence of a party if satisfied that the absent party was duly served with Notice of the time appointed. Now on examination of Order 28 of the Rules of Supreme Court, which I did not then take into account, I notice that although the Order 32 rule 5 I used, is specifically recognized as applicable under Originating Summons Procedure, there were a few shortfalls attending the particular Origination Summons before me which had a bearing on its qualification or otherwise for hearing, well apart from the fact that it had been served.

Be this as it may, I must mention that the argument advanced by Mrs Jumbe as regards Order 2 rule 2 of the Rules of Supreme Court is quite valid. It is not true as Mr Msisha, SC, argued in reply that that provision is not applicable on account of the fact that he was not in this case applying for dismissal of the plaintiff's Originating Summons. Order 2 rule 2, in my understanding, is of wide application and is not confined to applications for dismissal only. It competently covers applications to set aside for irregularity of any proceedings, any step taken in any proceedings, or any document, judgment or order therein. Now it is clear that in this case the defendant although pre-exempt..... a ruling is all the same trying, alleged irregularity, to set aside the hearing that took place on 15th February, 2001, which was a step in these proceedings. I then quite fail to appreciate why Mr Msisha, SC, was arguing that his client's application was exempt from complying with the demands of this provision. The truth of the matter is that Mr Msisha's "Notice" did not comply with Order 2 rule 2 herein Summons or Notice of Motion bearing grounds of objection within itself and these requirements it did not satisfy. Besides, an examination of the supporting affidavit reveals that the defendant must have meant this affidavit. To be an all - capturing document, rather than an affidavit strictly supporting the Notice filed, hence its content of even depositions that fit for substantive hearing of the Originating Summons.

Reverting to events attending the Originating Summons before I heard it, the situation is as follows. Service of the Originating Summons having been effected, within 14 days of acknowledgment of service by the defendant, the plaintiff was under obligation to file affidavit evidence (See O28/1A(1) RSC). The plaintiff did not file such affidavit evidence

on this case. There was, however, served along with the Originating Summons, a petition, but this cannot be taken as a substitute to affidavit evidence. Now in a way, although I think the plaintiff was at fault in not filing the requisite affidavit evidence in this case, I equally think that the defendant contributed to this fault. As I have pointed out before, the acknowledgment of the defendant found on the court does not bear any date. It was not filed and so it has no date stamp and even Mr Msisha, SC, himself did not date it. In the circumstances it becomes difficult to ascertain whether the defendant acknowledged service within time and if so run for purposes of service of the plaintiff's affidavit. With an undated acknowledgment like this, a party can easily play hide and seek in a case. As can be seen the plaintiff is therefore not solely to blame for the absence of her affidavit induce as some place is clearly attributable to the defendant on the point.

Now from whenever the 14 days was going to expire from the date of acknowledgment of service of the Originating Summons by the defendant, per Order 28 rule 1A(4) the defendant was going to have 28 days within which to file his own affidavit evidence, if he so deserved, and to serve the same on the plaintiff. This in turn was going to entitle the plaintiff, if she so wished, to serve further affidavit evidence in reply within a further 14 days. (See O28 rule 1A(5) R.S.C.). Next after this any additional affidavit from the parties will only be entertained once the leave of the court has been obtained. See O28/1A(6) R.S.C.). Order 28 rules 2 and 2 R.S.C. then hereafter govern the fixture of time for attendance of parties before the court and for the issue and service of Notice of hearing.

Looking at the time-table set by Order 28 rule 1A of the Rules of Supreme Court it is difficult to envisage an Originating Summons matter ripening for hearing in a period falling short of a full month. In this case only fourteen days elapsed between the day the Originating Summons was served (i.e. 12th January, 2001) and the day the date for hearing was secured and fixed (i.e. 26th January, 2001). Achieving this feat, I must say, was a supersonic speed of getting the matter set down and I dare say that it hardly left any room at all for the parties to fully comply with the steps I have just dismissed above. Even granted the fault of the defendant in not dating or filing his acknowledgment of service of the Originating Summons, I must and do find that the plaintiff secured her hearing date by jumping the gun, so to speak, and that this was quite premature and done in disregard of the preliminary steps covered by Order 28 rule 1A R.S.C. The resultant scenario is that I heard the Originating Summons herein before it was really due for hearing. The defendant is thus quite justified in complaining that he has been deprived of opportunity to be heard in this matter. The only problem with his complainant is that it has been presented contrary to the dictates of Order 2 of the Rules of Supreme Court.

I have acknowledged above that there was an irregularity in the early fixture of the case before all preliminary steps had been taken. The hearing of the Originating Summons was thus also irregular. To his credit the defendant took steps to point this out at the earliest opportunity and before taking any fresh step in the case. It thus cannot be said that the defendant waived the irregularity. To this extent the defendant was quite in compliance with Order 2 rule 2(1). The defendant however failed to satisfy Order 2 rule 2(2) in not

fitting his grounds of objection within the Notice he filed. I have wondered whether this default on the defendant's part can be said to so prejudice the plaintiff that on its account alone I should dismiss the defendant's application. In my judgment it does not achieve such level of prejudice.

Having help as I have done that the hearing I undertook on 15th February, 2001 was premature, justice requires that I set it aside and that I do not proceed to ruling, which I do. The plaintiff has 14 days from today within which to serve affidavit evidence in support of her Originating Summons. Thereafter the parties are to be guided by Order 28 rule 1A as regards any further affidavits they might desire to exchange before the matter is next set down for hearing. As regards cost of this application I think the best order is to direct them to be in the cause as the irregularities committed by both the parties are fairly well balanced and I so direct.

Made in Chambers this 4th day of May, 2001 at Blantyre.

A.C. Chipeta

JUDGE