**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NUMBER 1828 of 2004**

**BETWEEN:**

NATIONAL BANK OF MALAWI……..RESPONDENT

-and-

SPARKS JUMBE……APPELLANT

**CORAM: HON KATSALA J,**

Jere, counsel for the respondent

Chisale, counsel for the appellant

Mrs Matekenya, official interpreter

Mrs L. Kasasi, typesetter

**R U L I N G**

***R. R. Mzikamanda J,***

On 27th February 2006 the learned Assistant Registrar granted the National Bank of Malawi their application against Mr Sparks Jumbe to amend a writ of summons changing the capacity in which Mr Sparks Jumbe was sued to that of being sued as a guarantor of a loan the National Bank of Malawi gave to a company for which Mr Sparks Jumbe was a Managing Director. Mr Sparks Jumbe said that he had no objection to the amendment but sought to be given a chance to defend the matter. He also sought that the default judgment that had been

entered against him be set aside and garnishee proceedings scheduled for 28th February 2006 be dismissed. In making the order the learned Assistant Registrar said that

> *"Consequently then I do hereby make an order amending the writ of summons as prayed by the plaintiff. I make a further order that the default judgment which was entered herein be nullified and that the defendant be allowed to file their defence within 14 days from today.*

Mr Sparks Jumbe, the defendant, was dissatisfied with the order of the learned Assistant Registrar and appealed to a Judge in chambers by way of rehearing. The amended grounds of appeal were that:

*(a)* *The learned Assistant Registrar erred in law in making an order amending the writ of summons when all she was required to do under the rules of court was simply to grant the plaintiff leave to amend as prayed for, or make an order to amend.*

*(b)* *The learned Assistant Registrar erred in law in ordering the defendant to serve a defence within 14 days without (in the absence of an order dispensing with re-service) requiring the plaintiff to re-service the writ in its amended form, on the defendant.*

*(c)* *The learned Assistant Registrar erred in law in amending the writ of summons to change the capacity in which the defendant is being sued from that of borrower to guarantor when she ought to have known that doing so would set up a new claim in respect of a cause of action which since the issue of the writ had become statute-barred by the Limitation Act more than six years having elapsed since the alleged contract between the plaintiff and defendant was entered into.*

The notice of appeal was filed on 6th March 2006 and the amended notice of appeal was filed on 1st June 2006. The appeal was heard on 8th June 2006 by Hon Justice Katsala who reserved ruling to 15th June 2006. As matters turned out the Honourable Judge has to travel to

the United Kingdom to study before he could prepare the ruling. The matter was thus placed on my table for me to prepare the ruling which I now proceed to do.

This matter has a background. On or around 2nd October 1998 Sparks Trading Limited was granted an overdraft facility by the National Bank of Malawi sums totaling K4,975,000.00 repayable within 12 months with interest as may be charged from time to time by the plaintiff. Mr Sparks Anderson Jumbe, the defendant, and another guaranteed the repayment of the sums advanced to Sparks Trading Limited together with interest thereon and executed the guarantee and indemnity deed on 5th May 1999. The overdraft was not repaid as agreed. The liability rose to K8,026,957.00 and continued to rise with the application of interest at 56% per annum. On 5th July 2004 National Bank of Malawi instituted proceedings against Mr S. A. Jumbe to recover the said amount together with interest thereon. There was a judgment in default entered against Mr Sparks Jumbe. This turned Mr S. A. Jumbe into a judgment debtor with the National Bank of Malawi as a judgment creditor. As luck would come Mr S. A. Jumbe's way he won a prize of K2,000,000 in a Telekom Networks Malawi "Be a Millionaire Promotion". National Bank of Malawi as a judgment creditor got to know about Mr S. A. Jumbe's fortunes and immediately obtained a **Garnishee Order Nisi** with respect to the MK2,000,000.00 prize. This effectively abbreviated Mr S. A. Jumbe's celebration on the prize money even before he received it. When the learned Assistant Registrar dismissed the garnishee proceedings scheduled for 28th February 2006 the judgment debtor promptly obtained an order for payment of the prize money into court as an attachment against the judgment amount outstanding. The learned Registrar's order of 27th February 2006 also nullified the default judgment and paved way for the judgment debtor to enter a defence. The appellant has never got to enjoy the prize money he won.

The amended memorandum of appeal shows the following as the part of the order of the learned Assistant Registrar complained against:

(a) *The Assistant Registrar's order amending the writ of summons and requiring the defendant to serve a defence within 14 days.*

(b) *The Assistant Registrar's failure to date the order.*

*(c) The Assistant Registrar's order allowing the amendment of the capacity in which the defendant is being sued outside the period of limitation.*

In this appeal there are eight reliefs sought with the sixth relief being broken further into four reliefs. I will deal with each one of them at an appropriate time.

The hearing before Katsala J lasted from 8.41 a.m. to 10.05 am most of which time the Judge was called upon to resolve preliminary matters before the actual hearing of the appeal. When time for the hearing of the actual appeal came counsel adopted their skeleton arguments filed earlier and adduced additional evidence by way of affidavit. The actual appeal is recorded on three and half handwritten pages with a line skipped between the actual recordings just to show how brief the hearing was. It is the written arguments on which this ruling is largely to be based.

I will now summarize the appellant's skeletal arguments on the appeal against the order of the Assistant Registrar. According to the appellant by a write of summons issued on 5th July 2004, the respondent commenced an action against the appellant claiming certain sums of money being an overdraft and a loan allegedly granted to him on or about 2nd October 1998 payment of which was guaranteed to the respondent by the appellant and a third party, repayable within a year. Judgment in default of appearance was obtained. Then the appellant won MK2,000,000.00 in a Telekom Networks Malawi Ltd competition. The respondent took a **Garnishee Order Nisi** against Telekom Networks Malawi Ltd in respect of the money not yet credited to the appellant's account. The appellant engaged counsel to challenge the garnishee order and made it clear that he never borrowed money from the respondents as alleged in the writ of summons. The respondents took out a summons abandoning the claim and seeking leave of the court to amend the writ to change the capacity in which appellant was being sued from that of a borrower to that of a guarantor. By the same summons the respondent sought to disperse with the writ of summons once amended. The loan had been given to Sparks Trading Limited, a company in which the appellant was a managing director and that the appellant guaranteed the loan and

pledged his property Title Number Ndirande-1, Blantyre as a collateral. The appellant in principle, had no objection to the proposed amendment, but pleaded with the court to consider in deciding whether to grant leave to amend the writ or not, the appellant's entitlement to the defence of limitation, as the contract which was the subject matter of legal proceedings, was according to the plaintiff's own writ entered into early October 1998 and that the leave to amend was being sought in February 2006 more than six (6) years (the limitation period allowed for such action based on contract) having elapsed since the alleged cause of action had accrued to the respondents. The appellant also indicated to the court an intention to defend the matter in the event that the court granted leave. He prayed for a specific order in the event that leave was granted, nullifying the default judgment and an order dismissing the garnishee proceedings. The court made an order amending the writ and requiring the appellant to serve defence with 14 days. It nullified the default judgment and dismissed the garnishee proceedings. The appeal is against order amending the writ of summons and ordering the appellant to serve defence in 14 days and allowing the amendment outside the period of limitation. The appellant takes issue with the Assistant Registrar's failure to date her order. The reliefs sought are:

*(a) An order that the court has no power to amend or make an order to amend and a further duration that the responsibility to effect the actual amendment as granted vests in the party seeking the amendment; and consequently an order setting aside/reversing the Assistant Registrar's order amending the writ of summons.*

*(b) A reversal/setting aside of the Assistant Registrar's order requiring the appellant to serve a defence within 14 days before the amendment being sought was effected.*

*(c) A reversal/setting aside of the Assistant Registrar's order requiring the defendant to serve a defence on the plaintiff before (in the absence of the order dispending with served writ of summons as amended, was reserved on the defendant.*

*(d) An order that the Assistant Registrar's order requiring the appellant to serve a defence within 14 days is unenforceable and confusing on the basis that the*

*Assistant Registrar's order is undated (i.e. for failure to indicate the date from which it should take effect).*

*(e)* *An order that the within proceedings against the defendant as a guarantor are a nullity and/or void* ***ab initio*** *the plaintiff having failed to take steps to effect the amendment (which would constitute the origin of a new action against the defendant as guarantor within 14 days as required by the rules of court, the plaintiff having abandoned its earlier action against the defendant as a borrower.*

*(f)* *If the reliefs in (a) to (e) or any one of them are/is granted, a specific order*

*(1)* *Nullifying the subsequent order of attachment obtained by the plaintiff under Order VIII of the Rules of the High Court on ex parte application of the 27th February 2006 the same having been obtained under the mistaken belief that there were, in existence at the time valid proceedings against the defendant as guarantor.*

*(2)* *If the order of attachment is nullified/discharged an order making an award to the defendant for such damages as may be just and assessed, to compensate him for injury to his credit and reputation pursuant to Order VIII rule 4 of the Rules of the High Court.*

*(3)* *Nullifying the subsequent default judgment obtained by the plaintiff on 7th April 2006, the same having been based on proceedings that have been declared a nullity* ***ab initio****.*

*(4)* *Reversing/discharging the Registrar's order of 13th April 2006 for the payment out to the plaintiff of the sum of MK2 .0 million belonging to the defendant that had been attached and paid into court pursuant to the order of attachment in (1) above.*

*(g) An order reversing the learned Assistant Registrar's order amending/or granting the plaintiff leave to amend the writ of summons to change the capacity in which the defendant is being sued from that of borrower to that of guarantor on the ground that such leave to amend could not be granted if it was being sought outside the period of limitation for such actions based on contract.*

*(h) An order for costs here and below.*

The appellant argues that by virtue of Order 58/1/2 of the Rules of the Supreme Court, this court is obliged to deal with the appeal by way of an actual rehearing of the application that led to the order complained of. In arguing the appeal, the appellant states that it is not the duty of the court to amend the writ of summons, a pleading or any other document under Order 20 of the Rules of the Supreme Court. It is argued that in all cases, the duty of the court is restricted to granting leave to amend or making an order to amend. Even where the court acts of its own motion, its duty is restricted to ordering an amendment to be made. The court's function in a civil suit is not inquisitorial but to act as a kind of umpire. Then the writ of summons ought to have been re-served, as the court did not dispense with service thereof.

The writ as amended, becomes the origin of the action. The proceedings herein cannot therefore be said to have been validly commenced when the Amended Writ thereof was never drawn up, filed and issued by the court. They lack origin and are thus a nullity and/or void **ab initio** a judgment or order of the court takes effect from the day of its date. The Assistant Registrar's undated order requiring the defendant to serve a defence within 14 days is therefore unenforceable as it lacks the date from which it is/was to take effect. The proceedings against the defendant as a guarantor are a nullity and void **ab initio** because they lack origin. Any subsequent proceedings based on them like the order of attachment, the subsequent default judgment and the order for the payment out to the plaintiff of the sum of KM2.0 million that had been attached and paid into court pending the determination of this action cannot stand and ought to be nullified/set aside. It was also argued that the court has jurisdiction to make an award for compensation to the defendant for injury to his credit and reputation in the event that it is found that the order of attachment was wrongly/irregularly obtained. The practice of the court is that

amendments should not be allowed which might have the effect of depriving a party the defence of the Limitation Act. The court therefore ought to have refused the amendment sought as the alleged contract had been entered into over six years since the alleged cause of action had accrued to the plaintiff.

After arguing the applicable law the appellant observed that the procedure on amendments was seriously flawed and it would be wrong to allow it to stand. The requirement that a party seeking an amendment is the one who has the duty to effect that amendment is the very reason why the court does not have the power to amend but simply to order an amendment or grant leave to amend. The flawed procedure emanating from the ruling of the Assistant Registrar and the misconceived view of the procedure on the amendment by the plaintiff has obviously brought untold suffering on the defendant who has been deprived of the use of his MK2.0 million.

It was argued for the respondent that the issues for the court's determination are whether or not the Assistant Registrar erred in making an order amending the writ of summons and if the answer is in the affirmative whether or not the defendant is entitled to any of the reliefs prayed for. It was conceded that an appeal from the Registrar to the Judge in chambers is dealt with by way of an actual rehearing of the application which led to the Order under appeal and the Judge treats the matter as though it came before him for the first time. The judge will give the weight it deserves to the previous decisions of the master but he is in no way bound by it as per Lord Atkin in **Evans vs Bartlan** 1937 AC473. It was argued that since this is a rehearing of the application to amend the writ of summons it is not within the scope of this court's jurisdiction to deal with issues relating to the attachment order and indeed anything other than the application which led to the order under appeal (see **Krakamer vs Katz** [1954] 1WLR 278. It was argued that the order amending the writ of summons was by consent since the appellant indicated to the court that he had no objection to the amendment being granted. The appellant only prayed for specific orders setting aside the default judgment and the Garnishee Order Nisi so that the appellant could have the opportunity to defend the matter since the amendment being sought had the effect of changing the capacity in which the appellant was being sued and that there were issues of limitation period which the appellant might wish to avail himself in his defence. The respondent

argued that the appellant having consented to the amendment being granted, he cannot now turn around and appeal against the granting of the amendment and start arguing that the court cannot grant leave to amend outside period of limitation. It was submitted that it is trite law that if a party wants to challenge a consent order/judgment it can only do so by a fresh action ( see **Bhima vs Bhima** 6MLR 427). The contention that court could not grant an amendment outside the period of limitation was not raised at the hearing of the application and ought not to be considered here.

On whether a court cannot amend a writ of summons it was contended that amendments are a matter of discretion on the part of the court. The application for amendment here also included prayer for dispensation of service of the amended writ of summons. The terms of the order of the court show implicitly or otherwise that service of the amended writ of summons was dispensed with in that it required the appellant to file a defence within 14 days of the order. It was argued that there is no law that prohibits the court from effecting an amendment.

On the Assistant Registrar's failure to date the order it was contended that much as it may be the procedural requirement that all judgments and orders of the court ought to be dated, it is not correct to suggest that failure by the court to date its order renders the order in question unenforceable. Whether a court order is enforceable or not depends very much on the nature of the order itself and the circumstances of the case under which the order is made. In the present case the order was delivered in the presence of both parties and both parties knew that when the Registrar said the appellant be allowed to file a defence within 14 days from today "meant within 14 days from the date the order was made being 27th February 2006."

On failure to amend by reason of failure to act on the order to amend within the specific time or after 14 days of the date of the order, the effect is that the order granting leave to amend lapses. This then means that the writ of summons or whatever document that was to be amended still stands in its original form. It was also argued that a challenge to the attachment order and subsequent default judgment ought to be done through separate application and not along with the present appeal. There is a procedure for such a challenge which the appellant ought to follow.\

As regards the limitation period it was argued that the relevant period had not lapsed as in terms of the Guarantee the money was only to become due upon a demand in writing having been made by the respondents/the appellants. The demand was only made on 15th October 2003. The prayer is that the Assistant Registrar's order be upheld. The general principles governing the grant of leave to amend have long been recognized by this court. In **C. Khembo and S. Khembo vs Mandala Motors Ltd, Pirie and Kamtema** 11 MLR 134 Jere J observed that the court has discretion to order an amendment even at the close of the case. Thus an amendment may be allowed at any stage of the proceedings. According to Jenkins L J in **G. L. Baker Ltd vs Medway Building Supplies Ltd** 1958 1 WLR 1216 at page 1231 cited with approval in **C. Khembo and S. Khembo vs Mandala Motors Ltd, Pirie and Kamtema** (supra) "it is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings". Bowen LJ put it more succinctly in the much cited passage in **Cropper vs Smith** (1884), 26 Ch D at pp 710-11 when he said:

> *"it is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights…. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake if discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace….It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real mater in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice as anything else in the case is a matter of right".*

A. L. Smith L J, expressed emphatic agreement with these observations in **Shoe Machinery Co. vs Cultan** [1896] 1Ch at p112. Nyirenda J quoted this passage with approval in

**Potgieter vs Whedel Shipping Ltd and Others** [1996] MLR 210. Bramwell L J, had earlier on stated in **Tildesley vs Harper** (1878) 10 Ch.D 393 at 396-397 that

> *"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting **mala fide**, or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise".*

The authorities have favoured allowing an amendment if thereby the real substantial question can be raised between the parties, and a multiplicity of legal proceedings avoided. In the present appeal the complaint is that the procedure on amendments was seriously flawed thereby bringing untold suffering on the appellant as he could not enjoy the use of the MK2.0 million which he won in a Telekom Networks Malawi Ltd competition that the amendment is disallowed.

As to the first ground of appeal that the learned Assistant Registrar erred in law in making an order amending the writ of summons when all she was required to do under the rule of the court, was simply to grant the plaintiff leave to amend as prayed for or make an order to amend, there are several observations to be made. First and foremost it must be observed that all amendments come under or may come under the control of the court. It is correct to say that the function of this court is not inquisitorial but to act as a kind of umpire. It is also correct to say that is not the duty of the court to force upon the parties amendments for which they do not ask even though the court is empowered to order an amendment to be made of its own motion. Yet with this power the court is enabled, by persuasion, if possible, and, by order, if necessary to raise the real point at issue between the parties, and to ensure that its proceedings are free from errors and defects. The passive role played by the court in relation to the raising of the issues for its consideration and determination is, as predicted by Order 20 rule 8 sub-rule 3 of the Rules of the Supreme Court, being replaced by a more proactive role in case of management. It is also to be observed that there is need to view the order of the learned Assistant Registrar in context. The amendment applied for did not seek to change parties. It sought to change capacity of the defendant from borrower to guarantor of a loan. While Order 20 rule 8 sub-rule18 of the Rules of the Supreme Court specifically states that an amendment to alter the capacity in which a party

sues may be allowed there appears no reason why an amendment to alter the capacity in which a party is being sued should not be allowed. In the present application the proposed amendment is not extensive or lengthy. Besides the proposed amendment was already endorsed on the writ served with the application. At the hearing of the application the defendant said that he had no objection to the amendment being made. Under Order 20 rule 10 of the Rules of the Supreme Court on mode of amendment of writ, etc if amendments are not so numerous or lengthy they may be done by making written alterations on the writ or document so as to give effect to the amendment. But if making written alterations of the document would make it difficult or inconvenient to read, a fresh document amended as authorized, must be prepared and in the case of a writ re-issued. In the case at hand when the learned Assistant Registrar said *"consequently then I do hereby make an order amending the writ of summons as prayed for by the plaintiff"*, she did not herself make the written alterations on the writ. When she made the "*order amending the writ of summons as prayed for by the plaintiff"* she was clearly simply allowing the proposed amendments as shown on the writ of summons served with the application, which amendment the defendant had no objections to. The question might then be whether in the circumstances described above the learned Assistant Registrar by making an "*order amending the writ of summons"* in fact amended the writ of summons. She did not herself make any written alterations on the writ of summons. Ordering an amendment or allowing an amendment cannot mean the same thing as making the amendment. Under Order 20 rule 5 sub-rules (1) to (5), the court may allow an amendment in certain circumstances. Under Order 20 rule 8 a court may of its own notion order an amendment. The learned Assistant Registrar clearly made the "*order amending the writ of summons as prayed for by the plaintiff*". In other words her order showed no departure from the prayer presented to her by the plaintiff. She did what the plaintiff had asked her. The first ground of appeal is misconceived and is without merit. It fails.

The second ground of appeal is so far as it is premised on the argument that the learned Assistant Registrar erred in law in amending the writ of summons cannot succeed for the same reasons I have given when dealing with the first ground of appeal. There is a second leg to the second ground of appeal which is that the learned Assistant Registrar's erred in law in ordering the defendant to serve a defence within 14 days without requiring the plaintiff to effect the amendments being sought. According to the appellant the amended writ should have been

prepared by counsel for the plaintiff filed and issued by the court before the defendant was ordered to serve a defence. This second leg of the second ground of appeal can be dealt with together with the third ground of appeal.

The third ground of appeal is that the learned Assistant Registrar erred in law in ordering the defendant to serve a defence within 14 days without (or in the absence of an order dispensing with re-service) requiring the plaintiff to re-serve the writ, in its amended form, on the defendant. Again here we must contextualize the order of the learned Assistant Registrar. The summons to amend writ of summons had the following prayers –

> *"WHEREFORE I humbly pray that leave be granted to amend the writ of summons and the statement of claim as appears in red ink in the proposed amended writ of summons and statement of claim attached hereto and that service of the same be dispensed with"*.

It is correct to say that the order of the learned Assistant Registrar does not specifically state that service will be dispensed with. It is clear however that the defendant told the court that had he no objection to the prayer made by the plaintiff. The learned Assistant Registrar therefore saw no point in making a determination on matters on which there was no objections. She said –

> *"Since the defendant does not object to the amendment the main issue for my determination is whether the default judgment which was earlier on entered should be nullified and consequently whether the forthcoming garnishee proceedings should be nullified"*.

Thus there being no objection to the prayer by the plaintiff, there was no time spent on discussing the prayer of the plaintiff. The prayer was granted *"as prayed for by the plaintiff"* excludes the prayer *"that service of the same be dispensed with"*. Be that as it may, it is clear from the order by the learned Assistant Registrar that the defendant was directed to serve a defence within 14 days of the date of the order. By necessary implication the learned Assistant Registrar dispensed with service of the amended writ of summons, whether in response to the

prayer of the plaintiff prayer *"that service of the same be dispensed with"* or by employing the court's discretion. Obviously the matter would have been clearer had the learned Assistant Registrar specifically indicated in her ruling *"that service of the same be dispensed with"*. I am however not able to observe any abuse of discretion on the part of the learned Assistant Registrar in the manner the order was framed. The learned Assistant Registrar in her order did not require that the plaintiff re-serve on the defendant the writ of summons in its amended form. The amendment did not involve numerous or lengthy amendments and the matter remained with the discretion of the court to order re-service or not. The second leg of the second ground of appeal and the third ground of appeal must fail.

As the fourth ground of appeal that the learned Assistant Registrar erred in law in amending the writ of summons to change the capacity in which the defendant is being sued from that of a borrower to guarantor, when she ought to have known that doing so would set up a new claim in respect of a cause of action which, since the issue of the writ, had become statute-barred by the Limitation Act, more than six years having elapsed since the alleged contract between the plaintiff and the defendant was entered into, I must say at once that what I said earlier as to whether the learned Assistant Registrar amended the writ of summons or made an order amending the writ of summons applies here as well. It is doubtful that the learned Assistant Registrar could have ordered herself to amend the writ of summons when she said *"I do hereby make an order amending the writ of summons as prayed for by the plaintiff"*. It should also be observed that in this appeal the appellant is raising objections to the same amendment which he told the learned Assistant Registrar that he had no objection on and a fact the learned Assistant Registrar relied upon in making the order she did. As a matter of principle the defendant cannot be allowed to approbate and reprobate or change positions by turning around and saying the exact opposite of what he told the lower court. According to the order of the learned Assistant Registrar –

> *"The defendant does not have any objections (to) the amendment but only seeks that he should be given a chance to defend the claim and also prays for a specific order that the default judgment which was duly entered should fall away and also that the garnishee*

*proceedings scheduled to take place tomorrow on 28th February should subsequently be dismissed".*

The lower court granted the defendant all his three prayers including the one given to defend himself against the claim following the amendment. He has not filed the defence. An appeal does not operate as an automatic stay of proceedings.

In arguing the four ground of appeal the appellant makes reference to Section 4(1)(a) of the Limitation Act (Cap 6:02) of the Laws of Malawi and argues that an action founded on contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action arose. It was also argued that the practice of the court is that amendments should not be allowed which might have the effect of depriving a party of the defence of the Limitation Act (Rules of the Supreme Court Order 20 rule 5(2). Exceptions to the rule are –

i. *An amendment to correct the name of a party.*
ii. *An amendment to alter the capacity in which a party sues.*
iii. *An amendment whose effect is to add or substitute a new cause of action if the new cause of action arises and out of the same facts or substantially the same facts.*

It was argued that the present situation is not covered in any of the exceptions. An amendment that seeks to alter the capacity in which the defendant is being sued is not covered in the exceptions. It must be pointed out that these matters were never raised in the court below. I also observed earlier that no defence has been filed on this matter. In **Mudaliar vs Kayisi** 1964-66 ALR Mal 103 Bolt Ag J in dealing with a similar situation had this to say:

> *"In both local courts the appellant maintained that he had paid the amount owing. He said nothing about the Statute of Limitations, It is apparent, therefore, that he is seeking to rely on a defence which he failed to raise in either of the lower courts. In my opinion this is wrong in principle and should be permitted*

*only in exceptional circumstances. Moreover, there is a strict rule that the Limitation Act 1623 must be specifically pleaded."*

In this case the pleadings are not yet closed and the Limitation Act has not been specifically pleaded. Defence of the Limitation Act was not raised in the lower court. This ground of appeal cannot succeed at this point purely on principle. However, the defence of the Limitation Act would still be open to the defendant if raised in his defence and considered in all the circumstances of the matter.

The appellant also took issue with the failure on the part of the learned Assistant Registrar to put a date to the order she made. It was argued that under Order 42 rule 3(1) of the Rules of the Supreme Court an order of the court takes effect from the day of its date and that failure to date the order effectively means that the order is unenforceable as it lacks the date from which it is to take effect. It is correct that the rules require that an order of the court be dated. In my view an order in the court should be dated so that the parties know when the order was made and when it takes effect from unless the court orders some future date on which the order takes effect. The observation is correct that the learned Assistant Registrar did not put a date when the order was delivered. However, she made it clear that the order took effect from the date it was delivered.

When she said that *"the defendant be allowed to file their defence within 14 days from today"*, the order was delivered in the presence of both parties. Even the amended memorandum of appeal states that the undated order of Her Honour Miss M. Chizuma was *"delivered on the 27th February 2006"*. Indeed the order itself has a portion which reads *"….and also that the garnishee proceedings scheduled to take place tomorrow on the 28th February should subsequently be dismissed"*. This leaves no doubt as to the date when the order was made. The complaint about the undated order is not really justified.

As regards the effect of failure to comply with leave to amend Order 20 rule 9 is clear that if the party does not amend the document in accordance with the order before the expiration of the period specified for that purpose in the order or, if no period is so specified, of a period of

14 days after the order is made, the order shall cease to have effect. When the order to amend lapses, it is my view that the original documents remain as unamended. The question of non-compliance with rules of procedure is dealt with under Order 2 of the Rules of the Supreme Court Order 2 rule (1) provides that

> *"Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has by reason of any thing done or left undone, been failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein."*

Having considered the parts of the Assistant Registrar's order of 27th February 20-06 complained of, I have come to the conclusion that there can only be regarded as procedural irregularities which would not nullify the proceedings herein or the order of the Assistant Registrar itself. As observed at the outset all amendments came under or may come under the control of the court. The court may at any stage of the proceedings either of its own motion or on application of any party to the proceedings order any document to be amended for the purpose of determining the real question in controversy between the parties to the proceedings or of correcting a defect or error in the proceedings. There will be some irregularities of a fundamental nature that the court may not use its discretion to disregard it. Other defects may be cured by the court by the exercise of discretion under Order 2 rule 1. For example, a defective service of proceedings, however gross the defect, and even a total failure to serve, where the existence of the proceedings is nevertheless known to the defendant, is an irregularity which can be cured by the court by the exercise of discretion under Order 2 rule 1 of Rules of the Supreme Court (see **Golden Ocean Assurance Ltd and World Mariner Shipping SA vs Martin, The Golden Mariner** [1990] **2 Lloyd's Rep 215; Fielding vs Righy** [1993] 1 WLR 1355: [1993] 4 ALL ER 294).

In the present case it is curious that the appellant having obtained all three orders he had requested the lower court to grant him even without formal application to set aside judgment

would like this court to reverse the only order in favour of the respondent, which order was granted on the strength that the appellant said he had no objection to the application. The grounds for seeking such reversal not having been made out on this court I would dismiss the appeal in its entirety with costs. Matters relating to attachment order and subsequent default judgment entered against the appellant were outside the province of this appeal and could not be dealt with here.

**MADE** this 23rd day of March 2007 at Blantyre.

pp R. R. Mzikamanda

**JUDGE**