



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

FAMILY AND PROBATE DIVISION PRINCIPAL REGISTRY

PROBATE CAUSE NUMBER 6 OF 2023

**IN THE MATTER OF THE DECEASED ESTATE (WILLS, INHERITANCE AND PROTECTION ACT
AND IN THE MATTER OF THE ESTATE OF ~MASINDISA SAMBO (DECEASED)**

**BRIAN SAMBO (MINOR, SUING THROUGH FREIDA MUOMBA, MOTHER AND LITIGATION
GUARDIAN).....CLAIMANT**

AND

KHUMBO SAMBO.....1ST DEFENDANT

GEORGE MUVA SAMBO.....2ND DEFENDANT

CORAM: HONOURABLE JUSTICE JEAN ROSEMARY KAYIRA

Counsel Katuya of Counsel for the Applicant

Counsel Ngunde of Counsel for the Respondent

Ms. Christina Kazembe Court Clerk and Official Interpreter

RULING

Kayira J

INTRODUCTION

The application before this Court is for setting aside a defaults judgment entered in favour of the Claimants. On 10th January, 2023 the Claimant commenced the present application by way of initial directions and summons which were duly issued by this Court. The Claimant claims the following:

1. A declaration that the Defendants did not make a full and frank disclosure of the estate of Masindisa Sambo, deceased;

2. An order akin to an order to account compelling the Defendants to make full and frank disclosure of what constituted the estate of the deceased at the date they were granted letters of administration by the Court;
3. An order compelling the Defendants to account on how they have administered the estate of the deceased;
4. An order removing the Defendants as administrators of the estate of the deceased;
5. An order appointing suitable administrators of the estate of the deceased;
6. An order compelling the new administrators to distribute the estate of the deceased to those entitled to inherit the intestate of fair property of the deceased within 90 days or within any reasonable period;
7. In the alternative to (d), an order compelling the Defendants to administer and/or distribute the rightful portion of the deceased estate to the Claimant as a person entitled to inherit the intestate of fair property of the deceased estate;
8. An order appointing Freida Muomba the Claimants mother as the administrator of the distributed share of the deceased accruing to the benefits of the Claimant. And
9. Costs of the action

On 12th April, 2023, the Claimants filed an application for default judgment on the basis that the Defendants neither filed a response nor a defence 28 days after being served with the summons. On 14th April 2023, this Court granted the prayer for default judgment in favour of the Claimants. After this order, on 25th April 2023, the Defendants appointed Messrs Dowell & Jones to represent them in this matter. On the same day, they applied to stay the default judgment and the same was granted. The Defendants filed an application to set aside the default judgment under Order 10 rule 1 and under Order 12 rule 21 of the CPR. This application was supported by a sworn statement of Counsel Katuya and skeleton arguments. The Claimant filed a sworn statement and skeleton arguments in opposition. In addition to the submissions, the parties orally addressed this Court. The arguments are outlined below;

ARGUMENTS BY THE PARTIES

Counsel Katuya applied that this Court should set aside the default judgment that was entered in favour of the Claimant on the grounds that the Defendants were not served with the summons and that this was clearly stipulated in the sworn statement and skeleton arguments in support of the application to set aside the default judgment. The second point is that there was an irregularity in the service of the summons

under Order 5 rule and Order 8 rule 3 of the CPR which require that summons must be served personally. According to Counsel, this rule does not provide for an option on the part of a Claimant to effect service of a summons through post as was in the old rules of civil procedure without an order of the court. Counsel further submitted that if a party wants to use other modes of service of documents, those other means should be adequate to bring the Defendant to notice about the summons. Since there was no personal service in this case, and no leave or permission was obtained by the Claimant from the court, then the service of the summons by post in this case was irregular. This being the case, Counsel Katuya submitted that the Defendants are entitled to have the default judgment set aside as a matter of course.

Counsel further submitted that the Claimant is not amongst those people who have an interest in order to have letters of administration for the deceased estate. In this case, there is no explanation that the property in this deceased estate is being dissipated. Further, that there is no triable issues which makes it sensible that this Court sets aside the default judgment and allows the Defendants to have an opportunity to defend themselves in court. This will allow that the case should be determined on merit. Counsel further submitted that the Defendants are entitled to letters of administration as brothers to the deceased and therefore this is a necessary basis for setting aside the default judgment which was entered in favour of the Claimant.

Counsel Ngunde adopted the sworn statement and scared on arguments in opposition and this adoption of the document was duly accepted by this court council admitted that they did not seek leave or permission to save summons by post to the Defendant from the court and in terms of the rules of procedure this is an irregularity under order to rule three of the CPR. Counsel prayed for this court to consider this irregularity and make the process ineffectual. Although the Defendant is right that the Claimant did not seek permission from the court in order to serve the summons by way of post, the summons was sent to the last known address of the Defendants on 24th February, 2023. The address indicated on an application for letters of administration by the Defendants is what was used to serve the summons. Counsel Ngunde emphasised that the default judgment was entered a month and some days before the hearing of this application. As such, it was their belief that the Defendant got the summons and are capitalising on this technicality yet they do not have a defence on the merit.

The Defendants did not file their defence and they did not oppose the application especially on the point that they concealed other properties which form part of the deceased estate only the appointment of an administrator in place of the Defendants council submitted that they are accepting that they need to be replaced and that if the court used to set aside the default judgment they can set aside the default judgment on depart which is relating to their appointment over the Claimant as a single administrator of

the deceased estate and delete the part which has been accepted by the parties. Counsel, further argued that the court may set aside the default judgment if there is a meritorious defence and that they will do they had reasonable goals to defend the application this must be joint requirements the Defendants have no meritorious defence in this case continue to submit and argue that they think that this is an appropriate case where the court should order that each party bears their own costs and only the request from council to have the default judgment set aside by consent. Counsel Ngunde asked to have the application on file and they refused to set aside the default judgment by consent. This is an expense that could have been avoided and that counsel for the Defendant refused to have the judgment set aside by consent. Therefore, the costs should be for the defendant.

In his final response, Counsel Katuya noted that the Claimants have accepted that this was an unreliable service of a summons but that the court should waive the irregularity because they believe that the Defendants received the summons but just sat back. The Defendants cannot ignore the court process they in service of summons because they have not ignored court processes in the Child Justice Court and cannot do that now. Counsel submitted that the application in this court is that they served using post but the law says that before a person can serve using post, they must justify why they prefer posting other than a physical and personal service or using other means for instance publishing in the radio. It is not like a person who will not use the last known address for the service who is restricted to service a summons by post. The law just does not allow that automatic use of alternative mode of serving a summons. So this is an irregularity hence the default judgment has to be set aside so that the Court should do the determination on merit. On issue of the claim that the Claimant cannot be one of the beneficiaries of the estate, Counsel for the Defendant argued that the point is that the Defendants be removed and another be appointed in their place. It cannot be the case that the Claimant should be appointed as an administrator. The question is, can the Claimant be appointed as a sole administrator?

In terms of how the present matter was commenced, Counsel for the Defendants argued that the law provides different ways of commencing the case and it is not by summons under the CPR. On the point that the stay is being disputed, that is not with any supporting evidence. The sworn statement in support of this application shows how the litigant shows that sometimes the Defendant are able to access the estate and gets paid illegally. The property in terms of each and every item needed to be declared as constituting the deceased estate. Counsel reminded the Court that it will also need to know the information as to the total properties comprising the estate. A failure to disclose the properties cannot be a basis for prejudice to the beneficiary since these are issues that should be determined after a full

examination at a trial. The Defendants submitted that they cannot say they did not disclose the properties hence removal as administrators. The Defendants maintained that the Court sets aside the default judgment and allow the Defendants to defend the matter on merit. In terms of costs, Counsel submitted a bill of costs and the same was refused by the Claimants owing to the fact that there was need to make an application to set aside the default judgment and this was necessary because the Claimant did this irregularly. Therefore, the Defendants were put to these expenses by the Claimants which justifies their claim for the expenses for this hearing and that the Court should decide on this costs. The matter was adjourned for a ruling and this is the ruling of Court.

REASONED ANALYSIS OF THE COURT

Order 12 rule 6 of the Courts (High Court) (Civil Procedure) Rules of 2017-CPR, the law is stated in this manner;

‘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
 - ii. carry on the proceeding against any other party to the proceeding.

The order is providing for situations where a party after being served with Court process does not act to demonstrate his or her interest or intention to contest. In the absence of such a response, the Court can summarily del with the case. The subsequent rule is very pertinent. Order 12 rule 7 of the CPR, 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.'

This rule buttresses the point that the Court cannot issue a default judgment *suo moto*, on its motion but has to be moved by an application. In this case, it is the Claimants who applied for a default judgment. In the application they deposed that service was effected on the Defendants who did not act on the served documents. It is for this reason that this Court granted the default judgment to the claimants. However, this Court notes that the application for staying the default judgment emphasises the point that service of documents was not effected on the Defendants as required by Order 8 rule 3 of the CPR. The said Order provides 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

The use of the word shall in this order means that the requirement is mandatory. It can only be waived where the exceptions arise. Order 5 rules 4 and 7 of the CPR are pertinent in this application. They provide that;

'The Registrar shall sign and seal the summons and all filed copies of any summons and ensure that the summons has been stamped indicating the date of filing and the date of issue, and that relevant filing fees have been duly paid. In this case, it is abundantly clear that the summons which was filed by the Claimants duly complied with these requirements and the Registrar duly attended to the same.

Rule 7 states that;

(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**.

(2) A summons shall contain a notice advising the Defendant that

(a) he must file a response in Form 2 within 14 days of the date of service, unless the Defendant files a defence within that time;

(b) he must file a defence within 28 days of the date of service;

(c) if he files a document in the proceeding, the Court shall notify the parties of the scheduling and pre-trial conferences under Order 14 where the Defendant shall be required to attend or be represented in Court; and

(d) if he does not file a response or defence in the proceeding, the Claimant may obtain

judgment against the Defendant.

(3) A summons commencing a proceeding shall have

- (a) a list of documents to be relied upon verified by a sworn statement; and
- (b) copies of the documents on the list.'

Clearly, the orders make it mandatory that court summons must be served on a party personally. In the event that Claimant opts to serve the summons by post, then he or she must use the Defendant's last known address or by other alternative mode. The use of such alternative mode is preceded by **the order of the Court**. It has to be remembered that in Order 8 rule 20 of the CPR, there is an exception to personal service of a summons in the following manner;

'Where it is not practical for a party to serve a document personally and an alternative way of serving the document is reasonably likely 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'). 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.
- g. 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
- h. 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.

This Court's reading of the above rules of procedure on service of a summons is that personal service is and remains mandatory. However, alternative service of a summons is allowed only following a Court order. Such a Court order is on the premise that the Court is satisfied that personal service is either impossible or difficult or may cause unreasonable delay to the process. In other words, it is only the Court that has the mandate or power to determine if alternative service of summons is justifiable.

The main argument raised by the Defendants is that they were never served with Court summons. This means that what is critical here is confirmation that the summons was duly served on the Defendants by the Claimants. The Claimants insist that they effected service on the Defendants through posting the summons to their last known address. Order 8 rule 7 of the CPR states that service of a document at the last known address, given as an address for service of a party, is effective service, unless a notice of change of address for service has been given to the party serving the document. On the summons, the address for the Defendants was P.O. Box 393, Blantyre. Further, on the summons, there is an attachment of the Court process relating to the appointment of Administrators for the deceased estate. In the documents the address for Messrs Khumbo Sambo, Pahlane Sambo and George Sambo is Post Office Box 393, Blantyre. The sworn statement of the 1st Defendant also confirmed the address as that one. This Court notes that the sworn statement of the surety shows that the address for Pahlane Sambo is P.O. Box 31791, Lilongwe 3.

On 12th April, 2023, the Claimant filed an ex-parte application for default judgment. This application was supported by a sworn statement of Gerald Zodabwitsa Kampeni. In paragraph 5 of the sworn statement, Counsel states as follows:

'that the initial directions, summons, statement of case, list of documents, sworn statement verifying statement of case and list of documents and response were served on the Defendants by post on 24th February, 2023 Produced and shown to me is the copy of proof of service exhibited and marked as GZK1. That a period exceeding 28 days has elapsed and the Defendants have not filed a response nor a defence to the Claimant's claim. In addition to this sworn statement, there is a sworn statement of Matthews Chinyanga a Process Server who states as follows:

That on the 24th February, 2023, I served the initial directions, summons, statement of case, list of documents, sworn statement verifying statement of case and list of documents and response by post in a sealed envelope duly addressed to the Defendants' last known address P.O. Box 393, Blantyre. Produced and shown to me are copies of the electronically generated receipts

showing the addresses of the Defendants to which the above documents were posted exhibited and marked MC1 and MC2.

That I posted the said documents to the Defendants' last known address in accordance with the law. That the said copies of the initial directions, summons, statement of case, list of documents, sworn statement verifying statement of case and list of documents and response have not been returned to the Claimant through the post undelivered to the addressee. That in my opinion the said documents so posted to the Defendants will have come to their knowledge within seven days after the said date of posting. The receipts from Malawi Post Corporation confirm that lawyers for the Claimant posted a parcel to the Defendants on the address P.O. Box 393 Blantyre on 24th February, 2023 at 3:31pm.'

This Court forms the view that the address used on the summons by the Claimants is indeed their last known address. Having made such a conclusion, this Court is duty bound to determine if the posting of the summons by the Claimants to the last known address of the Defendants suffices as service of the summons on the Defendants. The answer is in the negative. The law demands that service of a summons must be personal on the Defendants. In the event that the same cannot be attained without undue delay or hardship, the law provides for alternative modes of serving the summons. These alternative modes include service by post. However, a party cannot use such alternative modes of service without obtaining a Court order allowing them to use alternative mode of service. In this case, there is no Court order allowing for alternative mode of service by the Claimants. That failure to obtain a Court order means that the service of the summons by post was irregular. This Court finds as such.

The Claimant admits that they did not comply with the requirement to obtain leave of the Court before serving summons by post. He then seeks the Court's consideration under Order 2 rule 3 of the CPR in dealing with this irregularity. The said order states that 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.

This Court has considered the many options that the rule grants whenever there is an irregularity as is the case here. The options are considerate of the nature of the irregularity. Considering the nature of the

irregularity, justice will not be served if the process of serving the summons complies with the rules of procedure. As such this Court maintains that such an irregularity cannot be cured. This being the case, the default judgment is hereby set aside under Order 2 rule 3 (b) of the CPR. The Court further exercises its powers under Order 2 rule 3 (f) of the CPR such that the Claimants are ordered to serve the summons on the Defendants who should respond within 14 days thereafter. The Defendants should indicate their intention to defend within 28 days from the date of service. Once pleadings are closed this matter is exempted from mediation. The parties must file and serve their trial bundles within 2 days after closure of pleadings and the case will be heard on **7th May, 2025 @ 9AM** physically.

COSTS

The Defendants prayed for costs because the expenses incurred are due to non-compliance on the part of the Claimants. This Court is fully aware that costs are within its discretion under Order 2 rule 3 (e) of the CPR. This Court exercises its discretion and orders that the Claimant pays costs of the present application because had she followed the right procedure, there would not have been this expense. The costs must be paid within 45 days from today. If the parties do not agree, then the Registrar for Family and Probate Division should assess the costs within 90 days from the expiry of the 45 days.

It is so ordered.

PRONOUNCED IN CHAMBERS ON 4th March, 2025 @7:30AM.

A handwritten signature in black ink, appearing to be 'JRK', written in a cursive style.

HONORABLE JEAN ROSEMARY KAYIRA

JUDGE