IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO 706 OF 1989

BETWEEN:

FIDA MANGANI.....PLAINTIFF

- and -

DAVID ALEXANDER RHODES.....DEFENDANT

Coram: MWAUNGULU, Registrar

Plaintiff, absent, unrepresented
Mandala, Counsel for the defendant

ORDER

This is the defendant's application to set aside service of a Writ of Summons. The plaintiff took out this action on the 22nd of August, 1989. It is apparent on the writ that the defendant, David Alexander Rhodes, was at c/o Scott Associates, Box UA 196, Union, Harare, Zimbabwe. The defendant was therefore outside the jurisdiction. The action was for loss of dependency under Section 7 of the Statute Law (Miscellaneous Provisions) Act. The defendant killed the plaintiff's husband in a a car accident along the Luchenza-Mulanje Road on the 24th of August, 1986. This was therefore a sort of action where service could be effected outside the jurisdiction. The plaintiff could properly issue the writ within jurisdiction and serve it outside. When the writ was issued on the 22nd of August 1989, the plaintiff, on 15th January, 1990, lodged an affidavit of service alleging that the writ had been served on the defendant in Zimbabwe. On 30th January, 1990 judgment was obtained in default of notice of intention to defend. This was in spite that presumably there was a notice of intention to defend from Mr. Rhodes. On 4th of May, 1990 the defendant applied to set aside the service of the Writ of Summons and Statement of Claim on him. The main ground is that the plaintiff did not obtain leave of the court to serve the writ and the statement of claim on the defendant outside the jurisdiction.

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There are several problems on this file. The most conspicuous one being that the court did not, as it should, endorse on the writ that the writ was **"not for service out of jurisdiction"**. This is a requirement under the Practice Direction 1980, 3 All E.R. 822, 826 para. 11. This endorsement should be made for all writs where leave is necessary for service outside the jurisdiction. The defendant was in Zimbabwe. Zimbabwe is not a member of the Hague Convention on the service abroad of judicial and extra judicial documents of 15th November, 1965 although Malawi is. Leave was therefore necessary notwithstanding the Service of Processes and Execution of Judgment Act, Cap.4.04 of the Laws of Malawi.

Service of the writ on Rhodes was irregular in that leave was not obtained from the Court to serve the defendant outside the jurisdiction. As we have seen, judgment was obtained in default of notice of intention to defend although there was such notice. The defendant can still apply to set aside service of the writ on him even after judgment has been obtained in default: Field v. Bennett (1886) 56 L.J. Q.B. 89; Reynolds v. Colman (1887) 36 Ch. D. 453; and Massey v. Haynes (1888) 21 Q.B.D. 330.

The question that has exercised my mind a great deal is the exercise of discretion. I do not think that failure to obtain leave makes the proceedings a nullity. In other words, the fact that there was service without leave does not in itself nullify the service of the processes. It should be regarded as an irregularity under Order 2, rule 1 of the Rules of the Supreme Court. In exercising my discretion to set aside the service of the writ it may be important to consider the policy issues involved in serving processes outside the jurisdiction. Other sovereign states may not be tolerant to service of processes on either their nationals or nationals of other sovereign nationals living in their borders. Of course, as between Malawi and Zimbabwe, service of processes issued by certain Courts is permitted. Generally, however, states in respect of each other's sovereignty, prefer that either they be requested or have bilateral arrangements where service of such processes is permissible. To allow service of processes of nationals of another sovereign country or our nationals living in the borders of other sovereign countries is something that should be approached with caution. I am not prepared to presume for a moment that our nationals should take this for granted and serve processes in defiance of the sensibilities and the laws of other countries. This is ensured by first seeking leave of our Courts to ensure, where no convention or bilateral arrangements prevail, that other countries are consulted before service. In my exercise of the discretion therefore I would rather I set aside service of the Writ of Summons and Statement of Claim on the defendant. This stance was confirmed long ago by Justice Field in Hewitson v. Fabre (1888) Vol. 21 Q.B.D. 6 at p.8:-

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"But the evil is still greater in the case of foreign countries, the governments of which resent the service on their subjects without their leave of the process of the Courts of other nations, and for this reason the alteration has been made in the rule, and a specific distinction between serving the process itself and giving a courteous notice of it has been drawn by Order XI, r.6. Under that rule, if the defendant be a British subject residing abroad, the jurisdiction which the Courts of this country possess over British subjects wherever resident would authorize the service upon him of the writ; but if he be not a British subject, notice only of the writ is to be given to him, so that he may be under no compulsion to obey it, but may be able to exercise an option in that respect.

It is important to consider whether this objection lies in the mouth of the individual himself. In my opinion it is plain that it does, and that the very object of the rule was to enable him to take such an objection, and I have no doubt whatever that a foreigner residing abroad is competent to complain of the service of British process upon him."

I would therefore set aside the service of the Writ of Summons and the subsequent judgment in default of notice of intention to defend with costs.

Made in Chambers this 15th day of May, 1992 at Blantyre.

D.F. Mwaungulu
REGISTRAR OF THE HIGH COURT