JAHAWAH SOMBHAI NAYEE v DOBBIN MUBANGA LUFUNGULO (1986) Z.R. 47 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, JJ.S.
29TH MAY, 1986
(S.C.Z. JUDGMENT NO. 12 OF 1986)

Flynote
Civil Procedure - Service of pleading by ordinary post - Receipt acknowledged - Whether proper service.
Civil Procedure - Writ - Endorsement of - Need for full address for service.

Headnote
The defendant appealed against an order of the High Court dismissing his appeal from the Deputy Registrar's ruling granting judgment in de-

fault of defence in favour of the plaintiff. The defendant failed on two occasions to serve his defence in good time upon the plaintiff. The plaintiff claimed that the defendant's attempt to serve the plaintiff using ordinary post was bad service and did not comply with the requirements for service by registered post under 0.10 r 2(1) of the High Court Rules.

Held:

(i) It is sufficient to serve a document by ordinary post, as is the common practice among lawyers in Zambia, provided there is an acknowledgment of such service from the recipient.

(ii) Where the plaintiff has not endorsed a proper address for the service he cannot claim improper service and it would suffice for the defendant to file his defence with the District Registrar.

Legislation referred to:

(1) High Court Rules, Cap. 50, 0.10 r 2 (1), 0.7 r 1 (2) (c), 0.10 r 7.

For appellant: H.H. Ndhlovu, Jacques and Partners,
For the Respondent: In person.

Judgment
GARDNER, J.S.: delivered the judgment of the court.

This is an appeal against a judgment of a judge in chambers dismissing an appeal from an order of the deputy registrar refusing an application to set aside a judgment in default of defence.

The history of the case is that the plaintiff served a statement of claim in accordance with the order for directions and thereafter the defendant did not serve on the plaintiff a defence within the time laid down by the order. On the 16th of May, 1984, the plaintiff wrote a letter to the district registrar at Livingstone applying for judgment ire default of defence. On the 17th of May, 1984, the defendant's advocates wrote a letter to the plaintiff enclosing the defence and on the same day filed the defence with the district registrar in Livingstone. The district registrar, without hearing the application for interlocutory judgment, declined to enter judgment as the defence had already been filed in the registry and there after the plaintiff appealed to a judge in chambers who ordered that the district registrar must hear the application and sent it back for hearing. Thereafter the district registrar heard the matter. At the hearing the advocate for the defendant conceded that the defence had not been sent to the plaintiff by way of registered post in accordance with 0.10 r 2 (1) of the High Court Rules of Zambia and applied for an extension of time within which to serve the defence by way of registered post. The district registrar granted the application and gave an extension of time for 21 days. Thereafter the defendant's advocates defaulted again and did not serve the defence within the 21 days stipulated by the extension. The plaintiff then applied again for judgment in default of defence and this was granted. The defendant then appealed to a judge in chambers and

the learned judge refused the application and ordered that the judgment in default should stand. It is against that judgment of the High Court judge that this appeal is now brought.

In support of the application for judgment in default the plaintiff swore an affidavit exhibiting a letter dated the 17th May, 1984, from the defendant's advocates to the effect that they were enclosing by way of delivery their client's defence.

Mr Lufungulo, the plaintiff appeared on his own behalf in this appeal, has argued that service by ordinary post is a bad service and a defence served in that manner is not a valid defence. After hearing what this court had to say about the matter Mr Lufungulo conceded that any service could be good service provided the document was received, as was admitted, but maintained that in view of the concession of the defendant's advocates at the first hearing before the district registrar to the effect that it was admitted that service was bad, it follows that the service must be treated as bad in all proceedings arising thereafter.

> 0.10 r.2 (1) reads as follows:
>
> "2.(1) All writs, notices, pleadings, pleading orders, summonses, warrants and other documents, proceedings and written communications, in respect of which personal service is not requisite, shall be sufficiently served if left at the address for service of the person to be served, as defined by Order VII and XI, with any person resident at or belonging to such place, or if posted in a prevails registered envelope addressed to the person to be served at the postal address for service as aforesaid . . ."

The provision as to mode of service is not exclusive. It is common practice between practising lawyers in this country for service by ordinary post to be effected between their respective offices and the need for service by registered envelope is solely to enable the sender of the document to

prove that he has served the document in case of default proceedings. It is quite sufficient to serve a document by ordinary post provided that when it comes to proof of service the appellant has an acknowledgment from the recipient or, much more strongly as in this case, an affidavit by the recipient saying that he has received the document.

We agree with the earlier ruling of the appellate judge of the High Court who found that the district registrar could not dispose of an application for judgment in default merely by saying that a document had been filed in the registry. He was bound to hear the application. But in this particular case we are quite confident that on hearing this application he should have been satisfied by the production by the plaintiff of the letter of the defendant's advocates dated 17th of May, that the defence had been received by the plaintiff before he, the district registrar, dealt with the application. In the circumstances the plaintiff would have been entitled to his costs of having to issue the summons but he would not have been granted judgment in default.

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One further matter which has come to our attention is that the writ which was issued in the Livingstone district registry of the High Court was endorsed with an address for service of the plaintiff in Lusaka. 0.7 r. 1(2)(c) provides as follows:

> "A plaintiff suing a person shall endorse upon the writ of summons his place of residence, his postal address and his occupation.
>
> (2) If his place of residence and postal address are not more than five miles from the Registry at which the writ is issued, either of such addresses shall be an address for service for the purposes of these Rules, and if his place of residence and postal address or either of them be more than five miles from such Registry, or if he has no place of residence or postal address, the plaintiff shall also endorse on the writ of summons a proper place and postal address or either of them, as the case requires, which shall not be more than five miles from such Registry and either of the addresses within the limit aforesaid shall in such case be his address for service."

0.10 r.7 reads as follows:

> "7. Where no appearance has been entered for a party, or where a party or his solicitor, as the case may be, has omitted to give an ad dress for service, all writs, notices, pleadings, orders summonses warrants and other documents, proceedings and written communications in respect of which personal service is not requisite may be served by filing them with the Registrar."

In this particular case the plaintiff had not complied with these rules and, although we have said that the service by ordinary post was sufficient because the document was admitted to have been received, it would have been in order in this case for the defendant to have filed the defence with the district registrar. In any event, in view of the fact that the plaintiff had not properly endorsed a proper address on the writ he cannot be heard to say that service was improper. In view of the order we are about to make we give the plaintiff leave to amend the writ of summons by endorsing

thereon a proper address for service within the rules. We order that the amendment shall be made within twenty one days from today and a copy of the amended writ be served upon the defendant's advocates within that time.

By consent this appeal is allowed, the judgment in default of defence is set abide. The defence shall be deemed to have been properly served and this action will proceed to trial in accordance with the order for directions.

As costs, Mr Ndhlovu on behalf of the defendant has indicated that in view of the concession by his colleague at the first hearing before the district registrar to the effect that the defence had not been properly served, the defendant should be liable for costs up to and including the

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last order of the district registrar. We order that these costs shall be paid by the defendant on to the plaintiff. So far as the costs of this appeal are concerned we are satisfied that the learned appellate judge had before him the argument that the defence had in fact already been served. Accordingly, the costs before the learned judge in chambers and in this court will follow the event and will be paid by the plaintiff to the defendant.

Appeal allowed.