

Chawezi Banda (a.k.a 'Cha-Cha') v. Hana Jabesi (a.k.a 'Tamiya Ja')

Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice M.A Tembo
Cause Number:	Civil Cause Number 70 of 2025
Date of Judgment:	July 11, 2025
Bar:	C. Gondwe, Counsel for the Claimant S. Chirwa, Counsel for the Defendant

ORDER

1. This is the decision of this Court on the defendant's Notice of Preliminary Objections and Cross-Application against the claimant's with notice application for interlocutory injunction.

2. The facts of this matter are not complicated. As this Court understands, from the papers filed by the parties herein, both of them are social media influencers with quite a following online. The claimant is ordinarily resident in the United States of America. The defendant on the other hand is ordinarily resident here in Malawi.

3. The genesis of this matter is that the defendant made certain statements on her online social media platforms, with reference to the claimant. The claimant took the view that the defendant's statements pertaining to her were defamatory. The claimant therefore commenced the present case by summons filed on 30th June 2025 against the defendant alleging defamation. In her claim, the claimant seeks damages for defamation, an order of injunction restraining the defendant from further publishing the defamatory statements herein and an order compelling the defendant to remove the defamatory statements from her online social media platforms.

4. On the same day, 30th June 2025, the claimant filed an urgent application, without notice to the defendant, seeking an order of interlocutory injunction restraining the defendant from publishing the alleged defamatory statements herein against the claimant on Facebook and all other social media platforms. The claimant also sought a further order compelling the defendant to remove the defamatory statements from all her social media platforms. That application was made under Order 10 Rule 1 and 27 of the Courts (High Court) (Civil Procedure) Rules.

5. This Court considered the without notice application made by the claimant. It determined that according to the applicable law on interlocutory injunctions relating to defamation, which requires striking a balance between the constitutional right to freedom of speech and the right of a person not to be subjected to defamation, this Court could not, on the evidence presented by the claimant, grant an interlocutory injunction without notice to the defendant. This Court therefore ordered that the claimant make the application for interlocutory injunction with notice to the defendant.

6. The claimant then filed her application for interlocutory injunction herein with notice to the defendant. It is this application that the defendant objects to for being irregular and the claimant seeks that the application be dismissed, on the basis of two reasons. The claimant contested the defendant's application.

7. Before dealing with the two reasons advanced by the defendant against the claimant's application, this Court considers it expedient to first consider and determine a matter raised by the claimant against the defendant's Notice and Cross Application. The claimant contended that the Rules of procedure in this Court do not provide for such Notices. This Court agrees with the claimant that indeed this Court has said time and again that parties seeking to raise objections and seek sanctions for noncompliance ought to make an application under Order 2 of the Courts (High Court) (Civil Procedure) Rules. The reference by the defendant to a Notice is therefore irregular. However, as correctly indicated by the defendant, she also made an application as required under Order 2 of the Courts (High Court) (Civil Procedure) Rules alleging the reasons for seeking

sanctions for the claimant's noncompliance. This aspect saves the defendant's cause on this application.

8. This Court now deals with the reasons advanced by the defendant for seeking the dismissal of the claimant's application for interlocutory injunction for noncompliance with the Rules. The first reason advanced by the defendant is that the claimant's application for interlocutory injunction is not supported by a sworn statement.

9. The defendant correctly indicated that the Order 10 Rule 4 of the Courts (High Court) (Civil Procedure) Rules requires that the claimant's application be supported by a sworn statement setting out the facts supporting the relief sought. The defendant asserted that the claimant's sworn statement in support of the application for interlocutory injunction was taken by the claimant before Counsel Chikondi Mmanga Kasambara contrary to the relevant provisions of law and that therefore there is no supporting sworn statement. This was a matter of major disagreement between the parties herein.

10. The claimant filed a sworn statement in support of her application for injunction herein on 30th June 2025. The Rules of this Court require that the sworn statement be signed by the deponent (being the claimant herein, before a Commissioner for Oaths. The sworn statement filed by the claimant shows that it

was signed by the claimant before a Commissioner for Oaths, being Counsel Chikondi Mmmanga Kasambara in this case. It also showed that the claimant signed the sworn statement at Blantyre. The fact of the matter is that the claimant was not in Blantyre on 30th June 2025. She admitted this fact during cross examination by the defence at the hearing of the defendant's application herein. When pressed as to what actually happened on her making the impugned sworn statement, during the said cross-examination, the claimant was at pains to describe the process that was involved in her making her sworn statement before Counsel Chikondi Mmanga Kasambara. The claimant unsuccessfully suggested that she made her sworn statement virtually. What she indicated is that she asked Counsel Chikondi Mmanga Kasambara to sign the witness statement that she had prepared and Counsel Kasambara signed the same. She indicated that she did this in liaison with her lawyers.

11. The claimant had asserted in her sworn statement in opposition to the defendant's application that she made the sworn statement herein virtually. There was no elaboration as to what she actually did which is what was explored in detail during her cross-examination.

12. The defendant argued that the law requires that the claimant should have taken the oath before a Commissioner for Oaths physically, which the claimant herein never did. The defendant referred to Rules 3 to 6 of the Commissioner for Oaths Rules which provide an elaborate process for making an Oath to a sworn statement before a Commissioner for Oaths attests to the same. By that process,

the Commissioner for Oaths has to ask the deponent, one making the sworn statement, if she believes in God and whether she agrees to taking an Oath. Otherwise, the deponent shall make an affirmation. Once the Oath or Affirmation, in prescribed words is taken, the the deponent shall affix her usual signature on the sworn statement. Thereafter, the Commissioner for Oaths shall attest the sworn statement by fixing her signature as well.

13. The defendant correctly observed that, my sister Judge, Justice Mwale, in the case of Re Estate of Phiri Probate cause number 270 of 2015 (High Court) (Unreported) had occasion to emphasize the importance of following this statutory process. She also lamented the short cuts practiced by Commissioners for Oaths in attesting to sworn statements, as exemplified in that case where the process was not followed and the Commissioner simply signed off on the sworn statement against the deponent's signature. Similar sentiments. The defendant also correctly alluded to the decision of Justice Ligowe on this same matter in Gondwe v President of the Republic of Malawi and 3 Others Judicial Review case number 10 of 2019 (High Court (unreported) where my brother Judge implored Commissioners for Oaths to follow the relevant law on attesting sworn statements and that both the deponent and a Commissioner for Oaths shall be physically present for that purpose.

14. The defendant asserted that if an electronic signing of the sworn statement was to be done by the claimant virtually she should have complied with section 8 of the Electronic Transactions and Cyber Security Act which provides that where a law requires a document to be signed, an electronic form of the document shall

satisfy the requirement if an electronic signature is used. The section provides the conditions on authenticity of such an electronic signature. 171e defendant contended that the claimant never satisfied the requirement under this Act on electronic signatures. In this regard, during cross-examination, the claimant indicated that she had signed the sworn statement using a different signature and sent the statement to the Commissioner for Oaths for attesting. Nothing can be further from the truth. There is no evidence that the claimant used an electronic signature to comply with the Electronic Transactions and Cyber Security Act. It is clear that the impugned signature of the claimant is in black ink denoting that it was meant to convey the impression that the claimant took the oath at Blantyre and signed her witness statement as attested by the Commissioner for Oaths.

15. As correctly submitted by the defendant, this Court has had occasion to state that a sworn statement without a validly taken Oath is not a sworn statement. See *Dr Chilima and Dr Chakwera v Electoral Commission and Professor Mutharika* Constitutional Reference number I of 2019 (High Court) (unreported).

16. The claimant's contention that she validly made the sworn statement in the present case on her application for injunction is therefore unsustainable. As the defendant has successfully shown, the claimant never complied with the requirements on the electronic signing of documents and the prescriptions on the taking the Oath to her witness statement before the Commissioner for Oaths. This Court agrees with the defendant that the claimant therefore has no sworn statement in support of her application for injunction. The claimant contended

that this defect is curable under Order 2 of the Courts (High Court (Civil Procedure) Rules as an irregularity. However, on the contrary as submitted by the defendant, this defect is fatal. The defect cannot be cured by the claimant filing a subsequent sworn statement. There was no sworn statement in the first place to be cured since a sworn statement without a validly taken Oath is not a sworn statement. See *Dr Chilima and Dr Chakwera v Electoral Commission and Professor Mutharika* Constitutional Reference number 1 of 2019 (High Court) (unreported).

17. In the circumstances, the defendant's first ground for seeking sanctions against the claimant's application for interlocutory injunction succeeds. The application is dismissed on this first ground.

18. For the guidance of parties found in the position of the claimant, as sought by counsel for the claimant, this Court takes the view that with advances in technology and the relevant law, indeed the making of a sworn statement virtually should be allowed as long as certain prescriptions of law are followed and not anyhow. Physical presence of a deponent and the Commissioner for Oaths may in that case be replaced by fulfilment of the requirements of taking the Oath by the deponent virtually, with both the deponent and Commissioner for Oaths interacting virtually in real time by video link and then signing the sworn statement by the deponent in line with section 8 of the Electronic Transactions and Cyber Security Act. Thereafter signing off on the sworn statement by the Commissioner for Oaths. This is being stated in view of the fact that in terms of Order 1 Rule 5 of the Courts (High Court) (Civil Procedure) Rules, this Court shall

also encourage use of technology as part of its active case management of cases to further the overriding objective of the Rules to deal with matters justly. Dealing with matters justly includes making sure that we save expenses during litigation.

19. The second ground advanced by the defendant for seeking sanctions herein is that the claimant never made effective service of the application for interlocutory injunction herein. What transpired in this regard is that, the claimant's counsel, after getting the summons and application issued herein contacted the defendant via WhatsApp advising the defendant that he had court documents that he need to serve her and inquiring where service should be done. The defendant respondent that counsel could serve the documents on the same WhatsApp number, which the claimant's counsel did.

20. The defendant contends that this service was ineffective under the Rules of Procedure in this Court. The claimant vehemently contested this ground. She charged that the defendant herself indicated that she be served by WhatsApp and that she cannot now turn around and claim that she was not served effectively. In response, the defendant contended that the law is the law and that as an unrepresented litigant at the time she was asked about service she could not dictate service other than as prescribed by the law of procedure.

21. This Court finds some compelling force in the claimant's argument that indeed the defendant having indicated that she be served by WhatsApp, she cannot now turn around and say that she was not effectively served the application and the summons. However, as correctly and more compellingly submitted by the defendant, the Rules of Procedure provide for the manner of service of a summons and other documents such as the claimant's application for interlocutory injunction.

22. Order 8 of the Courts (High Court) (Civil Procedure Rules) is very clear regarding responsibility for service of court documents. It provides that where the Rules require a document to be served, the party who filed the document shall be responsible for ensuring that the document is served. See Order 8 Rule 1 of the Courts (High Court) (Civil Procedure) Rules. One can see that the responsibility is not on the person to be served. Of course, avoiding service would not be acceptable.

23. A summons shall be served personally unless one applies for substituted service. See Order 8 Rule 2 of the Courts (High Court) (Civil Procedure) Rules. Other documents, such as the claimant's application for interlocutory injunction may be served personally or by leaving it at a party's address of service, by sending to a party's address of service by prepaid post, registered mail, courier service, facsimile, or if the party has given an address for service by electronic mail, by electronic mail. See Order 8 Rule 8 of the Courts (High Court) (Civil Procedure) Rules.

24. Where personal service and Order 8 Rule 8 service of documents is not reasonably practicable then the party required to serve a document may apply to this Court for substituted way of service of the documents. Under this one, the Court may order service of documents in any other way that will ensure that the document reaches the party sought to be served. See Order 8 Rule 20 of the Courts (High Court) (Civil Procedure) Rules.

25. It is the firm view of this Court, in agreement with the defendant, that the Rules are clear on service of documents that the claimant has to serve documents as prescribed. In this case, service via WhatsApp can only be had as substituted service on application to the Court. It was the duty of the claimant to ensure that service was effected by the required methods under the Rules. The claimant never applied to this Court to have service effected by WhatsApp. That means that the service effected herein was indeed not effective as it is contrary to the Rules, as correctly submitted by the defendant. The duty to comply with those Rules rests with the claimant.

26. There is persuasive case authority in the UK Supreme Court, albeit a split one, that even if a person is acting in person without legal representation they must follow the Rules on service of a summons and by extension other documents. See *Barton v Wright Hassal LLP* [2013] UKSC 12. Represented litigants cannot therefore be allowed to relax in this regard, as correctly

submitted by the defendant.

27. If we want to make service by WhatsApp at par with service by electronic mail then the Rules on service ought to be changed accordingly. One may argue vigorously, as the claimant did, that indeed time for such a review is here. But until that is done, methods of service as provided by the Rules are important and we are to observe the Rules on service as contended by the defendant. Rules are rules and validating the claimant's service by WhatsApp herein will not sit well with the said Rules.

28. In the premises, contrary to the claimant's contention, the defendant was therefore right not to respond to the application for interlocutory injunction as she is bound to object to irregularities and defects by application to this Court, within a reasonable time of noting the same before taking any steps in the matter. See Order 2 Rule 4 of the Courts (High Court) (Civil Procedure) Rules.

29. There being no effective service herein as prescribed by law, the claimant's application for interlocutory injunction cannot be proceeded with. It is also dismissed on this ground. The Claimant must follow the Rules on service.

30. The defendant had also advanced the allegation that the Claimant's

application is made in bad faith, involves fraud and misrepresentation. However, as submitted by the claimant, there is specificity and no proof of these grave allegations and, in any event, such allegations are not proved and are actually not suitable to proof on an application like the present one.

31. The defendant has succeeded on her application and shall get the costs of this application.

Made in chambers at Blantyre this 11th July, 2025.