

IN THE HIGH COURT OF MALAWI, BLANTYRE

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 572 OF 1985

BETWEEN:

M.L. KADAMMANJA ..... PLAINTIFF

- and -

AGRICULTURAL DEVELOPMENT & MARKETING CORPORATION (ADMARC) .. DEFENDANT

Coram: UNYOLO, J.

Chirwa, Counsel for the Plaintiff  
Banda, Counsel for the Defendant  
Manda, Court Reporter  
Kaundama, Official Interpreter

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O R D E R

By his originating summons dated 15th October, 1985, the plaintiff seeks the determination of the court on the following questions, namely:

"(1) Whether the plaintiff as a duly retired employee of the defendant is entitled to a payment of pension benefits under Clause 10 or Clause 8 of Appendix 'J' of the Defendant's Conditions of Service in force on the 7th day of July, 1983.

or

(2) Whether or not the plaintiff is entitled to retirement benefits under Rule 3.1.2 (i.e. Pension on Early Retirement) of the Rules of the ADMARC Senior Staff Pension Fund."

The matter is hotly contested by the defendant. It is contended on the part of the defendant that the action herein is really an abuse of the process of the court. The defendant counterclaims against the plaintiff the sum of K3,394.35 being money paid by the defendant to the plaintiff, allegedly under a mistake.

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The following facts are common case. The plaintiff had been an employee of the defendant until the 7th July, 1983, when he was retired by the defendant. This was forced, premature retirement. In the normal course of events, an employee of the defendant would retire upon reaching the age of sixty. The plaintiff was only 39 years old at the time of his said retirement. The action to retire the plaintiff was prompted by the plaintiff's alleged involvement in certain financial malpractices. These are spelt out in the letter of retirement written by the defendant to the plaintiff.

It is common case further that prior to his said retirement the plaintiff was a member of the defendant's senior staff pension scheme underwritten by Old Mutual. The plaintiff contributed 5% of his salary each month towards the said pension scheme and the defendant for its part supplemented this by its own contribution of 15% of the plaintiff's salary every month.

Following his said retirement the defendant paid to the plaintiff terminal benefits in the sum of K7,452.10 (gross) which the defendant calculated to be due and payable by itself to the plaintiff in terms of Clause 10 of its, the defendant's, conditions of service. The next amount actually received by the plaintiff came to K3,394.35.

The foregoing facts emerge from the affidavit evidence filed by the parties in this case and as I have already indicated these facts are common case. Perhaps I should mention here that the plaintiff filed with his affidavit evidence several documents including the defendant's conditions of service abovementioned. And in argument counsel for the plaintiff also produced a handbook containing the rules applicable to the defendant's senior staff pension scheme.

Apart from the said affidavit evidence and documents filed therewith, no witnesses were called in this case by either side. Put simply, the plaintiff is asking the court to determine whether he was, upon his said retirement, entitled to benefits under Clause 10 of the defendant's conditions of service or under Rule 1(2) of the pension scheme rules. What is clear about the plaintiff's case, if I may respectfully say so, is that the plaintiff himself is not sure what manner of benefits he was entitled to. He would like the court to decide this for him and should the court's decision at the end of the day turn out in his favour he would then like to pursue the matter further and obtain a judgment against the defendant accordingly.

Let me pause here to say something about the law. Order 5/4 of the Rules of the Supreme Court provides that the use of an originating summons is appropriate in proceedings (a) where the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law or (b) where there is unlikely to be any substantial dispute of fact.

And referring to the present case it appears to me that the question at issue is not solely or principally one of construction of the defendant's conditions of service or the pension scheme rules. There is definitely more to it, as is clear from the defendant's affidavit. Secondly, it appears

to me that the documents produced on the part of the plaintiff deal with matters which are challenged by the defendant and which require clarification and explanation by viva voce evidence of competent witnesses, if justice is to be done. I also take the view that the defendant's counterclaim cannot simply be determined by the court upon affidavit evidence solely. The claim must be substantiated factually. In a word, the parties in this case must be prepared to fight a duel in the usual manner, in open Court.

All said, I take the view that this matter ought to have been commenced by writ as opposed to and distinct from an originating summons. Fortunately, the court has power to order that a case such as this one be continued as if it had been begun by writ. Order 28/8(1) of the Rules of the Supreme Court is pertinent and provides as follows:

"Where, in the cause (sic) of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof."

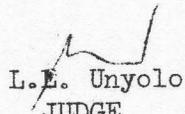
The effect of this Rule is stated in O.28/8/1 which provides that when the Rule here is invoked, the usual order is for pleadings to be served very quickly and then for the matter to be restored for final directions. There is a word of caution here to the effect that in such cases it is better not to let affidavits stand as pleadings because such affidavits cannot be amended nor can particulars thereof be ordered. Indeed in the present case it appears to me necessary that the plaintiff should consider his facts fully and carefully and then decide precisely what manner of terminal benefits he thinks he is entitled to. He should then put his case squarely, rather than as an academic point, claiming a declaration that he is so entitled and an order for the payment of the same. It therefore seems to me that the plaintiff should actually serve a writ and statement of claim.

It is therefore ordered that these proceedings do continue as if the same had been commenced by writ of summons and that the plaintiff do serve his statement of claim within thirty days of the date hereof. Needless to point out that should the defendant still be minded to prosecute its counterclaim the same will be raised in the usual manner in its defence to the plaintiff's claim.

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The question of costs worried me somehow. It is to be observed, however, that both parties were content to proceed with the matter here by way of originating summons. In those circumstances I order that all costs thrown away by reason of this order, save those which were specifically allowed each of the parties previously, be costs in the cause.

PRONOUNCED in open Court this 6th day of June, 1986, at Blantyre.

  
L.E. Unyolo  
JUDGE