

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 920 OF 1997**

BETWEEN

OIL COMPANY OF MALAWI

PLAINTIFF

AND

S. JUMBE

DEFENDANT

CORAM: MWAUNGULU, J

Chisanga, for the plaintiff

For the defendant, absent

Nkwepu, Official Interpreter

Mwaungulu, J

JUDGMENT

This is a summons for judgment. The plaintiff took out this action on 6th May, 1997. The action was commenced by writ. The action was for an injunction, a declaration and damages for trespass. At the same time as the writ was taken out the plaintiff applied ex parte for an interim injunction. The application was granted. The plaintiff subsequently obtained another order ex parte for the injunction to persist till trial of the action. The statement of claim was served with the writ. On 21st May the defendant lodged a notice of intention to defend. The time to serve defence has expired. This is a summons for judgment.

The plaintiff filed with the Court a judgment in default of defence. I am informed that the Registrar refused to enter final judgment. This he was entitled to do. The plaintiff's action included claims for an injunction and a declaration. It is therefore covered by Order 19,

rule 7 of the Rules of the Supreme Court. The plaintiff was to apply to the Court by motion or summons for judgment. The plaintiff applied to the Registrar for judgment. The Registrar remitted the matter to me because he has no jurisdiction to grant an injunction. This is also correct.

The plaintiff is a limited company whose business is to operate filling stations for selling motor vehicle fuels and lubricants on retail to the public. The company has one filling station at Chitawira. This filling station is on plot number SW8/596/1 Chitawira. The company has a ninety-nine-year lease on it. The defendant has a shop adjacent to the plaintiff company's filling station. The defendant approached the plaintiff last year for the plaintiff to allow the defendant to construct a drive way on and through the plaintiffs land. The plaintiff refused. The plaintiff has gone ahead to construct such a road. He has removed the plaintiff company's pavement. The plaintiff's action is for a declaration, an injunction and damages for trespass.

The application is made under order 19, rule 7 of the Rules. The rule has been considered in three decisions. In the earlier case of *Gibbings -v- Strong* (1884) 26 Ch. D. 66, 69, the Earl of Selborne, L.C., said:

“This means that the Court is to exercise some judgment in the case: it does not necessarily follow the prayer, but gives the plaintiff the relief to which, on the allegations in his statement of claim, he appears to be entitled; and if a defence has been put in, though irregularly, I think the Court would do right in attending to what it contains.”

On a summons for judgment therefore the judgment is not given as a matter of course. The Court has to exercise some judgment. In *Charles -v- Shepherd* [1892] 2 Q.B. 622,624, Lord Esher, M.R. said:

“We have consulted the members of other divisions of the Court of Appeal upon the question of the construction to be placed upon Order XXVII. , r. 11, and we are of opinion, upon the construction of that rule- first, that the Court is not bound to give judgment for the plaintiff, even though the statement of claim may on the face of it look perfectly clear, if it should see any reason to doubt whether injustice may not be done by giving judgment; it has a discretion to refuse to make the order asked for...”

The language of the rule is not peremptory. The court has a discretion to do what in the circumstances of the case appears just. (*Wallersteiner v Moir* [1974] 3 All E.R. 217, 245, per Buckley, L.J.)

The plaintiff, however, is claiming for a declaration. The Courts are wary of granting such relief without evidence. This was the view of Lord Justice Buckley in *Wallersteiner -v- Moir* following the views of Kekewich J., in *Williams -v- Powell* [1894] W.N. 141). This however is only a rule of practice. It is not a rule of law. It should be followed ‘where the claimant can obtain the fullest justice to which he is entitled without such a declaration.’(per Millet J., in *Patten -v- Burke Publishing Co. Ltd.* [1991] 2 All E.R. 821, 823). This is a case where the sort of declaration that the plaintiff is claiming should be made after an enquiry. In any case, the plaintiff can have full justice without the declaration sought.

There will therefore be judgment for the plaintiff for the injunction and trespass.

Damages will be assessed by myself.

Made in Chambers this 18th Day of September 1997.

D.F. Mwaungulu

JUDGE