

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO 1068 OF 2005**

**BETWEEN:**

M. H. C.....PLAINTIFF

- and -

M. M. W. JERE..... DEFENDANT

**CORAM:**     **CHIMASULA PHIRI J,**  
              Nkuna of the counsel for the plaintiff  
              Phillip T. B. of counsel for the defendant  
              Mrs Malani, official interpreter

*Chimasula Phiri J*

**ORDER**

In the present appeal against the order of the Registrar, the matter is by way of rehearing. Both parties have made their skeleton arguments. However, there is a preliminary point which

ought to be disposed of before the merits of the appeal are considered. The issue relates to the propriety of the affidavit in support of the originating summons which was sworn by counsel for the plaintiff. Affidavits contents are governed by Order 41 Rule 5 of the Rules of Supreme Court. Firstly, affidavits must be sworn by persons who have personal knowledge and can prove to the materiality of the issues from such personal knowledge.

Secondly, Order 41 Rule 5 is subjected to Order 113 Rule 3 which allows for affidavit to contain information based on knowledge gained or opinion based on understanding of the circumstances i.e a process of deducing a decision from the circumstances. In my view Order 113 Rule 3 does not confer a right to a third party like counsel to swear an affidavit on behalf of the plaintiff. This provision merely extends the scope of what the plaintiff may include in his affidavit i.e. statements of belief or opinion.

This matter was not an interlocutory matter because its decision was final. I stressed in **Norse International Ltd vs Group Five and Group Five Construction Ltd cc Number 2309 of 1995** that counsel should as matter of good practice desist from swearing affidavits on behalf of their clients because one day they will put their integrity at stake by cross examination from the other party.

My finding is that there was no affidavit in support of the originating summons. I allow the appeal with costs to the appellant. The orders of the Registrar are set aside. I also need mention that I have decided on the merits of commencing this action under Order 113 but just at a glance, I would be hesitant to do because of the additional claims in addition to possession. Order 113 is supposed to cater for possession of land simpliciter. The plaintiff may care to commence appropriate legal proceedings.

Chimasula Phiri

**JUDGE**