

M/s. J. F. Mwaungulu

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 413 OF 1992



BETWEEN:

FATIMA LAMBAT.....PLAINTIFF

- and -

ALISTER JAMIESON.....DEFENDANT

CORAM: MBALAME, J.

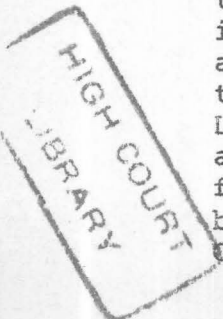
Nkhono, of Counsel, for the Plaintiff
Mthukane, Official Interpreter

R U L I N G

By her Notice of Motion the plaintiff herein, Fatima Lambat, prays to this Court pursuant to Order 19, rule 7(9) of the Rules of the Supreme Court for an order that a perpetual injunction restraining the defendant from entering her property be granted, and for damages for trespass. There is a Writ of Summons filed in which she seeks a declaration that the defendant has since trespassed on her land.

According to the statement of claim, the plaintiff is the occupier of a piece of land situate at Chipande in Blantyre District. It is said that sometime between June 1991 and March 1992 the defendant wrongfully entered the plaintiff's land with his vehicle and drove the said vehicle in a manner that endangered the lives of young children residing in the plaintiff's house. Apparently, he is said to have been driving without due care and attention on a road which was only 2 metres away from the plaintiff's house. It is from this alleged act that the plaintiff claims she has been deprived of the use and enjoyment of her land and has thereby suffered damage.

Briefly, the history of the matter is that the plaintiff began her action against the defendant by her Writ of Summons dated 2nd April 1992. This was duly served on the defendant. On 7th April 1992 she obtained an injunction, in which the defendant, either by himself, agents or servants or otherwise, were restrained from trespassing within 200 metres of the plaintiff's plot on Lambat Estate in Chipande until the determination of the action or until some further order. The defendant then filed an acknowledgement of service of the Writ of Summons, but never entered any defence. Instead, he applied to the Court for an order to dissolve or discharge the injunction.



On the date of the hearing of that application, the presiding Judge noted that there had been no proof of service on the plaintiff and adjourned the matter to a date to be fixed by the Registrar. The defendant has done nothing since. Now, the plaintiff, in the absence of a defence, applies to this Court for a perpetual injunction under Order 19, Rule 7(9) of the Rules of the Supreme Court. Under that Order, when a plaintiff makes against the defendant a claim of a description not mentioned in Rules 2 to 5, and if the defendant fails to serve a defence on the plaintiff, he may, after the expiration of the period fixed by or under the rules of service of the defence, apply to the Court for judgment and on the hearing of the application the Court may give such judgment as the plaintiff appears entitled to on the pleadings before it.

I am satisfied that the Notice of Motion before me is within the scope of Order 19, Rule 7(9) and I must proceed to decide the motion on its merit. The plaintiff seeks damages for trespass and a perpetual injunction against the defendant in the event of any future trespass. Although the defendant did not appear at the hearing, there is an affidavit by the defendant which is part of the pleadings. In that affidavit, he contends that the plaintiff is on the plot in question by licence of one, F A Lambat, who is the actual owner of the plot and that he entered the said plot by the command and authority of the said F A Lambat. I do not think there has been any evidence to contradict Mr Lambat's ownership of the plot, but, on the other hand, there is ample evidence that the plaintiff is in actual occupation and possession of the plot. What then are her rights to the land, vis-a-vis, those of Mr Lambat as a landlord, and those of third-parties, if any? In law, trespass is actionable at the suit of the person in possession of the land. Thus, a tenant in occupation can sue, but not a landlord, except in cases of injury to the reversion. Indeed, a person in possession can sue even if he is neither the owner nor derives title from the owner. In the instant case, it is said that the plaintiff is on the land under licence from Mr Lambat. Although this has not been proved, I do not think it makes any difference. She has the right to sue in trespass. On the facts before me, and after hearing Counsel for the plaintiff, I am, therefore, satisfied that this is a case where a motion under the provisions of Order 19, Rule 7(9) of the Rules of the Supreme Court should be allowed. I grant a perpetual injunction restraining Alister Jamieson, the defendant herein, from entering the plaintiff's aforesaid premises.

The plaintiff also claims damages against the defendant. In her statement of claim she alleges that the defendant wrongfully drove onto her plot and endangered the lives of young children residing in her house. How these children's lives were endangered, is not clear and, indeed, no damage has been proved. Be that as it may, a plaintiff

in trespass is entitled to recover damages even though she has sustained no actual loss. Where the trespass consists of a mere user of the soil by passing over it without doing any damage, the damages recoverable will be the price which a reasonable man would be willing to pay for the right of user. In other words, in these circumstances, the damages are certainly bound to be very minimal. I award the plaintiff the sum of K25 by way of damages and condemn the defendant to pay the costs of this action.

MADE in Chambers this 5th day of March 1993, at Blantyre.



R P Mbalame
JUDGE