

[Chap0302]CHAPTER 3:02

COURTS

ARRANGEMENT OF SECTIONS

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An Act to consolidate the law relating to the High Court and certain courts subordinate thereto

[1ST AUGUST 1958]

PART I

PRELIMINARY

[Ch0302s1]1. Short title

This Act may be cited as the Courts Act.

[Ch0302s2]2. Interpretation

2 of 2004 In this Act, unless the context otherwise requires—

“court” means the High Court and any subordinate court;

18 of 1984 “District Registrar” means a Deputy Registrar appointed under section 7A(3);

“High Court” means High Court of Malawi;

“Judge” means a Judge of the High Court and includes the Chief Justice;

“Judgment” includes any decision, decree, determination, finding or order of any court;

“magistrate” means a magistrate appointed under section 34 and includes a Resident Magistrate;

“Registrar” means the Registrar of the High Court and includes a Deputy Registrar and an Assistant Registrar;

“Resident Magistrate” means a Resident magistrate appointed under section 34 and includes the Senior Resident Magistrate;

“rules of court” means rules of court made under section 59 or 67;

“seal” includes stamp;

“Sheriff” includes a Sheriff’s Deputy and any Sheriff’s officer;

“subordinate court” means any court, subordinate to the High Court, established under this Act but does not include a Traditional Court established under the Traditional Courts Act or any Act replacing the same. Cap. 3:03

PART II

GENERAL

[Ch0302s3]3. Process of courts

(1) All summonses, warrants, orders, rules, notices and mandatory processes whatsoever, whether civil or criminal, shall—

(a) if issued or made by the High Court, be signed by the Registrar;

(b) if issued or made by the court of a magistrate, be signed by him,

and every such summons, warrant, order, rule, notice and mandatory process shall be sealed with the seal of the court issuing or making the same.

(2) All summonses, warrants, orders, rules, notices and other processes whatsoever, whether civil or criminal, issued or made by or with the authority of any court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Malawi.

(3) Service of any summons, warrant, order, notice or other document in a civil matter may be made by an officer of the court or by the legal practitioner acting for the party at whose instance, or on whose behalf, such service is to be effected, or by any person in the employment of such legal practitioner, or by an agent of such legal practitioner authorized in writing in that behalf.

[Ch0302s4]4. Legal practitioners

(1) Any person who is not entitled to practise as a legal practitioner before the courts of Malawi, by virtue of any law for the time being in force regulating the conditions on which persons may be admitted to practise before the courts of Malawi, and who, unless he proves that the act was not done for or in expectation of any fee, gain or reward, either directly or indirectly, does any of the following acts—

(a) acts as a legal practitioner or, as such legal practitioner, serves out any process or commences, carries on or defends any action, suit or other proceeding in the name of any other person or in his own name, or does any act required by law to be done by legal practitioner in any court;

(b) draws or prepares any instrument relating to real or personal estate or any proceeding in law or draws or prepares any document or caveat relating to land registration;

(c) does any other work in respect of which scale or minimum charges are laid down by the Legal Practitioners (Scale and Minimum Charges) Rules, 1955, or by any other rules for the time being in force prescribing or relating to charges for any services to be performed by a legal practitioner, Cap. 3:04 p. 28

shall be liable to a fine of K200.

(2) A person shall not be prosecuted for an offence under this section without the written consent of the Chief Public Prosecutor.

(3) This section shall not extend to—

(a) any public officer drawing or preparing instruments in the course of his duty;

(b) any person employed merely to engross any instrument or proceeding.

(4) For the purpose of this section the expression “instrument” does not include—

- (a) a letter or power of attorney not under seal;
- (b) a transfer of stock containing no trust or limitation thereof;
- (c) a letter written for the purpose of collection of monies;
- (d) an undefended trade mark or patent application;
- (e) a passport application.

(5) Nothing contained in this section shall be deemed to limit the right of any person to appear on his own behalf before any court in any proceedings to which he is a party.

PART III

HIGH COURT

General

[Ch0302s5]5. Constitution of High Court

7 of 1984, 19 of 1987The High Court shall consist of the Chief Justice and such number of other Judges as the President may, from time to time, appoint.

[Ch0302s5A]5A. Judges to have powers of subordinate courts

Every Judge shall, in addition to such other powers as may be conferred upon him, have all the powers conferred on any subordinate court by any written law.

[Ch0302s6]6. Senior Judge of the High Court

The Chief Justice shall be Senior Judge of the High Court and the other Judges shall take precedence after him according to the priority of their respective appointments as such.

[Ch0302s7]7. Registrars

19 of 1975(1) There shall be a Registrar of the High Court and such Deputy Registrars and Assistant Registrars as may be appointed.

(2) The qualifications provided by section 63 (3) of the Constitution for appointment as a Judge shall apply for appointment as the Registrar.

[Ch0302s7A]7A. Establishment of District Registries and appointment of District Registrars

18 of 1984, 9 of 1986(1) The Chief Justice may, by notice published in the Gazette, establish in such places as are specified in such notice, District Registries from which such writs of summons for the commencement of actions in the High Court may be issued, and wherein such other proceedings may be taken, as may be prescribed by rule.

(2) The Chief Justice may, at any time by notice published in the Gazette, vary or revoke any notice issued in pursuance of subsection (1).

(3) The Chief Justice may appoint any Deputy Registrar to be the District Registrar of any district registry.

(4) Every District Registrar shall be an officer of the High Court.

[Ch0302s7B]7B. Seals of District Registries

(1) In every District Registry there shall be used such seal as the Chief Justice shall direct.

(2) The seal of every District Registry shall be impressed upon every document which is required by any written law to be so sealed, and all such documents and copies thereof which purport to be sealed with the seal of a District Registry shall be received in evidence without further proof.

(3) For the purposes of this section “seal” means any device capable of making an imprint, whether embossed or otherwise, on paper.

[Ch0302s7C]7C. Powers, functions and duties of District Registrars

District Registrars may administer oaths and shall have such powers and perform such of the functions and duties of the Registrar with respect to proceedings in the High Court as the Chief Justice may by rule prescribe or as may be directed by any special order of the High Court in any particular cause or matter.

[Ch0302s7D]7D. Transfer of proceedings

(1) Any party to any proceedings commenced in a District Registry may, at any time, apply to a Judge to transfer the proceedings from the District Registry to the Principal Registry of the High Court or to another District Registry, and the Judge shall have discretion whether or not to order that the proceedings be so transferred.

(2) Proceedings ordered to be transferred by virtue of subsection (1) and such original documents, if any, as have been filed therein shall, upon receipt of such order by the District Registrar concerned, be transmitted to the Principal Registry of the High Court or to such other District Registry accordingly, and the proceedings shall thenceforth continue in the same manner as if they had been originally commenced in the Principal Registry or such other District Registry, as the case may be.

(3) A Judge may order the transfer of any proceedings from the Principal Registry of the High Court to a District Registry and, in that event, the provisions of subsection (2) shall, mutatis mutandis, apply.

[Ch0302s7E]7E. Rules to regulate practice and procedure in District Registries

Without prejudice to section 67, the Chief Justice may make rules for regulating and prescribing the procedure and the practice to be followed in District Registries and in the Principal Registry of the

High Court in all causes and matters whatsoever in or with respect to which they have for the time being jurisdiction and for all matters incidental or relating to any such procedure and practice, including (but without prejudice to the foregoing provisions) the manner in which and the time within which any applications thereto are to be made, the costs and charges to be allowed and the fees to be payable in respect of proceedings therein, and the review of any ruling or decision or matter heard by District Registrars in exercise, or purported exercise, of any power pursuant to section 7C or by the Registrar.

[Ch0302s7F]7F. Directions by the Chief Justice as to duties and functions of District Registries

The Chief Justice may give such directions as he thinks fit as to the duties to be carried out by, and for the apportionment of functions among, the staff of District Registries and, without prejudice to the generality of the power hereby conferred, such directions may specify, either by name or office, the persons who shall be responsible for the issue of summonses, warrants and writs of execution, for the registration of orders and judgments, for the taxing of bills of costs, for the keeping of the records of proceedings, and for the custody of and other matters relating to fines, fees and other moneys paid into or out of any District Registry.

[Ch0302s8]8. Powers of Registrar and other officers of Court

19 of 1975, 18 of 1984(1) The Registrar shall subject to any Rules of Court exercise jurisdiction, powers and duties in extent and manner similar to those which under the Rules of the Supreme Court are attributable to and exercisable by a Master of the Supreme Court of Judicature and a Registrar of the High Court, and shall also exercise such further jurisdiction, powers and duties as the Chief Justice may, from time to time, prescribe, by rule, for exercise by the Registrar.

(2) Subject to the general or special directions of the Chief Justice, or to the directions of the High Court in any particular cause or matter, the manner in which Deputy Registrars, Assistant Registrars and other officers of the High Court (other than District Registrars and the staff of District Registries) carry out the duties imposed upon them by this or any other written law or otherwise shall be under the control and superintendence of the Registrar.

[Ch0302s9]9. Proceedings of High Court to be disposed of by single judge

2 of 2004(1) Save as otherwise provided by this Act, or by any other Act for the time being in force, every proceeding in the High Court and all business arising there out shall be heard and disposed of by or before a single Judge.

(2) Every proceeding in the High Court and all business arising there out, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.

(3) A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact.

[Ch0302s10]10. Vacations

The Chief Justice may, by order published in the Gazette, direct such vacations, not exceeding three months in any one year, as he thinks fit.

[Ch0302s11]11. Additional jurisdiction

Without prejudice to any jurisdiction conferred on it by any other written law the High Court shall have—

- (a) jurisdiction—
 - (i) to appoint and control guardians of infants and generally over the persons and property of infants;
 - (ii) to order land to be charged or mortgaged, as the case may be, in any case in which there is jurisdiction to order a sale;
 - (iii) to grant relief by way of interpleader where the person seeking relief is under liability for any debt, money or goods or chattels for or in respect of which he has been or expects to be sued by two or more parties making adverse claims thereon, and to grant such relief where a Sheriff, or other officer of court, is charged with the execution of process of the High Court and claim is made to any money or goods or chattels taken or intended to be taken in execution under any process or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process is issued, and to order the sale of any property subject to interpleader proceedings;
 - (iv) to provide for the interim preservation of property the subject matter of any cause or matter by sale or by injunction or by the appointment of a receiver or by the registration of a caveat or lis pendens or in any other manner whatsoever;
 - (v) to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties or on sums found due and unpaid by receivers or other persons liable to account to the High Court;
 - (vi) to enforce a judgment of the High Court or a subordinate court in any manner which may be prescribed;
 - (vii) to transfer any civil proceedings from one place to another or to or from any subordinate court and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof;
 - (viii) subject to any Act, to arrest a defendant before judgment;
 - (ix) subject to any Act, to attach the property of a defendant before judgment;
 - (x) to direct the payment of any judgment debt by instalments;
- (b) all the jurisdiction and powers, civil or criminal, which belong to and are exercisable by any subordinate court;

(c) jurisdiction to order service out of the jurisdiction in accordance with rules of court for the time being in force.

[Ch0302s12]12. Procedure in perjury

The High Court, if it appears that a person has been guilty of perjury in any proceedings before it, may order that he be tried by a court of a Resident Magistrate and bind any person by recognizance to give evidence at such trial.

Arrest and Attachment before judgment

[Ch0302s13]13. Arrest before judgment

(1) If, in any civil action or suit, the High Court is satisfied by evidence on oath that the plaintiff has a good cause of action and that the defendant, with intent to obstruct, defeat or delay the claim of the plaintiff, is about to leave Malawi or has disposed of or has removed or is about to remove his property or any part thereof out of Malawi, the High Court may, upon application made by the plaintiff at any time after the issue of the writ, issue a warrant to bring the defendant before the High Court to show cause why he should not give security for his appearance to the satisfaction of the High Court.

(2) If the defendant fails to show cause or fails to give such security as may be ordered, the High Court may commit him to custody until the determination of the action or suit or execution of the judgment, provided that it may release him at any time on such terms as it may think just.

[Ch0302s14]14 Attachment before judgment

(1) If, in any civil action or suit, the High Court is satisfied by evidence on oath that the plaintiff has a good cause of action and that the defendant, with intent to obstruct, defeat or delay the execution of any judgment that may be given against him, has disposed of or is about to dispose of his property or any part thereof or has removed or concealed or made away with or handed over to others any of his property, the High Court may, upon application made by the plaintiff at any time after the issue of the writ, order the defendant to furnish security for such amount, not exceeding the claim and costs in the action or suit, as to the High Court may seem fit, or in default may direct that any property of the defendant be attached until further order.

(2) No attachment under this section shall prejudice the claims of any person not a party to the suit.

(3) The High Court may at any time order the attachment to be withdrawn.

[Ch0302s15]15. Imprisonment for debt

(1) No person shall be arrested or imprisoned for making default in the payment of a sum of money, except for—

(a) default in payment of a penalty, or sum in the nature of a penalty, imposed in any criminal proceeding;

(b) default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court in exercise of its jurisdiction in equity any sum in his possession or under his control;

(c) default by a legal practitioner in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order;

(d) default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order;

(e) default in the payment of sums in respect of the payment of which orders are in this Act or in the Traditional Courts Act authorized to be made: Cap. 3:03

Provided that—

(i) no person shall be imprisoned in any case excepted from this section for a period longer than one year;

(ii) nothing in this section shall alter the effect of any judgment or order of any court for the payment of any money except as regards the arrest and imprisonment of the person making default in paying such money.

(2) In any case coming within the exceptions in subsection (1) (b) and (c) any court or Judge making the order for payment may inquire into the case and subject to the provisos to subsection (1) may grant or refuse, either absolutely or upon terms, any application for any writ of attachment, or other process or order of imprisonment and any application to stay the execution of any such writ, process or order or for discharge from arrest or imprisonment thereunder.

[Ch0302s16]16. Committal of judgment debtors

(1) Notwithstanding section 15 and subject to this section and to any rule of court, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in the payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or other competent court:

Provided that the jurisdiction conferred by this section shall be exercised only by the High Court or by a subordinate court not being a court of a magistrate of the third grade.

(2) The jurisdiction conferred by this section shall only be exercised when it is proved to the satisfaction of the court that the person making the default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.

(3) Proof of the means of the person making default may be given in such manner as the court thinks just and for the purposes of such proof the debtor and any witnesses may be summoned and examined according to the rules of court in force for the time being.

(4) For the purposes of this section any court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments and may from time to time rescind or vary such order.

(5) No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the movable or immovable property of the person imprisoned, in the same manner as if imprisonment had not taken place.

(6) A person imprisoned under this section shall be discharged out of custody upon a certificate in such form, if any, as may be prescribed, to the effect that he has satisfied a debt or instalment of a debt in respect of which he was imprisoned, together with the prescribed costs, if any.

(7) Sequestration against property of a debtor may be issued by any court of equity in the same manner as if the debtor had been actually arrested.

[Ch0302s17]17. Saving of provisions relating to examination of judgment debtors

Nothing contained in section 13 or 14 shall in any way affect the jurisdiction and powers of the High Court under sections 15 and 16 or its powers in regard to the examination of debtors in accordance with the Rules of the Supreme Court.

Appellate Jurisdiction of the High Court

[Ch0302s18]18. Appellate criminal jurisdiction

The appellate criminal jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts, according to the law for the time being in force relating to criminal procedure and such other appellate criminal jurisdiction as may have been or may be conferred upon the High Court by any other law.

[Ch0302s19]19. Appellate civil jurisdiction

The appellate civil jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts as hereinafter provided and such other appellate civil jurisdiction as may have been or may be conferred upon the High Court by any other law.

Civil Appeals from Subordinate Courts

[Ch0302s20]20. Civil appeals from subordinate courts to the High Court

(1) An appeal shall lie to the High Court from a subordinate court in the following cases—

(a) from all final judgments;

(b) from all interlocutory judgments and orders made in the course of any civil action or matter before a subordinate court:

Provided that no appeal shall lie, except with the leave of the subordinate court or of the High Court, from an order made ex parte, or by consent, or as to costs only.

(2) Appeals from subordinate courts shall be heard by one Judge, except where in any particular case the Chief Justice directs that the appeal shall be heard by two or more Judges.

(3) Subject to subsection (4), the High Court shall not entertain any appeal unless the appellant has fulfilled all the conditions of appeal imposed by the subordinate court or by the High Court or prescribed by any rules of court made for that purpose.

(4) Notwithstanding anything hereinbefore contained, the High Court may entertain any appeal from a subordinate court on any terms which it considers just.

[Ch0302s21]21. Reservation of points of law

In addition to and without prejudice to the rights of appeal conferred by section 20 a subordinate court may reserve for consideration by the High Court any question of law which arises during the trial of any civil action or matter and may give any judgment or decision, subject to the opinion of the High Court, and the High Court shall have power to determine, with or without hearing argument, every such question.

[Ch0302s22]22. Power of High Court in civil appeals

In a civil appeal the High Court shall have power—

(a) to dismiss the appeal;

(b) to reverse a judgment upon a preliminary point and, on such reversal, to remit the case to the subordinate court against whose judgment the appeal is made, with directions to proceed to determine the case on its merits;

(c) to resettle issues and finally to determine a case, notwithstanding that the judgment of the subordinate court against which the appeal is made has proceeded wholly on some ground other than that on which the High Court proceeds;

(d) to call additional evidence or to direct the subordinate court against whose judgment the appeal is made, or any other subordinate court, to take additional evidence;

(e) to make any amendment or any consequential or incidental order that may be just and proper;

(f) to confirm, reverse or vary the judgment against which the appeal is made;

- (g) to order that a judgment shall be set aside and a new trial be had;
- (h) to make such order as to costs in the High Court and in the subordinate court as may be just.

[Ch0302s23]23. Appeal not to operate as stay of execution

In civil matters, an appeal shall not operate as a stay of execution or of proceedings under the judgment appealed from, except so far as the subordinate court or the High Court may otherwise order; and no intermediate act or proceeding shall be invalidated, except in so far as the High Court may direct.

[Ch0302s24]24. Subordinate court shall conform to order of High Court

In civil appeals the subordinate court shall conform to and execute such judgment or order as shall be issued, made or pronounced by the High Court therein in like manner as any original judgment or order by the said subordinate court could be or might have been executed.

Revision by High Court of Proceedings of Subordinate Courts

[Ch0302s25]25. Revision in criminal proceedings

The High Court shall exercise powers of review in respect of criminal proceedings and matters in subordinate courts in accordance with the law for the time being in force relating to criminal procedure.

[Ch0302s26]26. General supervisory powers of High Court

(1) In addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may, in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court such directions as to the further conduct of the same as justice may require.

(2) Upon the High Court calling for any record under subsection (1), the matter or proceeding in question shall be stayed in the subordinate court pending the further order of the High Court.

[Ch0302s27]27. No revision where appeal lies

Where an appeal lies from any judgment in any civil matter and no appeal is brought, no proceedings by way of review shall be entertained at the instance of the party who could have appealed.

[Ch0302s28]28. No right of party to be heard on revision

No party shall have any right to be heard, either personally or by a legal practitioner, before the High Court when exercising its powers of review or supervision under sections 25 and 26:

Provided that no order shall be made to the prejudice of any person unless such person has had an opportunity of being so heard.

Practice and Procedure

[Ch0302s29]29. Practice and procedure of the High Court

2 of 2004 Save as otherwise provided in this Act, the practice and procedure of the High Court shall, so far as local circumstances admit, be the practice and procedure (including the practice and procedure relating to execution) provided in the Rules of the Supreme Court, 1999:

Provided that—

(a) the Rules of the Supreme Court may at any time be varied, supplemented, revoked or replaced by rules of court made under this Act;

(b) any of the Rules of the Supreme Court which refer solely to procedure under Acts of the United Kingdom Parliament other than statutes of general application in force in England on the eleventh day of August, 1902, and any such Acts as have been applied to or are from time to time in force in Malawi shall not have any application in Malawi;

(c) if any provision of the Rules of the Supreme Court is inconsistent with any provision of any rules of court, the latter shall prevail and the Rules of the Supreme Court shall, to the extent of such inconsistency, be void.

Costs and Fees

[Ch0302s30]30. Costs in discretion of the High Court

Subject to this Act, the costs of and incidental to all proceedings in the High Court, including the administration of estates and trusts, shall be in the discretion of the High Court; and such discretion shall be exercised in accordance with the practice and procedure provided in the Rules of the Supreme Court:

Provided that nothing herein contained shall deprive an executor, administrator, trustee or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or funds to which he would be entitled according to the rules acted upon from time to time in the Chancery Division of the High Court of England.

[Ch0302s31]31. Costs when proceedings could have been commenced in subordinate court

(1) Where an action is commenced in the High Court which could have been commenced in a subordinate court then, subject to subsection (2), the plaintiff shall not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in the appropriate subordinate court.

(2) If in any such action as aforesaid the High Court is satisfied that there was sufficient reason for bringing the action in the High Court, it may allow the costs or any part of the costs thereof on the High Court scale or on such subordinate court scale as it may direct.

[Ch0302s32]32. Fees

(1) The fees set out in the Schedule shall be levied in the High Court in respect of the proceedings and matters therein mentioned.

(2) The Chief Justice may, with the approval of the Minister, from time to time, by notice published in the Gazette, revoke, replace or amend the Schedule.

(3) The High Court may in any cause or matter, if it thinks fit, dispense in whole or in part with the payment of any fee chargeable under the Schedule on the grounds of the poverty of any party or other person or for any other reason.

PART IV

SUBORDINATE COURTS

General

[Ch0302s33]33. Establishment of courts of magistrates

19 of 1995There are hereby established in Malawi the following courts subordinate to the High Court—

- (a) courts of Resident Magistrates;
- (b) courts of magistrates of the first grade;
- (c) courts of magistrates of the second grade;
- (d) courts of magistrates of the third grade; and
- 19 of 1995(e) courts of magistrates of the fourth grade.

[Ch0302s34]34. Constitution of courts of magistrates

The courts of magistrates shall be constituted as follows—

(a) the court of a Resident Magistrate shall consist of a fit and proper person appointed by the President to be a Resident Magistrate; and

(b) the court of a magistrate of one of the following grades, that is to say, the first, second or third grades, shall consist of a fit and proper person appointed by the President to be a magistrate of each such grade respectively.

(2) Any magistrate may sit in and constitute a court of a lesser grade than the court which he himself constitutes as if he were a magistrate of such lesser grade.

(3) For the avoidance of possible doubts it is hereby declared that a court of a Resident Magistrate is of a higher grade than a court of a magistrate of the first grade.

[Ch0302s35]35 A court of a magistrate to have jurisdiction throughout Malawi

Subject to any written law for the time being in force, the court of a magistrate shall exercise its jurisdiction throughout Malawi.

[Ch0302s36]36. Places and times of sittings of subordinate courts

The sittings of subordinate courts shall ordinarily be held in such places as the Chief Justice may direct and, subject to any directions of the Chief Justice, at such times as the magistrate constituting the court may deem most adapted to facilitate the business of the court.

[Ch0302s37]37. Records to be kept

Subordinate courts shall keep written records and furnish returns of cases tried by them to the High Court in such manner as the Chief Justice may from time to time direct.

[Ch0302s38]38. Seals

Subordinate courts shall use seals of such nature and patterns as the Chief Justice may direct.

[Ch0302s39]39. Civil jurisdiction of courts of magistrates

13 of 1980, 19 of 1992, 19 of 1995, 4 of 2000, 7 of 2010(1) Subject to this or any other written law, in exercise of their civil jurisdiction the courts of magistrates shall have jurisdiction to deal with, try and determine any civil matter whereof the amount in dispute or the value of the subject matter does not exceed—

- (a) in the case of a court of a Resident Magistrate, K2,000,000;
- (b) in the case of a court of a magistrate of the first grade, K1,500,000;
- (c) in the case of a court of a magistrate of the second grade, K1,000,000;
- (d) in the case of a court of a magistrate of the third grade, K750,000; and
- (e) in the case of a court of a magistrate of the fourth grade, K500,000.

(2) Notwithstanding subsection (1), no subordinate court shall have jurisdiction to deal with, try or determine any civil matter—

7 of 2010(a) whenever the title to or ownership of land which is not customary land is in question save as is provided by section 156 of the Registered Land Act; Cap. 58:01

(b) for an injunction;

(c) for the cancellation or rectification of instruments;

7 of 2010(d) wherein the guardianship or custody of infants, other than under customary law, is in question, unless jurisdiction is specifically provided under any written law;

(e) except as specifically provided in any written law for the time being in force, wherein the validity or dissolution of any marriage celebrated under the Marriage Act or any other law, other than customary law is in question; Cap. 25:01

(f) relating to the title to any right, duty or office; and

(g) seeking any declaratory decree.

[Ch0302s40]40. Counterclaims in subordinate courts

(1) Where, in any action or suit of a civil nature before a subordinate court, any defence or counterclaim of the defendant involves matters beyond the jurisdiction of such subordinate court, such defence or matter shall not affect the competence or the duty of the subordinate court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and any defence thereto, but no relief exceeding that which the subordinate court has jurisdiction to award shall be given to the defendant upon such counterclaim.

(2) In any such case the High Court may, if it thinks fit, on the application of any party order that the action or suit be transferred to the High Court and the action or suit shall then be proceeded with as if such action or suit had been originally instituted therein.

[Ch0302s41]41. Relinquishing part of claim

A plaintiff may relinquish any portion of his claim in order to bring the action or suit within the jurisdiction of a subordinate court, but he shall not afterwards sue in respect of the portion so relinquished.

[Ch0302s42]42. Claims not to be split

Claims may not be split, nor may more than one action or suit of a civil nature be brought in respect of the same cause of action against the same party.

[Ch0302s43]43. Jurisdiction to grant relief by way of interpleader

A court of a Resident Magistrate and a court of a magistrate of the first grade shall have jurisdiction to grant relief by way of interpleader and to order the sale of any property subject to interpleader proceedings.

[Ch0302s44]44. Res judicata

A subordinate court may dismiss or stay proceedings where the matter in question is res judicata between the parties or where by reason of multiplicity of proceedings in any courts the proceedings ought not to be continued.

[Ch0302s45]45. Stay of proceedings

A subordinate court may stay or transfer proceedings unless they have been instituted in the District in which—

- (a) the cause of action arose; or
- (b) the defendant resides or has his place of business; or
- (c) one of several defendants resides or has his place of business; or
- (d) the facts on which the proceedings are based exist or are alleged to have occurred; or
- (e) for other reasons it is desirable in the interests of justice that proceedings should be held.

[Ch0302s46]46. Transfer of proceedings

(1) Subject to any written law, a subordinate court may—

- (a) transfer any proceedings before itself to a subordinate court of a lesser grade;
- (b) transfer any proceedings before itself to any subordinate court of a higher grade with the consent of such court; and
- (c) direct the transfer to itself of any proceedings before any subordinate court of a lesser grade.

(2) A subordinate court shall comply with any direction given to it under subsection (1).

[Ch0302s47]47. Set-off

(1) A subordinate court may allow a set-off in any case where such a defence would be allowed in the High Court.

(2) Where in any action a set-off or counterclaim is established as a defence against the plaintiff's claim a subordinate court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case:

Provided that no relief exceeding that which the subordinate court has otherwise jurisdiction to award shall be given to the defendant upon such set-off or counterclaim.

[Ch0302s48]48. Discovery

A subordinate court may order discovery of facts or documents by any party or person in such manner as may be prescribed.

[Ch0302s49]49. Process to compel appearance

(1) Subject to this Act, a subordinate court may issue process to secure the attendance of any person in court for any purpose, whether by warrant of arrest or summons, and may require any person to give security for his appearance, or to meet any claim or demand, in such manner as may be prescribed.

(2) The subordinate court may, in default of compliance with any such order for security, or in order to ensure the attendance in court of any person, order that such person be committed to prison for such period, not exceeding six weeks, and in such manner as may be prescribed.

(3) No proceedings shall issue to compel the attendance of any person who, by virtue of any law, is exempted from personal attendance in court.

[Ch0302s50]50. Arrest

(1) A subordinate court may commit to prison, for such period and in such manner as may be prescribed, any person who wilfully disobeys or fails to comply with any order of such court or who, with a view to defeating the ends of justice or preventing or delaying the satisfaction of a judgment or order passed, or which may be passed, against him, flees or attempts to flee Malawi, or disposes or attempts to dispose of any property, or evades or attempts to evade the service on him of any process of such court.

(2) No order for arrest or commitment under this section or section 49 shall operate to discharge or satisfy any debt.

[Ch0302s51]51. Attachment of property

A subordinate court may, in such manner as may be prescribed, order the attachment and sale of any property of any person whom it might commit to prison under section 50.

[Ch0302s52]52. Sections 50 and 51 not to be construed as conferring jurisdiction under section 16

Nothing contained in sections 50 and 51 shall be construed as conferring on any subordinate court any jurisdiction under section 16 which is not expressly conferred by that section or other provisions of this Act.

[Ch0302s53]53. Variation and suspension of judgments

A subordinate court may discharge, vary or suspend the operation of any of its judgments or orders to such extent and in such manner as may be prescribed.

[Ch0302s54]54. Contempt of court

(1) A subordinate court may take cognizance of any contempt of court and may impose punishment for the same, not exceeding a fine of £5 or imprisonment for a term not exceeding seven days, and in default of payment of any fine imposed may commit the offender to prison for a term not exceeding seven days, unless the fine be sooner paid.

(2) In every case in which a subordinate court imposes any punishment under subsection (1), it shall without delay transmit to the Registrar for the consideration of the High Court under section 26, a statement certified to be true and correct of the grounds of and reasons for such imposition and shall also, if requested, furnish to the person committed or fined a copy of such statement certified as aforesaid.

[Ch0302s55]55. Setting aside judgments

A subordinate court shall have power to set aside, in such manner as may be prescribed, any judgment or order obtained by default or ex parte.

[Ch0302s56]56. Attachment of debt

A subordinate court shall have jurisdiction to attach debts due to a judgment debtor in such manner as may be prescribed:

Provided that, subject to any other law for the time being in force, no wages of any servant, labourer or workman shall be liable to attachment.

Execution

[Ch0302s57]57. Suspension of execution

A subordinate court may suspend any execution, judgment or order issued, given or made by such subordinate court for such time and on such terms as it shall think fit.

Criminal Jurisdiction of Courts of Magistrates

[Ch0302s58]58. Criminal jurisdiction of courts of magistrates

In exercise of their criminal jurisdiction the powers of courts of magistrates shall be as provided for in this Act, in the Criminal Procedure and Evidence Code and in any other written law. Cap. 8:01

Procedure

[Ch0302s59]59. Rules of court regulating practice and procedure in subordinate courts

Without prejudice to section 67, the Chief Justice may make rules of court—

(a) regulating the pleading, practice and procedure to be followed in subordinate courts in all causes and matters whatsoever in or with respect to which subordinate courts have for the time being jurisdiction, and all matters incidental to or relating to any such pleading, practice and procedure,

including the manner in which and the time within which any applications under any law for the time being in force are to be made to a subordinate court;

(b) regulating the costs and charges to be allowed and the fees to be payable in respect of proceedings in any subordinate court;

(c) regulating the procedure in connexion with the transfer of any proceedings from any subordinate court to the High Court or from the High Court to any subordinate court;

(d) regulating the means by which particular facts may be proved and the mode in which the evidence thereof may be given in any proceedings or on any application in connexion with, or at any stage of, any proceedings;

(e) amending the Rules of Court made under the British Central Africa Order in Council, 1902;

(f) prescribing anything which, under this Part, is to be or may be prescribed;

(g) generally for the better carrying out of this Part.

PART V

MISCELLANEOUS

[Ch0302s60]60. Proceedings to be in open court

In exercise of its jurisdiction, powers and authorities the proceedings of every court shall, except as otherwise provided by any other law for the time being in force, be carried on in an open court to which the public generally may have access:

Provided that any court shall have power to hear any matter or proceeding or any part thereof in camera if, in the opinion of the presiding Judge, or magistrate, it is expedient in the interest of justice or propriety or for other sufficient reason so to do.

[Ch0302s61]61. Protection of judicial officers

(1) No Judge, magistrate or other person acting judicially shall be liable to be sued in any court for any act done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

(2) No officer of any court or other person bound to execute the lawful warrants or orders of any Judge, magistrate or other person acting judicially shall be liable to be sued in any court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same, nor shall any such person or the person at whose instance such warrant or order shall be executed be deemed to be a trespasser by reason of any irregularity in any proceeding on

the validity of which such warrant or order depends or in the form of such warrant or order or in the mode of executing the same.

(3) No officer of any court shall be liable to be sued in any court for any act or omission of any police officer or other person in the execution of any process which shall have been done or may have occurred either through disobedience or neglect of the orders or instructions given.

[Ch0302s62]62. Expenses of witnesses

Any court may, in civil proceedings, allow to all persons required to attend or to be examined as witnesses such sums of money as expenses or compensation for their loss of time as may be prescribed; but it shall not be lawful in any proceeding for any person to refuse to attend as a witness or to give evidence when so required by process of the court on the ground that his expenses have not been first paid or provided for.

[Ch0302s63]63. Notice to bring persons from prison

Any court may, by notice addressed to the officer in charge of a prison, require any person in prison to be brought before it for any purpose.

[Ch0302s64]64. Proof of customary law

25 of 1968If in any proceeding a matter of customary law is material, such law shall be treated as a question of fact for purposes of proof. In determining such law the court may admit the evidence of experts and persons whom the court considers likely to be well acquainted with such law:

Provided that a court may judicially note any decisions of its own or of any superior court, determining the customary law applicable in a like case.

[Ch0302s65]65. Interest on judgments

Every judgment in civil proceedings shall carry interest at the rate of five per centum per annum or such other rate as may be prescribed.

[Ch0302s66]66. Execution of warrants

Any warrant of committal issued by the High Court in the exercise of its civil jurisdiction may be executed by a police officer or any other person to whom it is directed at any time, notwithstanding that the warrant is not in his possession at that time:

Provided that the warrant shall, on the demand of the person arrested, be shown to him as soon as practicable after his arrest.

[Ch0302s67]67. Rules of court

(1) The Chief Justice may make rules of court prescribing anything which, under this Act, may be or is to be prescribed and generally for the better carrying out of the purposes of this Act.

(2) Without prejudice to the generality of subsection (1), the Chief Justice may make rules of court for the purpose of varying, supplementing, revoking or replacing the Rules of the Supreme Court, and such rules of court may include provision for regulating the means by which particular facts may be proved and the mode in which the evidence thereof may be given in any proceedings or on any application in connexion with or at any stage of any proceedings.

(3) This section shall not be construed as in any way limiting or modifying section 59.

[Ch0302s68]68. Saving of rights of Government

Nothing in this Act shall be construed so as to limit or prejudice the rights of the Government applicable or attaching to any land under any grant, lease, right of occupancy or other disposition of land granted or made by the Minister responsible for land under any law in force at the time of such grant, lease, right of occupancy or other disposition.

[Ch0302s69]69. Savings

3 of 1906, 24 of 1929(1) Any criminal proceedings instituted before the coming into force of this Act shall be continued under and in conformity with the High Court Ordinance and the Courts Ordinance [now repealed] as if such Ordinances had not been repealed.

(2) Any civil proceedings instituted before the coming into force of this Act shall be continued under and in conformity with such repealed Ordinances as if such Ordinances had not been repealed, save that a court may, in its discretion, apply or adopt any rules of court governing practice and procedure made under this Act.

(3) Any magistrate and other person appointed to any office under such repealed Ordinances, and whose appointments thereunder were subsisting immediately before such repeal, shall be deemed to have been appointed as such under this Act.

[Ch0302s70]70. Saving of offices

47 of 1967(1) Upon the coming into operation of the Courts (Amendment) Act, 1967 (referred to in this section as the amending Act), any person empowered to hold a Resident Magistrate's Court or a first, second or third class court under the provisions of this Act repealed by the amending Act shall be deemed to have been appointed to be a Resident Magistrate or magistrate of the first, second or third grade respectively, as the case may be, under the provisions substituted by the amending Act for such repealed provisions.

(2)(a) Nothing in the amending Act shall affect the validity of proceedings instituted before the coming into operation of this Act in any subordinate court, but the same shall be carried on in the corresponding subordinate court established by the provisions substituted by this Act and enforced in like manner, as nearly as may be, as if the corresponding court were the court in which such proceedings were commenced and any such proceedings may be amended by order of a magistrate or under rules of court in such manner as may appear necessary or proper in consequence of this Act.

(b) An appeal shall lie to the High Court from any judgment of a subordinate court given prior to the coming into operation of this Act as it would have lain if this Act had not come into operation, if such appeal is commenced and prosecuted in accordance with the law and rules of court relating to appeals from subordinate courts in force immediately prior to the coming into operation of this Act.

SCHEDULE s. 32 G.N. 152/1977, 63/1997, 31/1998, 41/2004

SERVICE Fee payable Kt1. For service of summons, petition, answer, motion paper, notice, warrant, decree, order or other document on a party, witness, juror, assessor, or other person under any branch whatever of the Civil Jurisdiction 2000 DECISION OF QUESTIONS WITHOUT FORMAL SUIT 2. On summons for issue or special case 4000 3. On issue or special case 2000 4. On hearing 4000 SUMMARY PROCEDURE FOR ADMINISTRATION OF PROPERTY OF DECEASED PERSONS 5. On summons 4000 6. On order 4000 SUMMARY ORDERS BEFORE SUIT 7. On application for order 2000 8. On recognizance 2000 9. On order 1000 PROBATE AND ADMINISTRATION 10. On application for probate or administration 4000 11. On oath for every executor, administrator and surety, or on renunciation by an executor 2000 12. On every security 4000 13. On filing account 2000 14. On passing account 4000 ORDINARY SUITS 15. In every suit of any kind whatever, other than such as are before specified—(a) On summons or petition 6000 (b) On hearing 6000 16. On every summons, motion, application, notice or demand taken out, made or filed (not particularly charged) 1000 17. On filing any document for the filing whereof no specific fee is prescribed 1000 18. On every rule 2000 19. On every decree or order (not particularly charged) 500 20. On motion for new trial 4000 21. On order for adjournment of hearing rendered necessary by default of either party (to be paid by that party) 1100 22. On every warrant of execution against goods 5000 23. Sheriff's fees on execution of writs fieri facias—For seizure by the Sheriff, for each building or place at which seizure is made whether execution is subsequently withdrawn, satisfied or stopped, for every Kwacha or fraction of a Kwacha of the value of the goods seized, as valued by the Sheriff or Under Sheriff or the Assistant Sheriff, or the amount due under the warrant whichever is the less 015 For man, or when necessary, men in possession the sum actually and reasonably paid For removal of goods or animals to a place of safekeeping when necessary and for warehousing or taking charge of the same when removed the sum actually and reasonably paid For preparing an inventory of goods seized, for every 100 words or fraction thereof 800 For a copy of the same, for every 100 words or fraction thereof 200 For drawing and posting notices of sale 2000 For advertising and giving publicity to the sale, printing catalogues and bills and distributing same the sum actually and reasonably paid NOTE—The fee shall be payable by the person issuing the execution or the person at whose instance the sale is stopped, as the case may be. For sale—10 per cent of the amount realized by the sale of the goods. APPEAL TO THE HIGH COURT 24. On lodging notice of appeal 2000 25. On motion for leave to appeal 2000 26. On every security 2000 27. On order for leave to appeal 4000 28. On the hearing of an appeal where judicial relief or assistance is sought, but not the recovery of money 8000 29. On the hearing of an appeal in matters other than those specified in item 28 ½ per cent of the amount involved not exceeding a total fee of K100 but in no case less than K130. On every application, motion, order or rule not particularly charged 1000 APPEAL FROM THE HIGH COURT TO THE SUPREME COURT OF APPEAL 31. On motion for leave to appeal where the subject matter is less than K140 in value 2000 32. On every security 2000 33. On

order for leave to appeal400034.On filing memorandum of appeal200035.On application or order to amend memorandum of appeal200036.On every application, motion, order or rule not particularly charged2000MISCELLANEOUS37.On taxation of any bill of costs, for every 10 folios from each party to the taxation200038.On every deposition taken before trial200039.On balances of estates of deceased persons paid into Court otherwise than in a suit2 ½ per cent of amount40.On registration or registration and deposit of any deed (except power of attorney)200041.On registration or registration and deposit of a power of attorney50042.On registration or registration and deposit of any other document50043.For taking inventory (per hour, with maximum of K8 per diem)200044.For taking an affidavit25045.For every exhibit10046.For drawing any document not particularly charged per foolscap sheet50047.For certifying signature or seal50048.For attesting a signature, or administering an oath, or receiving a declaration or affirmation for the purpose of obtaining relief from British Income Tax25049.(a) For certified copy of document for first 200 words1000(b) For Court record on stencils per foolscap sheet75050.For an official certified translation of any document—(a) For first 100 words1000(b) For every further 100 words‘ or part thereof50051.For certifying a copy of any document or part of a document—(a) If not exceeding 100 words500(b) For every subsequent 100 words or part thereof10052.For attaching documents under official seal25053.For affixing the seal of the Court to any document not in a proceeding50054.On reference to the archives25055.For attendance at a sale—(a) At request of parties interested or of local authorities if absent less than two hours4000(b) At request of parties interested, for each additional hour or part thereof (with a maximum per day of K80)100056.For communication between two Courts100057.For communication in writing to a foreign consulate or to local or foreign authority100058.(a) For receiving report of survey, filing original and making certified copy of request, order and report of survey (if not exceeding in all 200 words)20000(b)For every subsequent 100 words or part thereof10059.For attendance of the Registrar or other officer of the Court at any other Court, office or Tribunal, such sum as the Court may direct, and reasonable travelling expenses, not exceeding per diem800060.For filing request for survey and issuing order for survey100061.For attendance of an interpreter at any Court, if required by a party in a suit, or ordered by the Court, for each hour or part of an hour201062.On any search, including inspection, of any case record or register50063.No fees shall be payable by the Government in respect of suits instituted by or against the Government: but a judgment in favour of the Government for costs shall include the amount of any fees which would have been payable if the suit had been instituted by or against a private person.64.No fees shall be payable by the Department of Legal Aid in respect of a suit instituted by or against a person who has been granted legal aid under the Legal Aid Act, but a judgment in favour of such a person for costs shall include the amount of any fees which would have been payable if the suit had been instituted by or against a person not granted legal aid under the Legal Aid Act:Provided that no fees paid in respect of a suit instituted by or against a person who has been granted legal aid under the Legal Aid Act shall be refunded.

SUBSIDIARY LEGISLATION

COURTS (ESTABLISHMENT OF LILONGWE DISTRICT REGISTRY) NOTICE

under s. 7A (1)

G.N. 2/1986

1. Citation

This Notice may be cited as the Courts (Establishment of Lilongwe District Registry) Notice.

2. Lilongwe District Registry

There is hereby established at Lilongwe a District Registry to be known as the Lilongwe District Registry.

COURTS (HIGH COURT) (PROCEDURE IN DISTRICT REGISTRIES) RULES

under s. 7E

G.N. 90/1985

1. Citation

These Rules may be cited as the Courts (High Court) (Procedure in District Registries) Rules.

2. Writ of other process may issue out of a District Registry

(1) Subject to sub-rule (2) and to rule 3, in any action the plaintiff, wherever resident, may issue a writ or other originating process out of any District Registry.

(2) A writ or other originating process in an action relating to probate or to the registration of foreign judgments shall not be issued out of a District Registry.

3. Writ claiming relief under a mortgage or charge

A writ of summons or originating process in which there is a claim for payment of principal money or interest secured by a mortgage or charge upon real or leasehold property, or a claim for possession of any such property forming a security for payment to the plaintiff of any principal money or interest, shall not issue out of a District Registry, unless the property is situated within the District of the District Registry.

4. Title of causes commenced in a District Registry

Causes or matters commenced in a District Registry shall be entitled as causes or matters in that District Registry and shall be serially numbered in that District Registry.

5. Proceedings in District Registries to be taken down

(1) Save as otherwise provided in the Act or in these Rules or as the court or a Judge may otherwise order, all proceedings, up to and including the entry of the final judgment or order, in any cause or matter proceeding in a District Registry shall be taken down in that District Registry.

(2) The District Registrar shall cause a proper book to be kept at the District Registry and to be entered therein every judgment or order made in any cause or matter proceeding in that District Registry as a like judgment or order is entered in the Principal Registry.

6. Entry of interlocutory judgment in a District Registry

Where the writ of summons or other originating process is issued out of a District Registry and the plaintiff is entitled to enter interlocutory judgment under Order 13 of the Rules of the Supreme Court, or where a cause or matter is proceeding in the District Registry and the plaintiff is entitled to enter interlocutory judgment under Order 19 of the Rules of the Supreme Court, then in either case such interlocutory judgment and, when damages have been assessed, the final judgment shall be entered in that District Registry unless the court otherwise orders.

7. Writs of execution

Where a cause or matter is proceeding in a District Registry, all writs of execution for enforcing any judgment or order therein and all summonses under Order VII of the Rules of the Supreme Court shall issue from that District Registry and all costs shall be taxed in that District Registry, unless the court otherwise orders.

8. Proceedings necessary or incidental to judgment

Where a cause or matter is proceeding in a District Registry, all proceedings relating to the following matters, that is to say—

- (a) leave to issue or renew writs of execution;
- (b) examination of judgment debtors for purposes of a garnishee order;
- (c) garnishee orders;
- (d) charging orders nisi; and
- (e) interpleader orders,

shall be taken in the District Registry, unless the court otherwise orders.

9. Mode of application

Every application to a District Registrar shall be made in the same manner in which applications in chambers to the Registrar are made.

10. Reference of matter to a Judge

The District Registrar may refer to a Judge any matter which he thinks should properly be decided by a Judge, and the Judge may either dispose of the matter or refer it back to the District Registrar with such directions as he thinks fit.

11. Appeal from a District Registrar

An appeal shall lie from any decision, order or direction of a District Registrar in the same way as an appeal lies from any decision, order or direction of the Registrar under rule 3 of the High Court (Exercise of Jurisdiction of Registrar) Rules.

12. District Registrar to be subject to a Judge's directions

In the performance of the duties of his office, a District Registrar and every other officer of a District Registry shall at all times be subject to the general or special directions of a Judge.

13. Filing in a District Registry

Where a cause or matter is proceeding in a District Registry, all pleadings and other documents required to be filed shall be filed in that District Registry.

14. Documents not to be taken out of a District Registry

A record of the court in a District Registry or any document filed in a District Registry shall not be taken out of the District Registry except upon an order or a direction of a Judge or the District Registrar; and, notwithstanding the provisions of any other written law, no subpoena shall be issued for the production of such record or document.

15. Application of the Rules of the High Court

Save as otherwise provided in these Rules, the Rules of the High Court, except Order VI, shall apply, mutatis mutandis, to the conduct of proceedings in District Registries.

HIGH COURT (EXERCISE OF JURISDICTION OF REGISTRAR) RULES

under s. 8

G.N. 189 of 1975

1. Citation

These Rules may be cited as the High Court (Exercise of Jurisdiction of Registrar) Rules.

2. Reference by Registrar to Judge

The Registrar may refer to a Judge any matter which he thinks should properly be decided by a Judge, and the Judge may either dispose of the matter or refer it back to the Registrar with such directions as he may think fit.

3. Appeal from Registrar

Any person affected by any decision, order or direction of the Registrar may appeal therefrom to a Judge at Chambers. Such appeal shall be by notice in writing to attend before the Judge without a

fresh summons, within seven days after the decision, order or direction complained of, or such further time as may be allowed by a Judge or the Registrar. Unless otherwise ordered, there shall be at least one clear day between service of the notice of appeal and the day of hearing. An appeal from the decision, order or direction of the Registrar shall be no stay of proceedings unless so ordered by a Judge or the Registrar.

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SUBORDINATE COURTS RULES

under s. 59

The following orders and rules may be cited as the Subordinate Courts Rules.

ORDER I

PRELIMINARY

O. 1, r. 1

1. Special procedure

Nothing in these rules shall affect any special mode of procedure prescribed for particular matters by any law or confer on any Court jurisdiction to hear and determine any proceedings which it would not otherwise have had jurisdiction to hear and determine.

O. 1, r. 2

2. Where no procedure laid down

(1) In any matter of practice or procedure not provided for in these rules the court may apply any appropriate provision thereof by construing the same with such modification not affecting the substance as may be necessary or proper to adapt the same to the matter before it.

(2) In any such matter in which it is not possible to apply subrule (1) the court may give such orders and directions as appear proper to do substantial justice between the parties, having regard to the summary settlement of matters in issue and to the saving of costs.

ORDER II

INTERPRETATION

O. 2, r. 1

1. Interpretation

(1) In these Rules, unless the context otherwise requires—

“action” includes suit and vice versa;

“certified translation” means a translation certified as correct by an Interpreter employed as such in or appointed by the High Court or in any other Court of Malawi;

“Court” means a Subordinate Court and includes Resident Magistrate or Magistrate as the case may be, and, as regards the performance of any ministerial act, includes the appropriate officer of the Court;

“notice” means written notice unless the Court in any case shall otherwise order;

(2) A form referred to in these Rules by number means the form so numbered in the First Schedule to these Rules, provided that where a document is required to be in a particular form, the notes to such form shall not be deemed to be part thereof, but the form shall be completed so as to give all particulars indicated by such notes.

ORDER III

FORM OF PROCEEDINGS

O. 3, r. 1

1. Size and format

Every proceeding and every document used in any proceeding, other than original documents produced in evidence, shall, unless the nature of the document renders it impracticable, be written, typewritten or printed, or partly written, partly typewritten, and partly printed, on foolscap folio paper of good quality and shall have adequate margins.

O. 3, r. 2

2. Language

Except where the Chief Justice otherwise directs, every such proceeding or document shall, if not in the English language, be accompanied by a certified translation thereof, and shall not otherwise be received, filed or used in Court.

O. 3, r. 3

3. Title and footnote Form 1

(1) Every such proceeding or document shall bear the heading and title in Form 1.

(2) Every document filed in Court and every notice served in any proceedings shall contain at the foot or end thereof particulars of the party or person by or on whose behalf it is filed and shall state his address for service as hereinafter provided.

O. 3, r. 4

4. Rejection

A document not complying substantially with this Order may be rejected or returned for amendment, but the Court may in the interests of economy permit the use of forms or paper of smaller size or inferior quality.

ORDER IV

JOINDER AND CONSOLIDATION

O. 4, r. 1

1. Joinder of causes of action

The plaintiff may unite in the same action several causes of action:

Provided that the Court shall have regard to the convenience of trial, to possible embarrassment of any defendant, and to possible delay, and may in any case order separate trials or exclude any cause of action and order any amendment, and may also make such order as to costs as is just.

O. 4, r. 2

2. Consolidation

(1) Two or more actions may be consolidated by order of the Court when such a course appears necessary or advisable.

(2) The application for consolidation shall be made in one action that such action may be consolidated with some other action.

(3) An order for consolidation shall direct that the action in which the application is made be thenceforward carried on in such other action, and that the title of such other action be amended by adding thereto the title of the action in which the application is made.

O. 4, r. 3

3. Consolidation applicable to third party procedure

An order for consolidation may be made in any case in which a defendant to an action claims to be entitled to contribution from or indemnity against any person not a party to the action.

ORDER V

PARTIES

O. 5, r. 1

1. Definitions

In this Order “plaintiff” includes an applicant and “defendant” includes a respondent and “sue” and “defend” shall be construed accordingly.

O. 5, r. 2

2. Joinder of parties

(1) All persons may be joined as plaintiffs or defendants in one action in or against whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where, if several actions were brought, any common question of law or fact would arise:

Provided that, if it appears to the Court that any joinder may embarrass any defendant or delay the trial or be otherwise inconvenient the Court may, either on the application of such defendant or of its own motion, order separate trials or make such other order as it thinks fit.

(2) Judgment may be given without any amendment for any plaintiff for the relief to which he is entitled, or against such one or more of the defendants as may be found liable according to their respective liabilities.

O. 5, r. 3

3. Change of parties

The Court may at any stage strike out, substitute or add any party in such manner and upon such terms as may be just:

Provided that no person shall be made a plaintiff without his consent, or, if under disability, the consent of his intended next friend or manager.

O. 5, r. 4

4. Right to omit defendants

A plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes.

O. 5, r. 5

5. Trusts and deceased persons' estates

Trustees, executors and administrators may sue or be sued on behalf of the trust or estate. If there be more than one, all shall be joined. The Court may for sufficient reason join any beneficiary.

O. 5, r. 6

6. Representation orders

Where numerous persons have the same interest in any proceeding, the Court may at any time authorize any one or more of them to act on behalf of all persons so interested, whether named as parties or not:

Provided that—

(a) no person shall be bound by any such order unless—

(i) he has been served with notice of intention to apply therefor; or

(ii) he has been served with a copy of the order and has not within 10 days thereafter applied to the Court to discharge or modify it;

(b) where such persons are very numerous or not easily ascertainable the Court may direct service of the order in such manner as it thinks fit.

O. 5, r. 7

7. Amendment and service

Where any change of parties occurs during the pendency of any proceedings—

(a) the title of the proceedings shall be amended accordingly;

(b) any person added or substituted as a defendant shall be served with the proceedings unless he consents to waive such service. The proceedings as against him shall be deemed to have begun upon the date of such service or waiver, as the case may be.

O. 5, r. 8

8. Savings

No proceeding shall be defeated by reason only of mis-joinder or non-joinder of parties.

O. 5, r. 9

9. Married women

A married woman may sue and be sued as provided by the Married Women's Property Acts of the United Kingdom or other law for the time being in force.

O. 5, r. 10

10. Infants

(1) The Court may entertain an action by an infant for money due to him for wages or piece work, or for work as a clerk or shop assistant or servant, in the same manner as if he were of full age.

(2) Save as provided in subrule (1), an infant may sue by his next friend and may defend by his guardian ad litem.

O. 5, r. 11

11. Persons of unsound mind

(1) A person of unsound mind adjudged to be so under any Act for the time being in force may sue or defend by the manager of his estate or, if there be no such manager, may sue by his next friend and defend by his guardian ad litem.

(2) A person not so adjudged, who is found by the Court on inquiry, by reason of mental infirmity, to be incapable of protecting his interests in the action, may sue by his next friend and defend by his guardian ad litem.

O. 5, r. 12

12. Costs of next friend

(1) A next friend shall in all cases be personally liable for costs, as if he were himself a plaintiff.

(2) The Court may in its discretion make an order for costs against the infant or person of unsound mind, and, if it does so, the next friend shall be entitled to indemnity as against the minor or person of unsound mind for any such costs, paid by him personally.

O. 5, r. 13

13. Guardian ad litem

If a defendant is an infant or a person of unsound mind having no manager or a person to whom rule 12 (2) applies—

- (a) any person may apply ex parte to the Court for leave to act as guardian ad litem;
- (b) The plaintiff may apply to the Court to appoint some proper person as guardian ad litem and notice of such application shall be served on the defendant;
- (c) the Court may in pursuance of any such application of its own motion appoint any fit and proper person who has no interest adverse to the defendant in the proceedings in question and who consents to act to be guardian ad litem;
- (d) the title and Cause Book or Register of Civil Actions shall thereupon be amended accordingly;
- (e) a guardian ad litem shall not be personally liable for costs unless occasioned by his personal negligence or misconduct.

O. 5, r. 14

14. Consent on behalf of person under disability

A consent or waiver given or made on behalf of any person under disability by his next friend, guardian ad litem or manager, as the case may be, with the approval of the Court, shall be binding on the person under disability.

O. 5, r. 15

15. General provisions as to disability

Where a plaintiff is a person under disability—

- (a) no settlement or compromise shall be valid without the Court's sanction;
- (b) all money or other property recovered for the plaintiff in, or in consequence of, such action shall be paid into Court or deposited in Court, unless the Court shall otherwise order;
- (c) the Court shall of its own motion, or on the application of any interested party, make such order for the investment or other disposal of the fund or property as seems proper:

Provided that this rule shall not apply where an infant sues under rule 10 (1), and shall not prejudice the lien of a legal practitioner for costs.

O. 5, r. 16

16. Irregular proceedings

Any proceeding taken by or against a person under disability otherwise than in accordance with this Order shall be struck out or dismissed, and any judgment or order made therein may be set aside.

O. 5, r. 17

17. Removal

The Court may for sufficient reason remove any next friend or guardian ad litem and replace him by another, being a fit and proper person and willing to act.

O. 5, r. 18

18. Minor plaintiff attaining majority

(1) An infant plaintiff shall, on attaining majority during the pendency of the proceedings, either withdraw the same before taking any step therein or adopt the same.

(2) No leave to withdraw shall be required, but Order XVI rule 3 shall apply as regards subsequent proceedings.

(3) If the plaintiff withdraws as aforesaid, he shall not be personally liable for costs, nor liable to indemnify the next friend in respect of costs, unless the Court shall so order, and rule 13(1) shall apply.

(4) If there are more plaintiffs than one, the former infant plaintiff shall not be entitled to withdraw without leave, but may apply to the Court to dismiss him from the action and the Court may do so, or, if he is a necessary party, may strike him out as plaintiff and add him as defendant, in either case on such terms as to costs or otherwise as may be just.

(5) If the plaintiff adopts the proceedings, he shall do so by applying to amend the title of the proceedings, and the same shall be amended to read—

“A.B., late an infant, by C.D., his next friend, but now having attained majority.”

The Court may require due proof of majority. On such amendment, the next friend shall be discharged and shall not be liable for costs incurred thereafter and shall be entitled to indemnity against the plaintiff in respect of costs incurred previously unless the Court shall otherwise order.

O. 5, r. 19

19. Minor defendant attaining majority

If an infant defendant attains majority during the pendency of any proceedings, either he or his guardian ad litem may file an affidavit in proof of such majority and thereupon the title of the proceedings shall be amended and the guardian ad litem shall be discharged, subject to any question of costs occasioned by his negligence or misconduct.

O. 5, r. 20

20. Abatement of action

In case of the marriage, death or bankruptcy of any party—

(a) if the cause of action does not survive, the proceedings shall abate, save as provided in paragraph (c);

(b) if the cause of action survives or continues, the proceedings shall not abate or become defective;

(c) in case of death after the conclusion of the trial but before judgment is delivered or entered, the proceedings shall not abate, and judgment may be delivered and entered.

O. 5, r. 21

21. Devolution of interest

In case of any assignment, creation, change, transmission or devolution of the interest, estate, title or liability of any party, between the commencement of any proceedings and judgment therein, the person to or upon whom the interest, estate, title or liability has come or devolved may apply to be added or substituted as a party, and the plaintiff may in like manner apply for such addition or substitution, if the party concerned was a defendant. Notice of any such application shall be served on all parties.

O. 5, r. 22

22. Remedies for default

Where an application should be made under the preceding rule and is not made within a reasonable period, the Court may of its own motion or on the application of any party order the party or person concerned to make such application within a stated time, and in default may strike out or dismiss the proceedings, or order that the party or person concerned be precluded from defending, as the case may be.

O. 5, r. 23

23. Service

Where any of the matters referred to in rule 21 has occurred after judgment and there is money in Court to the credit of the proceedings, the Court may order any person or persons to be served with any application for an order for payment out.

ORDER VI

SUMMONS

O. 6, r. 1

1. Form of summons

(1) Every action shall be commenced by summons which shall be in Form 2.

(2) The statement of claim shall be endorsed on the back of the summons and shall comply with the requirements of Order X rules 1 and 2.

(3) Where, by reason of its length, it is impracticable to endorse the whole of the statement of claim on the back of the summons the same may be continued in a separate sheet or sheets of paper attached to the summons.

O. 6, r. 2

2. Copies of summons

Every summons against a single defendant shall be presented for filing in triplicate and an additional copy shall be presented for every defendant more than one.

O. 6, r. 3

3. Copies of summons. Issue and service

The Court shall examine the summons and, if it appears to be in proper form, and if the plaintiff shall have paid the appropriate fees (including if applicable the fees for service thereof), shall assign a serial number thereto, seal, sign and issue it, and deliver it to the proper person for service. If the Court is of opinion that the summons is not in proper form, it may reject it or direct that it be amended.

O. 6, r. 4

4. Time of service

A summons shall not be served more than twelve months after issue, unless by leave of the Court, which shall not be given unless reasonable efforts have been made to serve the summons, or for other good reason.

O. 6, r. 5

5. Lost summons

If a summons is lost after issue, the Court may order a new summons to issue bearing the date of, and having the like effect as, the original summons.

O. 6, r. 6

6. Action in lowest Court

Every action shall, unless with the leave of the Court, be instituted in the Court of the lowest grade having jurisdiction to try it.

ORDER VII

LEGAL PRACTITIONERS

O. 7, r. 1

1. Service on legal practitioner

Where more parties than one are represented by the same legal practitioner in any proceedings, service of a single copy of any document on such legal practitioner shall be sufficient service on all such parties.

O. 7, r. 2

2. Change of legal practitioner

If a party desires to change his legal practitioner, he shall file a memorandum in Form 3, and serve all other parties.

O. 7, r. 3

3. Discharge of legal practitioner

If a party desires to discharge his legal practitioner, he shall file a memorandum in Form 4, and serve all other parties.

O. 7, r. 4

4. Discharge on legal practitioner's application

If a legal practitioner representing any party applies to be discharged, the Court may discharge him. Notice of the application shall ordinarily be given to the party represented, and he shall, if necessary, be required to furnish a new address for service.

O. 7, r. 5

5. Legal practitioner deemed to act until changed or discharged

Subject to rule 6, the legal practitioner whose name appears as legal practitioner for a party upon any document filed in any cause or matter shall be deemed to be the legal practitioner representing that party unless and until there has been a change of legal practitioner under rule 2 or the legal practitioner has been discharged.

O. 7, r. 6

6. Death

The death of either the party or his legal practitioner determines the retainer.

O. 7, r. 7

7. Retiring legal practitioner refusing to sign

If a legal practitioner refuses to sign a memorandum in Form 3 or Form 4 the Court may on application order him to do so. On any such application the Court shall have regard to any claim to lien or to a charging order. The costs of the application shall be in the discretion of the Court.

ORDER VIII

SERVICE

O. 8, r. 1

1. Address for service

Every plaintiff or applicant, and every person filing any document in any proceedings (other than an officer of any Court acting as such) and any other person ordered by the Court so to do shall give an address for service in Malawi:

Provided that if any such plaintiff, applicant or person is represented by a legal practitioner having an office within Malawi the address of such office shall be the address for service.

O. 8, r. 2

2. Mode of service

(1) Subject to this Order and Order IX, service of every document shall be personal, and shall be effected by delivering the document or by producing it for inspection and delivering a copy thereof. A copy bearing the seal of the Court and the signature of its proper officer shall for this purpose be deemed to be an original document.

(2) Such service shall be effected either by an officer of the Court or of another Court or by the legal practitioner acting for the party at whose instance or on whose behalf such service is to be effected or by a person in the employment of such legal practitioner or by an agent of such legal practitioner authorized in writing in that behalf.

(3) Where the person to be served is in the Public Service, the Court shall ordinarily serve him by sending the process in duplicate to the Head of the Office in which such person is employed and such Head shall thereupon cause the process to be served by delivering a duplicate of the process and requiring the person served to sign a receipt therefor on the back of the original which shall then be returned to the Court which issued the process with a certificate that the process has been duly served, and stating the date of service.

O. 8, r. 3

3. Non-acceptance

If the person to be served refuses to accept the document or copy, it may be left near him and his attention directed to it.

O. 8, r. 4

4. Service on legal practitioner

A document may be served on the legal practitioner of any party represented by such legal practitioner.

O. 8, r. 5

5. Service at address for service

Any document delivered at the address for service of any person shall be deemed to be served on such person.

O. 8, r. 6

6. Notice of hearing

Notice of hearing shall be seven clear days' notice unless the Court shall otherwise order.

O. 8, r. 7

7. Return date, other proceedings

Notice of all other proceedings shall be two clear days' notice, subject to any law to the contrary, and unless the Court shall otherwise order.

O. 8, r. 8

8. Place and time

Service may be effected at any place, on any weekday and at any time of the day or night. Service after 4 p.m. shall ordinarily be deemed to have been effected on the following day.

Service effected after noon on the day preceding, or at any time on any public holiday, shall be deemed to have been effected on the day after such holiday.

O. 8, r. 9

9. Special cases

(1) A married woman shall be served as if she were a feme sole.

(2) Where any person under disability is to be served, service shall be made on his manager, if any, or, if there is no manager, on the person with whom he resides or under whose care he is. The Court may order that service upon the person under disability shall be deemed good service.

(3) In any action relating to any business or work, where the defendant is outside the jurisdiction, service may be made on a manager or agent of the defendant actually in control or management of such business or work on behalf of the defendant.

(4) The master or agent of a ship may be served in an action relating to such ship against the owner or charterer thereof.

(5) A member of the armed forces of Malawi or of the armed forces of any Government serving in Malawi may be served by serving the commanding officer or adjutant of his unit, who shall cause the proceedings to be transmitted to him.

(6) A person in prison shall be served by serving the officer in charge of the prison, who shall cause the proceedings to be transmitted to him.

O. 8, r. 10

10. Corporations, etc.

(1) Where an action is against a corporation, the summons may be served—

(a) by leaving it at the Registered office (if any) of the corporation; or

(b) by sending it by post in a letter addressed to the corporation at the office, or, if there be more offices than one, at the principal office of the corporation, whether such office be situated within Malawi or elsewhere; or

(c) by handing it to the secretary or to any director or other principal officer of the corporation.

(2) This rule does not restrict the operation of any law as to service on any particular person or authority.

O. 8, r. 11

11. Substituted service

(1) Where the Court is satisfied that a party who has given no address for service was, at the date of the summons or other document to be served, resident within Malawi, and there is reason to believe that he is keeping out of the way for the purpose of avoiding service, or that for any sufficient reason the summons or other document cannot be served in the ordinary way, the Court may order the summons or other document to be served by affixing a copy thereof in some conspicuous place in the Court House and also upon some conspicuous part of the building in which the party to be served is known to have last resided, or in any other manner as the Court thinks fit.

(2) The Court may also, in any case falling within the terms of subrule (1), make an order for service by advertisement in such local newspaper or newspapers as the Court may think fit.

(3) Substituted service shall be as effectual as personal service.

(4) In cases of substituted service, the Court, where it is necessary, shall fix the time for the appearance of the party to be served, as the case may require.

(5) No order for substituted service shall be made in respect of—

(a) a subpoena; or

(b) a judgment debtor summons; or

(c) any document initiating proceedings for the arrest or committal of any person.

O. 8, r. 12

12. Proof of service

Service of process may, unless the Court shall otherwise order, be proved either by the endorsement on the summons of the officer of the Court who effected service or by affidavit of the person who effected service and, where the service was personal and the person served was not personally known to him, by such affidavit and the affidavit of the person who identified the person to be served. The person served shall sign an acknowledgment of service, but refusal or inability so to sign shall not affect the validity of the service.

O. 8, r. 13

13. Variation of orders

Any order for service, or for substituted service, may be varied by the Court.

O. 8, r. 14

14. District Messengers

For the purpose of rules 2 and 12 a District Messenger shall be deemed to be an officer of the court.

ORDER IX

SERVICE OUT OF THE JURISDICTION

O. 9, r. 1

1. When allowed

(1) Subject to the Act, the Court may order service out of the jurisdiction of any process whenever—

(a) the whole subject matter of an action properly brought in the Court is immoveable property situate within Malawi (with or without rents, profits or damages) or any document relating thereto is sought to be construed; or

(b) any relief is sought against any person domiciled or ordinarily residing or carrying on business within Malawi; or

(c) the action is founded on any breach or alleged breach of a contract—

(i) made within Malawi; or

(ii) made by or through an agent trading or residing within Malawi on behalf of a principal trading or residing out of Malawi; or

(iii) by its terms or by implication to be governed by the law of Malawi, or is founded on any breach or alleged breach within Malawi of a contract wherever made, even though such breach was preceded or accompanied by a breach out of Malawi which rendered impossible the performance of the part of the contract which ought to have been performed within Malawi; or

(d) the action is founded on a tort committed within Malawi; or

(e) the action is founded on a bill of sale over property situate in Malawi; or

(f) any person out of Malawi is a necessary or proper party to an action properly brought in the Court against some other person duly served within Malawi.

(2) Any order giving leave to effect such service shall direct in what mode service is to be effected and how such service may be proved.

O. 9, r. 2

2. Form of order

An order for service out of the jurisdiction shall fix the times within which Order X rule 3 shall be complied with and the date for any personal appearance by the person to be served and the Court shall have regard to and may require evidence as to the means of communication and transport.

O. 9, r. 3

3. Variation of orders

Any order for service out of the jurisdiction may be varied by the Court.

ORDER X

PLEADINGS

O. 10, r. 1

1. Statement of, Claim

Every statement of claim shall be signed by the plaintiff or his legal practitioner and shall contain—

- (a) a concise statement in numbered paragraphs of the facts relied on by the plaintiff and indicating his cause of action including particulars of any special capacity in which the plaintiff sues;
- (b) sufficient particulars of the claim;
- (c) a statement of the relief claimed; and
- (d) particulars of any set-off allowed or of any partial relinquishment of the claim.

O. 10, r. 2

2. Distinct causes of action

Where more than one cause of action is relied on, grounds of each and the relief claimed thereon must be stated separately.

O. 10, r. 3

3. Affidavit by defendant

(1) If a defendant desires to defend the whole or any part of the claim he shall, within eight days after service of the summons inclusive of the day of service, give notice by an affidavit made by himself or his legal practitioner to the Court from which the summons issued, of his intention to defend.

(2) The affidavit shall state that the defendant has a good defence to the plaintiff's claim and shall, subject to subrule (3), indicate clearly the grounds of his defence.

(3) If the grounds of the defendant's defence are such that the plaintiff's allegations in his Statement of Claim cannot be dealt with adequately except by filing a defence, the defendant's affidavit shall so state, and the defendant shall, within seven days after filing the affidavit or within such extended time as the Court may allow, file and cause to be served on each plaintiff a defence in Form 5:

Provided that no such defence shall be accepted by the Court if the defendant has not filed an affidavit under subrule (2).

(4) A copy of any affidavit filed by the defendant under this rule shall be served on each plaintiff.

(5) Upon the defendant filing an affidavit or a defence (as the case may be) the Court shall fix a date for the hearing and shall inform the parties of the date so fixed, subject to rule 6 (2).

(6) If a defendant desires to counterclaim he shall file and cause to be served on each plaintiff within the like period a counterclaim which may form part of the same document as his defence, if any.

O. 10, r. 4

4. Judgment in default of affidavit or defence

(1) If a defendant does not comply with rule 3 within the time or times limited by that rule, the plaintiff may, where service of the summons upon the defendant has been personal, after 8 days or, where rule 3 (3) applies, after fifteen days or where service has been other than personal, after one month from the day of service or such other period as may have been laid down in any order for substituted service, enter judgment against the defendant for the amount of his claim and costs on the scales set out in the Second Schedule, and the Court fees paid on the summons and judgment.

(2) Any judgment given under this rule may, on application by the defendant for good reasons and upon such terms as may be just, be set aside. Notice of such application shall be given to the opposite party.

O. 10, r. 5

5. Instalments may be ordered by consent

Such judgment shall be for payment forthwith or at such time or times and by such instalments, if any, as the plaintiff or his legal practitioner shall in writing have consented to take.

O. 10, r. 6

6. Form of defence

(1) Every defence shall—

(a) either admit or deny every material allegation of fact in the statement of claim; a denial must not be evasive, but must answer the point of substance;

(b) state concisely any new facts on which the defendant relies by way of defence or in mitigation of damages;

(c) raise concisely and without argument any necessary matters of law; and

(d) be signed by the defendant or his legal practitioner.

(2)(a) The court may either of its own motion or on the application of the plaintiff strike out a defence which does not comply with subrule (1), and may thereupon, unless the defendant shall satisfy it that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally, make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed.

(b) This subrule shall apply mutatis mutandis to a defence to a counterclaim filed under rule 8.

O. 10, r. 7

7. Counterclaim

(1) Every counterclaim shall contain the like matter and particulars as a statement of claim and shall be signed by the defendant or his legal practitioner.

(2) A counterclaim shall not be made against any person not then a party to the action, but, if a cross action is brought, an order for consolidation may be made in a proper case.

O. 10, r. 8

8. Defence to counterclaim

Where any defendant counterclaims, the plaintiff shall, if he desires to defend such counterclaim, file and cause to be served on the counterclaimant a defence to counterclaim within such time as the Court shall direct.

O. 10, r. 9

9. Tender

If a defence of tender before action is raised, the defendant shall on filing his defence pay into Court the amount alleged to have been tendered.

O. 10, r. 10

10. Defence where joint liability

If a plaintiff or counterclaimant does not sue all of several persons jointly liable, the defendant or defendant to counterclaim may set up any defence which he would have been entitled to set up if all the persons liable had been sued.

O. 10, r. 11

11. Reply

The Court may, for sufficient reason, give leave to file and deliver a reply to a defence, whether such defence be to a claim or counterclaim.

O. 10, r. 12

12. Rejection and amendment

The Court may refuse to accept or may return for amendment any pleading which does not comply with this Order, and, if the pleading be a statement of claim, shall not in such event issue the summons.

O. 10, r. 13

13. Particulars

(1) If any pleading does not contain sufficient particulars, the Court may, of its own motion or on the application of any party, order the party responsible to file and cause to be served further and better particulars and may stay all proceedings pending compliance, and may in case of default order that the action or counterclaim be dismissed or that the defendant or the defendant to a counterclaim be precluded from defending the action or counterclaim, as the case may be.

(2) Further and better particulars may be filed and served on request without order.

ORDER XI

PAYMENT INTO COURT

O. 11, r. 1

1. Payment into Court

(1) A defendant may pay money into Court—

- (a) in satisfaction of the claim; or
- (b) in satisfaction of any one or more of separate causes of action; or
- (c) in satisfaction of any part of the claim,

and may also pay into Court a sum of money in respect of costs.

(2) The defendant shall give notice to the plaintiff of the payment in and, where the payment in is less than the amount claimed, the notice shall state in respect of what it is paid.

O. 11, r. 2

2. Payment out of Court

Subject to Order V rule 15 and to rules 7 and 8 of this Order, where the payment in is of the amount claimed or the plaintiff elects to take it in satisfaction of the whole of his claim, the amount shall be paid out to him, and he may have judgment for all costs properly incurred prior to his receiving notice of the payment in, and costs of entering judgment for such costs, unless paid without order.

O. 11, r. 3

3. Part satisfaction

Subject to Order V rule 15 and to rules 7 and 8 of this Order, where the plaintiff elects to take the payment in satisfaction of any one or more of separate causes of action in respect of which it was paid in, he shall, within four days after receiving notice of the payment in, give notice of such acceptance. The amount shall thereupon be paid out to him and he may continue the action in respect of the other cause or causes of action.

O. 11, r. 4

4. Order for payment out

Save as aforesaid, money paid into Court shall not be paid out without order of the Court.

O. 11, r. 5

5. Costs

Where money has been paid into Court and the plaintiff does not receive judgment for any larger amount, the costs incurred by the defendant after payment in shall ordinarily be paid by the plaintiff.

O. 11, r. 6

6. Other relief

Where the plaintiff seeks relief other than the payment of money, he may continue his action for such other relief, notwithstanding the payment out to him of any money.

O. 11, r. 7

7. Several Defendants

Where payment in is made by one or more of several defendants sued jointly or in the alternative the money in Court shall not be paid out without order of Court.

O. 11, r. 8

8. Tender

Where payment in is made with a defence of tender and is accepted, the defendant shall ordinarily be entitled to full costs of the action and the money in Court shall not be paid out without order of Court

O. 11, r. 9

9. Defamation

In an action for libel or slander a plaintiff who takes money out of Court may make a statement in open Court in such terms as may be previously approved by the Court, after notice to the defendant.

O. 11, r. 10

10. Counterclaim

This Order shall apply mutatis mutandis to counterclaims.

ORDER XII

APPLICATIONS

O. 12, r. 1

1. Form 6

(1) Save as hereinafter provided, every application shall be made by means of a notice and affidavit in Form 6.

(2) If the application is in a pending proceeding it shall bear the heading and title of that proceeding.

(3) If the application is not in a pending proceeding it shall bear such heading and title as may be appropriate.

(4) The application shall state in full the nature of the order applied for and, in sufficient detail, the facts relied upon in support thereof, and unless the Court otherwise orders, shall be served on all parties and persons interested therein.

O. 12, r. 2

2. Oral application

(1) The Court may in its discretion allow any application to be made orally on production by the applicant of an application form in Form 7 and on payment of the appropriate fee for an application. In such event the application form shall be completed by the Court and filed.

(2) The Court may direct that notice of any such application be given to any other party or person.

O. 12, r. 3

3. Application during trial

During the trial or hearing of any action or other proceeding any application arising therein may be made orally and without formality or fee, unless the Court shall otherwise order.

O. 12, r. 4

4. Hearing

Applications, if contested, shall be heard in open Court.

O. 12, r. 5

5. Terms

The Court may as a condition of allowing any application impose such terms as may be just.

O. 12, r. 6

6. Evidence

The Court may receive, by affidavit or orally, evidence in support of or in opposition to any application.

O. 12, r. 7

7. Powers of Court

Subject to any Act, the Court may make such interlocutory orders as may be necessary to do justice between the parties whether applied for or not.

ORDER XIII

DISCOVERY

O. 13, r. 1

1. Discovery of documents

(1) The Court may, if it appears desirable in the interests of justice, and upon such terms as to costs or otherwise as it thinks just, order any party—

(a) to state on oath orally or by affidavit what documents he has or has had in his possession or power relating to the matters in question, or whether he has or has had in his possession or power any specified document or documents or class of documents, and, in either case, the present whereabouts of any documents formerly, but not now, in his possession or power;

(b) to produce any document in his possession or power.

(2) If the party is a corporation, an officer thereof may be ordered to act in like manner on its behalf.

(3) The Court may stay the proceedings pending compliance and in default of compliance may dismiss the action or preclude the defendant from defending, as the case may be.

O. 13, r. 2

2. Inspection of documents

Any party shall be entitled to inspect and copy any document in the possession or power of another party and referred to in any pleading, affidavit or other document filed by him in the proceedings or on oral examination under rule 1.

O. 13, r. 3

3. Privilege

Production and inspection of documents under this Order shall be subject to any law relating to privileged communications and documents.

O. 13, r. 4

4. Notice to produce or admit

Notice to produce documents or to admit facts may be given by letter.

ORDER XIV

AMENDMENT

O. 14, r. 1

1. Pleadings

Pleadings may be amended at any time by leave of the Court.

O. 14, r. 2

2. Defective proceedings

The Court may at any time, of its own motion or on the application of any party, and on such terms as may be just order—

(a) amendment of any defect or error in any proceedings;

(b) any amendment necessary for determining the real question in issue or doing substantial justice between the parties.

O. 14, r. 3

3. Method

Amendment shall be made by filing a fair copy of the amended document, which shall indicate in what manner the document was amended, and serving the other party or parties:

Provided that, if amendment is ordered during the trial or hearing of any action or proceeding, or if all parties are present when the amendment is made, the Court may in its discretion amend the document on the file and service on the parties shall not then be necessary.

O. 14, r. 4

4. Slips

Clerical mistakes or errors arising from any accidental slip or omission may at any time be corrected by the Court without formality.

ORDER XV

TRANSFER OF PROCEEDINGS

O. 15, r. 1

1. Method

Where an order is made under the Act for the transfer or removal of any proceedings from one Court to another Court, the Court from which the proceedings are transferred or removed shall send to the Court to which the proceedings are transferred or removed—

- (a) the order for transfer;
- (b) the Court's file of the proceedings; and
- (c) any other relevant documents, and shall retain a copy of the order for transfer.

O. 15, r. 2

2. Conduct of transferred proceedings

Proceedings so transferred to any Court shall be entered in the books of such Court, and such Court may, of its own motion or on the application of any party, give such directions as to the further conduct of the proceedings as may be just.

O. 15, r. 3

3. Transfer to High Court

Where an order is made by the High Court for the transfer of proceedings from a Subordinate Court, the Subordinate Court shall send to the High Court its file of the proceedings and any other relevant documents and shall retain a copy of the order for transfer.

ORDER XVI

WITHDRAWAL AND SETTLEMENT

O. 16, r. 1

1. Withdrawal of claim

The plaintiff may at any time before judgment withdraw any proceedings wholly or in part by giving notice to the defendant.

O. 16, r. 2

2. Costs

The defendant shall thereupon be entitled to costs of the proceedings or such part thereof.

O. 16, r. 3

3. Res Judicata

Withdrawal shall afford a defence by way of res judicata to subsequent proceedings unless—

(a) it occurred before the filing of the defence, or, if no defence is filed, before the trial or hearing of the proceedings; or

(b) the Court has granted leave to institute fresh proceedings.

O. 16, r. 4

4. Stay

If the costs of any withdrawn proceedings have not been paid, the Court may stay any subsequent proceedings of a like nature pending payment thereof.

O. 16, r. 5

5. Withdrawal of defence

The defendant may at any time by giving notice to the plaintiff withdraw his defence or any part thereof and shall in such event be precluded from defending the proceedings or part thereof, as the case may be.

O. 16, r. 6

6. Settlement

(1) Where by agreement of the parties an action has been settled—

(a) the Court may at any time by consent of the parties and without formality record the fact of such settlement with or without recording the terms thereof; or

(b) any party to the settlement may apply to have the settlement recorded and the Court, if satisfied, after hearing the parties, that the action has been settled, shall record the settlement and the terms thereof;

(c) the record of settlement shall afford a defence by way of res judicata to subsequent proceedings.

(2) Any party to an action which has been settled may obtain a certified copy of the settlement recorded.

ORDER XVII

SUBPOENAS

O. 17, r. 1

1. Request

(1) No written application or request for issue of a subpoena shall be necessary.

(2) The Court may issue a subpoena of its own motion.

O. 17, r. 2

2. Form 8

(1) A subpoena to produce documents shall be addressed to one person only, and shall be in Form 8.

(2) A subpoena to give evidence may be addressed to more than one person, and shall be in Form 9.

O. 17, r. 3

3. Documents

A person ordered only to produce a document complies therewith by sending it to the Court.

O. 17, r. 4

4. Records of Court

No subpoena shall be issued to produce records of any Court, including the High Court. The Court may in its discretion request such production. No document so produced shall be marked. Production of original records shall not ordinarily be requested if a certified or office copy will serve the purpose.

O. 17, r. 5

5. Return date

The return date or any error in a subpoena may be amended by the Court at any time before service.

O. 17, r. 6

6. Service

Without leave of the Court, no subpoena shall be served outside Malawi.

O. 17, r. 7

7. Prisoners

A party requiring the attendance of a person in prison may be required to deposit in Court the probable cost of his conveyance under escort to and from the Court and subsistence. Subject to any Act, the Court may thereupon issue an order for his production in Court.

O. 17, r. 8

8. Attendance of witness

A person subpoenaed to give evidence shall attend throughout the trial or hearing, including any adjourned hearing unless released by the Court.

O. 17, r. 9

9. Failure to attend

Subject to rule 6, if any person duly served with a subpoena to give evidence or produce a document shall, without sufficient reason shown, fail to attend the Court, whether on the first or any adjourned hearing, or produce such document, as ordered, he shall be guilty of a contempt of Court. The Court may also issue a warrant for his arrest.

O. 17, r. 10

10. Contempt

If any person who is in Court and required to give evidence refuses to be sworn or affirmed, or to give evidence, or to answer any question allowed by the Court, he shall be guilty of a contempt of Court.

O. 17, r. 11

11. Persons in Court

Any person present in Court may be ordered to give evidence, or to produce any document then and there in his possession or custody, without service of a subpoena.

O. 17, r. 12

12. Commissions, etc.

(1) In any action before the Court it may issue a subpoena for the purposes of any commission, letters of request or examination de bene esse.

(2) If any person duly served with a subpoena under subrule (1) shall—

(a) fail, without sufficient reason shown, to attend the hearing or adjourned hearing, or produce a document; or

(b) fail to attend throughout the hearing, including any adjourned hearing, unless released by the Commissioner or other presiding officer; or

(c) refuses to be sworn or affirmed, or to give evidence or to answer any question allowed by the Commissioner or other presiding officer, he shall be deemed to be guilty of contempt of Court.

ORDER XVIII

AFFIDAVITS

O. 18, r. 1

1. Before whom sworn

An affidavit to be used in any proceeding in a Court may be sworn—

(a) in Malawi, before any Magistrate or Commissioner for Oaths;

(b) in any part of the Commonwealth, before a judge, Court, Registrar or Deputy Registrar of any Court, Magistrate, Notary Public, or person lawfully authorized to administer oaths;

(c) in the Republic of India or Pakistan before a Judge, Court, Registrar or Deputy Registrar of any Court, First Class Magistrate or Notary Public;

(d) elsewhere, before any accredited member of the Malawi Foreign Service or any British Consul or Vice-Consul, or before any person authorized, under the laws of the place of swearing, to administer oaths, if the signature of such person is verified by a certificate of any British Consul or Vice-Consul, and such certificate shall be sufficient evidence of such authority.

O. 18, r. 2

2. Form and contents

An affidavit shall be intitled in the proceeding in which it is sworn, shall be expressed in the first person, and shall be drawn up in paragraphs numbered consecutively. It shall state the full name or names of the deponent, his age, his description or occupation, his place of residence, and, if any facts therein are deposed to otherwise than of his personal knowledge, the sources of his information. It shall be signed by the deponent. The jurat shall show the place and date of swearing and shall be signed by the person administering the oath, who shall add the title of the office by virtue of which he acts.

O. 18, r. 3

3. Forms 10, 11, 12 and 13

Subject to Order XII, an affidavit shall ordinarily be in Form 10. If the deponent understands English but is unable to read, the jurat shall be in Form 11. If the deponent does not understand English, the jurat shall be in Form 12 or 13.

O. 18, r. 4

4. Irregular affidavits

The Court may in its discretion permit an affidavit to be used, although not in proper form, if otherwise satisfied that the deponent understood its contents and effect.

O. 18, r. 5

5. Exhibits

(1) Every exhibit to an affidavit shall be marked in Form 14 by the person administering the oath.

(2) Exhibits shall remain in the custody of the party, if he so desires, unless the Court shall otherwise order.

O. 18, r. 6

6. Rejection

The Court may in its discretion reject any affidavit which by reason of its form or content cannot be easily read and understood, or in which there is any interlineation, alteration or erasure, or other defect of form.

O. 18, r. 7

7. Amendment

An affidavit may be amended and resworn at any time before filing.

O. 18, r. 8

8. Filing

Every affidavit shall be filed before use, unless the Court shall permit it to be used on the undertaking of a party to file it.

O. 18, r. 9

9. Cross-examination

(1) Any party desiring to contest the truth of facts deposed to in an affidavit may serve on the party who filed the same, notice of intention to cross-examine the deponent, and thereupon, if the deponent is not produced for cross-examination, the Court shall, except in special circumstances, reject or disregard the affidavit.

(2) The Court may of its own motion require the attendance of any deponent for examination on his affidavit and, in default of such attendance, may reject or disregard the affidavit.

ORDER XIX

TRIAL OR HEARING

O. 19, r. 1

1. Hearing in Court

Subject to section 60 of the Act, all proceedings shall be heard and determined in open Court.

O. 19, r. 2

2. Appearance

(1) Any party may appear in person or by a legal practitioner:

Provided that joint plaintiffs shall not, unless by leave of the Court, be represented by separate legal practitioners.

(2) A person served under Order VIII rule 9 (3) or (4) may appear on behalf of the defendant for whom he was served.

(3) A partnership may appear by any partner or by its legal practitioner.

(4) An infant or person of unsound mind may appear by his next friend, guardian ad litem or manager, as the case may be.

O. 19, r. 3

3. Absence of parties

(1) If, when any action is called on, neither party appears the action may be dismissed.

(2) If the defendant does not appear, the Court may, on proof of due service, hear and determine the action in his absence.

(3) If the plaintiff does not appear, the claim may be dismissed and the Court may hear and determine any counterclaim.

(4) The Court may in its discretion in any such case order an adjournment.

(5) Any judgment or order given or made in the absence of a party may, on his application and if good reason for such absence be shown, be set aside and the proceedings may be reheard upon such terms as to costs or otherwise as the Court shall think fit. Notice of such application shall be given to the opposite party.

(6) If there are more plaintiffs or defendants than one, and one at least is present, the Court may hear the action as if all were present.

O. 19, r. 4

4. Undefended actions

(1) In any action in which the defendant, having filed a defence, does not appear at the trial, the Court may permit the plaintiff's case to be proved by evidence on affidavit:

Provided that the Court may, if it thinks fit, require the case to be proved by oral evidence, or require further evidence, oral or by affidavit, and may adjourn the trial for such purpose.

(2) In any action the Court may give leave to prove any particular fact by affidavit, but such leave shall not ordinarily be given if it appears that such fact is bona fide in dispute.

O. 19, r. 5

5. Counterclaims

The stay, withdrawal, striking out or dismissal of the plaintiff's claim shall not prevent the hearing and determination of a counterclaim.

O. 19, r. 6

6. Mutual claims

Where judgment is given for sums of money on both claim and counterclaim the Court may set the one off against the other and give judgment for the balance only but without prejudice to the power of the Court to make such order as to costs as shall be just.

O. 19, r. 7

7. Note of evidence

The Court shall take in English a note of the evidence given and, so far as appears desirable, of the submissions of law made, including any objections to evidence and may add remarks on the demeanour of witnesses and other material matters. The Court, unless it delivers a written judgment, shall also make a note of the judgment or order.

O. 19, r. 8

8. Exhibits

Documents put in evidence shall be marked and, unless the Court shall otherwise order, they shall, or copies thereof shall, be retained in Court during the pendency of the proceedings and until the time for appeal has expired. A negotiable instrument which was the basis of a successful claim shall be so retained, unless the Court shall otherwise order, and shall be endorsed with a note of the judgment. Documents tendered in evidence, but rejected, shall be marked. The Court may for sufficient reason order that any document produced in any proceedings be sent to the Attorney General or the Collector of Stamp Duties or their deputies.

O. 19, r. 9

9. Addresses

(1) Each party may, before calling evidence, open his case. The party against whom judgment would be given on the pleadings, if no evidence were called, has the right to begin.

(2) Each party may sum up his case after the conclusion of the evidence, but so that the party who begins shall have the last word, whether or not any other party has called evidence.

(3) The Court may at any stage call any evidence which it considers desirable in the interests of justice, and may inspect any place or thing.

O. 19, r. 10

10. Trial not concluded

Where a Magistrate has commenced a trial and is unable for any reason to conclude it, another Magistrate may with the consent of all parties continue the trial and give judgment. In the absence of such consent the case shall be heard de novo.

O. 19, r. 11

11. Application

This Order shall apply, mutatis mutandis, to proceedings other than actions.

O. 19, r. 12

12. Adjournment

The Court may adjourn any proceedings from time to time and from place to place and may impose terms on so doing.

ORDER XX

JUDGMENTS AND ORDERS

O. 20, r. 1

1. Pronouncing judgment

Judgment shall be pronounced in open Court. If the Magistrate has written, but is for any reason unable to read, a judgment, it may be read in open Court by any other Magistrate.

The original or a signed copy of every written judgment shall be filed.

O. 20, r. 2

2. Judgment by consent

Judgment by confession or consent of the parties may be recorded by the Court at any time.

O. 20, r. 3

3. Settling judgment or order

The Court shall settle the terms of a judgment or order.

O. 20, r. 4

4. Instalments when due

If any order is made for payment by instalments, such instalments shall, in the absence of any direction to the contrary, be deemed to be payable on the first day of the calendar month next after that in which the order was made and on the first day of each succeeding calendar month.

O. 20, r. 5

5. Order for instalments

(1) Any debtor against whom judgment has been, or is about to be, given may apply to the Court for leave to pay the judgment debt by instalments, or, if an order for payment by instalments has been made, for leave to pay by reduced instalments, and the Court, after hearing the parties, may make such order as is just.

(2) If any such instalment is more than one calendar month in arrears, the said order shall be deemed to be vacated and the judgment creditor may execute for the whole amount then due on the judgment, but the judgment debtor may apply for another order.

(3) Any judgment creditor may, if an order for payment by instalments has been made, apply that it be vacated, or that the instalments be increased, and the Court, after hearing the parties, may make such order as is just.

O. 20, r. 6

6. Service of orders

(1) Every judgment or order requiring any person to do any act other than the payment of money shall state the time within which the act is to be done. If no time be so stated, the act shall be done within seven days from the date of the judgment or order.

(2) If the person required to do such act was personally present or represented by a legal practitioner when the judgment or order was given or made, it shall not be necessary to serve him with a copy thereof or any notice of the consequences of default. If he was not so personally present or represented, no proceedings for his arrest or commitment shall be taken unless he shall have been served with a copy of the judgment or order endorsed with a notice in Form 15.

O. 20, r. 7

7. Date

Every judgment or order shall be dated and take effect as of the date on which it was given or made.

O. 20, r. 8

8. Supplementary provisions

A judgment for delivery of moveable property shall state the amount of money to be paid as an alternative if delivery cannot be had.

O. 20, r. 9

9. Requirement where defendant is employed in the public service

Where a defendant is a person employed in the public service, a true copy of the judgment or order shall, not later than three days from the date on which it is given or made, be sent by the Court to the Head of the Department or office wherein the defendant is employed.

ORDER XXI

EXECUTION

O. 21, r. 1

1. Definitions

In this order “judgment” includes an order and “judgment creditor” and “judgment debtor” include respectively a person entitled to the benefit of, or bound by, any judgment or order.

O. 21, r. 2

2. Duty to comply

Every person directed by any judgment to do any act shall comply therewith without demand, and it shall not be necessary to serve him therewith or with any notice thereof save as provided in Order XX rule 6.

O. 21, r. 3

3. Leave to execute

(1) Execution shall not issue without leave of the Court—

- (a) if the judgment was subject to any condition or contingency;
- (b) at any time more than six years from the date of the judgment;
- (c) if any change has taken place by death, assignment or otherwise in the person entitled to enforce, or liable under, the judgment;
- (d) if the judgment creditor desires to enforce the judgment against any person other than the judgment debtor named in the judgment;
- (e) if an order of commitment is outstanding;
- (f) save as in Order XX rule 5 (2) provided, if an order for payment by instalments is in force; or
- (g) if execution has been stayed by the Court.

(2) An application for leave to execute may be made ex parte, but the Court may order service on any party or person concerned.

O. 21, r. 4

4. Warrant of Execution

(1) A Warrant of Execution shall be in Form 16 or 23 as the case may be, and shall be valid for twelve months from the date of its issue unless renewed with leave of the Court.

(2) Upon receipt of the warrant the Sheriff may execute the judgment in all respects as though it were a judgment of the High Court.

O. 21, r. 5

5. Attachment of debts

A judgment creditor who has obtained a judgment or order for the recovery or payment of money may apply to the High Court under Order II of the Rules of the High Court for the attachment of debts as though the judgment were a judgment of the High Court. Below p. 103

ORDER XXII

JUDGMENT DEBTORS

O. 22, r. 1

1. Definitions

In this Order “judgment” means any judgment or order under which any person is bound to pay to another any sum of money and “judgment creditor” and “judgment debtor” have corresponding meanings.

O. 22, r. 2

2. Judgment debtor summons

(1) Subject to subrule (10), a judgment creditor may, whether execution has issued or not, summon any judgment debtor with a summons in Form 17 to be examined as to his ability to pay the judgment debt, as to his property and as to any disposal thereof.

(2) If the judgment debtor is a corporation, any of its officers may be so summoned.

(3) The summons shall be personally served not less than two clear days before the hearing.

(4) At the hearing when the judgment debtor has been examined either party may adduce any additional evidence and the Court may make such order for payment whether by instalments or in one sum by the judgment debtor as may be just, or may make no order.

(5) If a judgment debtor duly summoned under this rule does not appear he may be arrested on a warrant and brought before the Court for examination.

(6) Any person wilfully failing or neglecting to comply with any order for payment made under this rule may, after due notice in Form 18, be committed to prison for any period not exceeding six weeks.

(7) A person so imprisoned shall be released forthwith upon payment of all sums due and payable at the date of payment under the order for non-compliance with which he was imprisoned, together with such part of any deposits made under rule 1 or 2 of Order XXIV as may actually have been expended.

(8) A person so imprisoned may at any time apply to be released and the Court may order his release on such terms as to re-arrest, security or otherwise, or unconditionally, as may be just.

(9) Any order made under this rule may be suspended, discharged, or varied by the Court.

(10) In the cases referred to in Order XXI rule 3, no summons shall issue without leave of the Court.

O. 22, r. 3

3. Arrest

(1) If the Court is satisfied that a judgment debtor, with a view to avoiding or delaying payment of the judgment debt or examination of his affairs, has absconded or left Malawi, or is about to do so, or has disposed of or removed or concealed or made away with or handed over to others any of his property, or is about to do so, or has wilfully evaded or attempted to evade service of the process of the Court upon him, he may be arrested on a warrant and examined under rule 2 and may be detained in prison pending order of the Court.

(2) The Court may in any such case make any order under rule 2 and may in addition—

(a) order the judgment debtor to furnish security for his appearance or for payment of the judgment debt; or

(b) order that he be committed to the civil prison.

(3) Security under this rule may be given by payment into Court, or by bond with two sureties who may be required to justify, or in such other manner as the Court may permit. On furnishing security, the judgment debtor shall, if in custody be released.

O. 22, r. 4

4. Costs

Subject to rule 6 costs of proceedings under this Order shall, unless otherwise ordered, be added to the judgment debt.

O. 22, r. 5

5. Order

At the hearing, when the judgment debtor has been examined, either party may adduce any additional evidence, and the Court may order the judgment debtor to pay to the judgment creditor such amount, whether by way of instalments or in one lump sum, as may be just; or may make no order:

Provided that the judgment debtor shall be deemed to have complied with the order of the court if he pays the sum, or sums, so ordered, into the court and at the place where the original action was commenced.

O. 22, r. 6

6. Payment

If the judgment debtor elects to make payment through the court in terms of the proviso to rule 5, then the judgment creditor may either collect the sum in question from the court or may have it sent at his own expense either direct to himself or to his legal practitioner.

ORDER XXIII

ATTACHMENT AND ARREST BEFORE JUDGMENT

O. 23, r. 1

1. Powers of Court

(1) If the Court, after issue of the summons, is satisfied that a plaintiff has a good cause of action and that the defendant, with intent to defeat or delay the claim of the plaintiff, has absconded or left Malawi, or is about to do so, or has disposed of or removed or concealed or made away with or handed over to others any of his property, or is about to do so, or has wilfully evaded or attempted to evade service of the process of the Court upon him, the Court may—

(a) order his arrest on a warrant and require him to furnish security, in the manner set out in Order XXII rule 3 (3), for his appearance and, in default, commit him to prison; or

(b) order that attachment issue against the defendant's property, in all respects as if he were a judgment debtor, save and except that the order shall be in Form 19 and any property seized shall not be sold prior to judgment, unless subject to rapid decay or deterioration, or by leave of the Court.

(2) (a) If any property has been attached under subrule (1) (b), it shall not be necessary to seize it thereafter in execution, but it shall be deemed to have been seized in execution under a warrant of execution delivered to the Sheriff at 10 a.m. on the day after the judgment was given, and may be sold accordingly.

(b) For the purpose of security in any subsequent bankruptcy and of claims of judgment creditors inter se, the judgment creditor shall rank and have priority—

(i) if the property has been sold under subrule (1) at any time earlier than 10 a.m. on the day after judgment, as if the order of execution had been delivered to the Sheriff and the property seized and sold simultaneously at 10 a.m. on the day after judgment;

(ii) if the property is sold at any time after 10 a.m. on the day after judgment, as if the order for execution had been delivered to the Sheriff and the property had been seized at 10 a.m. on the day after judgment and the property had thereafter been sold at the actual time of sale.

(3) Any order made under this rule may be suspended, rescinded or varied in such manner and on such terms as may be just.

(4) A defendant committed to prison in default of furnishing security shall be released forthwith on furnishing the same at any time.

O. 23, r. 2

2. Procedure

Any application under this Order may be made ex parte but the Court may in its discretion order any person to be served.

O. 23, r. 3

3. Forms 20 and 21

A warrant under this Order shall be in Form 20 and an order of commitment in Form 21, with such variations as circumstances may require.

O. 23, r. 4

4. Costs

Costs of proceedings under this Order shall, unless otherwise ordered, be added to the judgement debt.

O. 23, r. 5

5. Compensation

If any order has been made under this Order and it later appears that such order was improperly obtained, or that the action was brought without sufficient grounds, the Court may on application by the defendant award against the plaintiff such damages, not exceeding £100 in the case of the Resident Magistrate's Court, or £25 in the case of any other Subordinate Court, as may be just to compensate the defendant for injury to his property, credit or reputation. If the defendant obtains an order under this rule, he shall be debarred from bringing any action in respect of the same matter.

O. 23, r. 6

6. Release of property

Any property seized or attached under this Order shall be released upon the defendant paying into Court, or giving security for, the value thereof or the amount of the plaintiff's claim, whichever be the less.

ORDER XXIV

GENERAL PROVISIONS AS TO ARREST AND COMMITMENT

O. 24, r. 1

1. Expenses of arrest

Before any order for the arrest of any person is executed, the party at whose instance it was issued shall pay into Court the fees prescribed in Items 18 or 19 of the Third Schedule, whichever fee is applicable.

O. 24, r. 2

2. Expenses of commitment

Before any order of commitment is made the Court shall direct that such commitment will be at the expense of the party, if any, at whose instance it is made, and in such event the order shall not be executed unless the party shall deposit in Court a sum sufficient to provide for the subsistence of the person committed for the period of his imprisonment.

O. 24, r. 3

3. Discharge of order on payment

(1) Every order for arrest or order of commitment issued on grounds of failure to pay money shall show on its face the sum due and payable, and on payment thereof together with such part of any deposits made under rule 1 or 2 as may actually have been expended the order shall be deemed to be discharged and the party, if arrested or committed, shall forthwith be released.

(2) Payments on account of the sum due and payable shall be noted on the order by the Court or the officer in charge of the prison, as the case may be, and, if the order has not been served, it may be amended so as to give credit therefor.

(3) If payment in full is made to the Court while the party is in prison, the Court shall order his release in Form 22. The Court shall inform the prison authorities of any payment to account.

(4) If payment in full is made to the officer in charge of the prison, he shall release the prisoner and pay the money into Court.

O. 24, r. 4

4. Discharge of order in certain other cases

(1) An order of arrest or commitment issued on grounds of failure to pay money shall be deemed to be discharged—

(a) if it appears that the party has been adjudged bankrupt or that a receiving order has been made against him; or

(b) if the party at whose instance the order was made files in Court a request in writing that the party in question be released.

(2) Notice of such discharge shall forthwith be sent by the Court to the officer in charge of the prison, if the party is in prison.

O. 24, r. 5

5. No further commitment for same sum

A debtor shall not be liable to be imprisoned a second time for non-payment of a sum in respect of which an order of commitment has been made and in respect of which he has been imprisoned.

O. 24, r. 6

6. Notice to judgment creditor

The Court shall give notice of any arrest forthwith to the person at whose instance the arrest was ordered.

O. 24, r. 7

7. Time

An order for arrest or commitment may not be executed more than one year after the date thereof, unless renewed by the Court.

O. 24, r. 8

8. Military men

An order for the arrest of any member of the armed forces of Malawi or of the armed forces of any Government serving in

Malawi may be delivered to the commanding officer or adjutant of his unit, who shall cause him to be arrested and delivered to the Court.

O. 24, r. 9

9. Arrest by another court

The Court may request any Court of co-ordinate jurisdiction to effect any arrest ordered by the requesting Court. Any person so arrested shall be brought before the requesting Court, subject to any question of payment or security, and shall be dealt with thereby.

O. 24, r. 10

10. Duration of imprisonment

(1) Wherever by these Orders and Rules imprisonment may be ordered, the term thereof shall not exceed—

- (a) six weeks, if ordered by a Resident Magistrate's Court; or
- (b) three weeks, if ordered by a magistrate of the first grade Court; or
- (c) one week, if ordered by a magistrate of the second or third grade Court.

(2) Wherever by these Orders and Rules imprisonment may be ordered for any reason other than non-payment of money, the Court may impose in lieu of imprisonment a fine not exceeding £50 for every week's imprisonment which might have been ordered.

(3) Notwithstanding anything herein contained, imprisonment under Order XXIII rule 1 shall not in any case continue after the decision of the action.

O. 24, r. 11

11. Effect of imprisonment

Subject to Order XXI rule 3, imprisonment shall not operate to prevent the issue of execution.

O. 24, r. 12

12. Release on illness

(1) At any time after a warrant of arrest has been issued, the Court may cancel it if the person to be arrested is seriously ill.

(2) Where a person has been arrested, the Court may release him if in its opinion he is not in a fit state of health to be detained in prison.

(3) A person committed to prison may be released by order of the committing Court made on application or of its own motion if—

- (a) he is seriously ill; or
- (b) any infectious or contagious disease is likely to affect him or other inmates of the prison in which he is confined; or

(c) the Court for any other reason sees fit.

(4) A person released under this rule may be re-arrested, but the periods of his detention in prison shall not in the aggregate exceed those prescribed by rule 10 of this Order.

ORDER XXV

INTERIM ORDERS AS TO PROPERTY

O. 25, r. 1

1. Protective orders

(1) Where in any action on a contract or for the recovery of any moveable property the plaintiff's claim is prima facie established and the defendant relies by way of defence on matters as to which the burden of proof is on him, or claims a lien, the Court may make such order for the delivery, preservation or custody of any moveable property the subject-matter of the dispute, or for the payment into Court of any sum in dispute, or both, as may be just.

(2) This rule shall apply mutatis mutandis to counterclaims.

O. 25, r. 2

2. Sale of subject matter

The Court may order the sale (without prejudice to any subsequent finding), of any property in dispute in any proceedings, which—

- (a) is subject, to rapid decay or deterioration; or
- (b) incurs charges for food or keep; or
- (c) for any other reason ought to be sold,

in such manner and on such terms and conditions as may be just.

O. 25, r. 3

3. Orders to facilitate trial

The Court may make any order for the detention, preservation, inspection, surveying, measuring, weighing or testing of any property or thing in dispute in any proceedings or as to which any question arises therein.

O. 25, r. 4

4. Additional powers

The Court may for any of the purposes of this order authorize any person to enter enclosed premises, by force if necessary, and to take samples, make plans, models or diagrams, or conduct experiments.

ORDER XXVI

INTERPLEADER

O. 26, r. 1

1. Where allowed

Where any person (in this Order called "the applicant") is sued or expects to be sued by any two or more persons for or in respect of any debt or property in which he claims no interest otherwise than for charges and costs, and such persons claim adversely to one another, the applicant may seek relief by way of interpleader in the Court in which he has been sued or, if not yet sued, in any Court in which he might be sued.

O. 26, r. 2

2. Procedure

(1) The applicant shall file in Court an application in writing for the relief claimed.

(2) If the applicant has been sued, such application shall be filed within five days after service of the summons.

(3) A copy of the application shall be served on every person (including any plaintiff in an action against the applicant) believed by the applicant to be a claimant.

(4) Every claimant so served, except a plaintiff in an action against the applicant, shall before the hearing file either a notice that he makes no claim or particulars of his claim.

O. 26, r. 3

3. Hearing

On the hearing the Court may make such order for the consolidation and further conduct of all relevant proceedings as may be just, and may in particular make an order that the applicant, on paying any money into Court, or dealing with the property in issue as the Court may order, may be dismissed from the proceedings and that his costs may be paid out of the money or property in issue or in such other manner as the Court may direct, or it may determine all the matters in question in a summary manner.

O. 26, r. 4

4. Absent parties

Any claimant duly served shall be bound by the proceedings whether he appears therein, or files any notice or particulars of claim, or not.

O. 26, r. 5

5. Costs and sales

In any interpleader proceedings the Court may make such order as to costs and as to any sale or other disposal of any property in issue as may be just, and may itself assess the value of any such property.

ORDER XXVII

ACTIONS BY AND AGAINST FIRMS

O. 27, r. 1

1. Action in firm's name

Partners and persons liable as partners may be sued and partners may sue in the name of their firm.

O. 27, r. 2

2. Procedure

(1) In every such action it shall be stated in the title or statement of claim that the plaintiffs sue or defendants are sued as a firm.

(2) The partners of the firm and each of them shall on demand in writing, which may be incorporated in or served with a pleading, file and serve on all parties concerned a statement of the names and addresses of all persons who are partners in the firm. Alternatively, any one partner may file and serve an affidavit giving such particulars of all the partners.

(3) Any person signing such a statement which declares him to be a partner, and any person named as such in any such affidavit, shall be deemed to have been served with the proceedings as a partner:

Provided that, where an affidavit has been so filed, the Court may require service on any alleged partner (other than the person who swore the affidavit) who is not registered as a partner under the Business Names Registration Act. Cap. 46:02

(4) In default of such statement or affidavit, the Court may stay the action, or preclude the defendants from defending, as the case may be, or may issue an order requiring such a statement or affidavit to be filed. Wilful non-compliance with such an order shall be a contempt of Court.

(5) Any partner or the person in control of the firm's principal place of business in Malawi may be served on behalf of the firm.

(6) A person served on behalf of a firm shall be deemed to be served as a partner, unless the contrary is stated in the summons or in a pleading.

(7) Any person served as a partner may apply to set aside the service on the ground that he is not a partner or liable as such, or may, in addition to any other defence, allege such matters by way of defence.

(8) When judgment is given against a firm, execution may issue—

- (a) against any partnership property;
- (b) against any partner served as such and not expressly found not to be a partner;
- (c) against any person served as being, and expressly found to be, liable as a partner.

The judgment or order may name the persons against whom execution may issue under this rule.

(9) If after judgment the judgment creditor desires to issue execution against any other person as being, or being liable as, a partner, he may apply to the Court for leave to execute. If the person concerned is not registered as a partner under the Business Names Registration Act he shall be served with the application and the Court may try any necessary issue of fact and give all necessary directions. Cap. 46:02

(10) Except in the case of a sole surviving partner, it shall not be necessary to join the personal representative of a partner who dies during the pendency of the proceedings, but execution shall not issue against his separate property, unless the personal representative has been served.

(11) If any defendant partner be an infant, judgment may be given against the firm other than him, and in such event no execution shall issue against his separate property. Where such a judgment is sought, it shall not be necessary to serve the infant or to appoint a guardian ad litem for him. If a plaintiff partner be an infant, it shall not be necessary for him to be represented by a next friend.

O. 27, r. 3

3. Application

(1) This Order shall apply to actions between one or more partners and the other partners of a firm, and to actions between firms having partners in common. No execution shall issue in any such action without leave of the Court.

(2) This Order shall apply mutatis mutandis to an individual carrying on business in a name other than his own, save that an infant so carrying on business may not sue or be sued under this Order.

O. 27, r. 4

4. Dissolved partnerships

Where, to the knowledge of the plaintiff, a firm was dissolved before action brought, the plaintiff shall serve individually every person whom it is sought to make liable as a partner.

ORDER XXVIII

EXECUTORS AND ADMINISTRATORS

O. 28, r. 1

1. Definition

in this Order “executor” means an executor who has proved the will or an administrator.

O. 28, r. 2

2. Costs of plaintiff

Costs of proceedings brought by an executor which are dismissed or fail shall ordinarily be borne by him personally, but the Court may for sufficient reason allow costs against the estate, either in the first place or if not recoverable from the executor.

O. 28, r. 3

3. Judgment against estate

(1) A judgment against an executor shall provide that the amount of the judgment (including any costs) be satisfied out of property of the deceased which is in or may come into the hands of the executor to be administered by him as such.

It shall also provide that—

(a) as regards the amount of any costs; and

(b) as regards the amount of any assets of the deceased alleged and proved to have been wasted by the executor (but not as regards any other amount due on the judgment),

the judgment shall, if not satisfied out of the assets of the deceased, be satisfied by the executor personally.

(2) If an executor alleges and proves administration of assets, he may be granted costs of that defence, notwithstanding that judgment may be given to be satisfied out of any property of the deceased which may at a future time come to the hands of the executor to be administered by him as such.

O. 28, r. 4

4. Judgment de bonis futuris

On a judgment to be satisfied out of any property of the deceased which may at a future time come to the hands of the executor to be administered by him as such, execution shall not issue without leave of the Court and notice of the application shall be served on the executor. If waste since the date of the judgment is alleged, execution may be ordered against the executor to the extent of the waste and costs.

O. 28, r. 5

5. Form of warrant

A warrant of execution against an executor may be in Form 23.

ORDER XXIX

GENERAL PROVISIONS

O. 29, r. 1

1. Forms

Forms prescribed by these Orders and Rules shall be used wherever applicable and with such variations as circumstances may require, but so that no form shall be varied in such a way as to impose on any person any obligation, or to deprive him of any right or information, otherwise than in due course of law.

O. 29, r. 2

2. Certificate of expert

(1) In any proceedings the Court may, if it sees fit, receive in evidence and act upon the certificate of any accountant, actuary, architect, botanist, chemist, engineer, medical practitioner, surveyor or other scientific person or expert, and may similarly receive any account, analysis, plan, diagram or document relating to and identified by such certificate. On receiving such evidence the Court shall inform the parties of the right of cross-examination under subrule (2).

(2) Any party bona fide desiring to cross-examine in respect of any such matters shall be afforded the opportunity to do so, but may afterwards be ordered to pay any costs of, and incidental to, such cross-examination.

O. 29, r. 3

3. Certified copies and lost documents

(1) The Court may supply for any sufficient reason a certified copy of any document, including, with the consent of the Magistrate, any notes of evidence.

(2) The Court may upon proof of loss of any document issued by the Court order that a duplicate or copy be issued upon such terms as may be just.

O. 29, r. 4

4. Fees, deposits and disbursements

Where any fee or deposit is payable in respect of any act, or any disbursements are necessarily involved in doing the same, the officer charged with doing such act shall not be obliged to do it until such fee or deposit, or the amount of such disbursements, has been paid.

O. 29, r. 5

5. Independence of Court staff

No officer of any Court shall become a surety, or sign any receipt or document, or receive any money, for or on behalf of any party to any proceeding in the Court, or bid or otherwise become a purchaser directly or indirectly at any sale by the Court.

O. 29, r. 6

6. Furnishing security

(1) Security shall be given by deposit of money or by bond. The amount shall be fixed by the Court. Expenses shall be borne by the person giving the security. The undertaking in writing of a legal practitioner may be accepted in lieu of other security.

(2) Where security is given by deposit of money, the money shall not be paid out without order of Court.

(3) Where security is given by bond two sureties shall be required unless the Court shall otherwise order, and the opposite party shall be given opportunity to object to the sureties.

O. 29, r. 7

7. Enlargement of time

The Court may extend or abridge the time limited for doing any act, upon such terms as may be just, and notwithstanding that the time originally limited has expired.

O. 29, r. 8

8. Enlargement by consent

Time for filing or serving any pleading, particulars, affidavit, notice or similar document may be extended by consent, unless in any case the Court shall otherwise order.

O. 29, r. 9

9. Irregularities

(1) Non-compliance with these Rules or any rule of practice in force shall not render the proceedings void unless the Court shall so order, but the Court may of its own motion or on application of any party set aside any proceedings wholly or in part as irregular, or order amendment on such terms as may be just.

(2) Any such application may be dismissed unless made within a reasonable time and before the applicant has taken any step in the proceedings with knowledge of the irregularity.

O. 29, r. 10

10. Scandalous matter

The Court may at any time order that any scandalous, irrelevant, vexatious, oppressive, argumentative or prolix document, or matter in any document, be struck out, and may award costs of any application in that behalf.

O. 29, r. 11

11. Consents

A consent may be made or proved in such manner as the Court may approve.

O. 29, r. 12

12. Filing notices

(1) In every case where any party is obliged to serve, or cause to be served, any notice on another party or person, he shall also file a copy of such notice in Court, unless the notice, document, or proceeding to be served, or a copy thereof, is already so filed.

(2) Service of any document may be proved by affidavit unless the Court shall otherwise order.

O. 29, r. 13

13. Personal appearance

Save as expressly provided by any law, the Court may for sufficient reason order the personal appearance of any party to any proceedings at any time unless such party is outside Malawi, and wilful failure to comply with such order shall be a contempt of Court, and, notwithstanding the appearance of any legal practitioner or other agent for such party, the Court may proceed as if he had not appeared in the proceedings. An order for personal appearance shall be personally served.

O. 29, r. 14

14. Defendant precluded from defending

If in any action it is ordered that a defendant be precluded from defending—

- (a) his defence, if any, shall be deemed to have been struck out;
- (b) the plaintiff at the trial may prove his case and obtain judgment in like manner as if the defendant had not appeared; and
- (c) for the purpose of any appeal or further proceedings the judgment shall be deemed to have been given inter partes.

O. 29, r. 15

15. Service by other Court

Any process or document required to be served may be served by any other Court of co-ordinate jurisdiction on request by the first named Court.

O. 29, r. 16

16. Notice to admit fact or documents

When proof of any relevant fact or document is likely to be difficult or expensive, the party on whom the burden of proof thereof lies may by written request require any opposite party to admit the same, for the purpose of specific proceedings only, and saving all just exceptions. Such admission may be made by letter. If the admission is not made, and the Court is of opinion that in the circumstances it was unreasonable not to make it, it may order such party to pay the costs of proving such fact or document.

O. 29, r. 17

17. Examination de bene esse

The Court may examine, or direct some fit and proper person to examine, any witness de bene esse at any place. Evidence so taken may be used at the trial.

O. 29, r. 18

18. Inherent powers

Nothing in these Orders and Rules shall be deemed to limit or affect the inherent power of the Court to make such orders as may be necessary to prevent abuse of the process of the Court.

ORDER XXX

COSTS, ALLOWANCES AND COURT FEES

O. 30, r. 1

1. Costs discretionary

Subject to these Orders and Rules, costs of all proceedings shall be in the discretion of the Court. The Court may award costs of proceedings filed in that Court although it has no jurisdiction to determine such proceedings.

O. 30, r. 2

2. Assessment Second Schedule

Costs shall not be taxed but shall be assessed in accordance with the scale and rules in the Second Schedule by the Court at the trial or hearing, on settling the terms of the judgment or order, and shall be added to or set off against any sum payable thereunder. Costs may be made a charge on the subject-matter of the proceedings.

O. 30, r. 3

3. Security for costs

A plaintiff who is out of Malawi, or who, being a married woman, is not liable as if she were a feme sole, may be ordered to give security for costs, and in default of such security the action may be dismissed. This Rule applies also to a counter-claimant. Where security for costs is so ordered, it may be given to the party or to the Court at the option of the person furnishing the same.

O. 30, r. 4

4. Special interpreters

The Court may employ and pay any necessary special interpreter and may in its discretion order his fee to be paid by the party calling the witness for whom such special interpreter shall have been required. A fee so paid shall be costs in the cause.

O. 30, r. 5

5. Plans, etc.

The Court may assess and allow as costs the reasonable cost of any plan, diagram, chart, photograph or model.

O. 30, r. 6

6. Witnesses

A person necessarily attending Court as a witness of fact (including a party giving evidence) shall be allowed, unless the Court otherwise orders, the appropriate sum as set out in Part III of the Second Schedule.

O. 30, r. 7

7. Expert witnesses

(1) A person necessarily attending Court as an expert witness may be allowed such fee for qualifying to give evidence and for giving evidence as the Court may direct, but not exceeding except for special reasons £5 for qualifying and £5 for each day of attendance in Court.

(2) For the purposes of this and the preceding rule necessity of attendance shall be determined in accordance with the probable normal course of the hearing. Attendance may be necessary although the witness is not in fact called and although no subpoena has been issued to him.

O. 30, r. 8

8. Subsistence and travelling

A party or witness may be allowed reasonable subsistence and travelling expenses in respect of his attendance at the trial or hearing.

O. 30, r. 9

9. Apportionment

In case of attendance for purposes of two or more distinct proceedings, allowances under this Order may be apportioned.

O. 30, r. 10

10. Seafaring men

A special allowance may be made by the Court to a seafaring man detained on shore.

O. 30, r. 11

11. Court fees

The fees and percentages set out in the Third Schedule and no others shall be taken and paid in respect of all causes, matters and proceedings in Subordinate Courts.

O. 30, r. 12

12. Folio

A folio shall comprise 72 words and every figure shall be counted as one word.

O. 30, r. 13

13. Proceedings by Court

No fees shall be chargeable in respect of any proceedings issued or taken at the instance of the Court.

O. 30, r. 14

14. Exemption of Government from payment of fees

No fees shall be chargeable to or payable by the Government in respect of proceedings instituted by or against the Government; but a judgment in favour of the Government for costs shall include the amount of any fees which would have been payable if the proceedings had been instituted by or against a private person.

ORDER XXXI

CONTEMPT OF COURT

O. 31, r. 1

1. Notice to shew cause

(1) If a contempt is committed in face of the Court, it shall not be necessary to serve notice to shew cause, but the Court shall ensure that the person alleged to be in contempt understands the nature of the offence alleged against him and has the opportunity to be heard in his own defence, and shall make a proper record of the proceedings.

(2) In all other cases of contempt of Court, notice to shew cause why he should not be committed to the civil prison or fined shall be served personally.

O. 31, r. 2

2. Execution

An order imposing a fine may be enforced by order of execution or by commitment, but execution shall ordinarily issue in the first place.

O. 31, r. 3

3. Vacation of order

An order made by way of punishment for contempt of Court may be suspended, vacated or varied by the Court for sufficient reason, and in particular, but without prejudice to the generality of the foregoing, if the person guilty of contempt makes proper submission and apology or otherwise purges his contempt.

O. 31, r. 4

4. Contempt by corporation

If a corporation is guilty of contempt of Court, the Court may treat as guilty thereof, and punish accordingly, any officer of the corporation who caused or wilfully permitted or contributed to the contempt of Court.

O. 31, r. 5

5. Proceedings without authority

Any person doing any act or taking any proceeding in the name or on behalf of another person, not being, and knowing himself not to be, lawfully authorized thereunto, shall be guilty of contempt of Court.

ORDER XXXII

O. 32, r. 1

1. Deleted by G.N. 84/1969

[Deleted by G.N. 84/1969.]

ORDER XXXIII

APPEALS TO THE HIGH COURT

O. 33, r. 1

1. Notice of appeal

(1) Appeals to the High Court shall be brought by giving notice of appeal in Form 26.

(2) The appellant may appeal from the whole or any part of a judgment, and the Notice of Appeal shall state whether the whole or part only, and what part, of the judgment is complained of.

(3) The Notice of Appeal shall be instituted and filed in the proceedings in which the judgment appealed from was pronounced, and shall be filed within fourteen days from the day on which such judgment was pronounced. At the same time the appellant shall pay the prescribed fee for such Notice.

(4) The Notice of Appeal shall be served by the appellant on all parties directly affected by the appeal or their legal practitioners respectively. It shall not be necessary to serve parties not so affected.

O. 33, r. 2

2. Copies of record of hearing

(1) When the appellant has complied with rule 1 the Court appealed from shall prepare the requisite number of copies of the record comprising the pleadings, the notes of evidence, the judgment appealed from, the documentary exhibits and any other relevant documents.

(2) As soon as the copies of the record are ready, the Court appealed from shall serve the appellant with a notice in Form 27.

(3) Upon request by the appellant and upon payment by the appellant of the cost of preparing the record the Court shall supply the appellant with one copy thereof.

(4) Within fourteen days from the service upon him of the notice referred to in subrule (2) the appellant shall prepare a Memorandum in writing setting forth the grounds of appeal, and shall forward to the Court appealed from the number of copies of the Memorandum called for in the notice.

O. 33, r. 3

3. Record of Appeal

On receipt of the copies of the Memorandum of Appeal the Court appealed from shall prepare the Record of Appeal which shall consist of—

- (a) the documents referred to in rule 2 (1); and
- (b) the Memorandum of Appeal,

and shall forward the appropriate number of copies of the Record of Appeal to the Registrar of the High Court.

O. 33, r. 4

4. Execution of judgment on appeal

When either party has extracted the order of the High Court on any appeal and has produced such order to the Subordinate Court appealed from such Subordinate Court shall execute the order in accordance with section 24 of the Act and these Orders and Rules.

o. ii, r. 1 (2)

FIRST SCHEDULE

o. iii, r. 3

FORM No. 1

General Heading and Title

Resident Magistrate's(1) As may be applicable.(1) In the.....Court at(2) Name of place.(2) Grade Subordinate(1) As may be applicable.(1)(3) Nature of proceedings (e.g., Action, Civil

Application, etc.).(3)..... No.(4) Complete in pending proceedings: otherwise leave blank, for completion by the Court.(4) of 19(4) Complete in pending proceedings: otherwise leave blank, for completion by the Court.(4)Between

Plaintiff(1) As may be applicable.(1)(5) Name. If under disability, give particulars of representation (e.g. A.B., an infant, by C.D., his next friend).(5)Applicant

and

Defendant(1) As may be applicable.(1)(6) Name. If under disability, and representation has been ordered, give particulars (e.g. A.B., an infant, by C.D., his guardian ad litem).

If the proceedings are not inter partes, omit "Between and" and head "In the matte of" etc.

Every document filed in Court and every notice served in any proceedings must bear a heading and title in this form with such variations only as the Court may permit.

Every document filed in Court, except a change or discharge of legal practitioner and every notice served in any proceedings must contain the particulars referred to in Order III, rule 3 (2) and the address for service (e.g. "This affidavit is filed by A.B., legal practitioner for the plaintiff, whose address for service is").

Every notice to be served on another party or person must be addressed to the person who is to be served, or his legal practitioner.(6)Respondent

FORM No. 2

o. iv, r. 1

SUMMONS

(Heading)

To (1) Name.(1) the above-named defendant, a (2) Description(2) residing (or having his place of business or employed) at (3) Full address.(3) (4) If there are more defendants than one, each copy of the summons to be served must show to which defendant it is addressed.(4).

TAKE NOTICE THAT

1. UNLESS within eight days after the personal service of this summons on you, inclusive of the day of service, you return to the Resident Magistrate at the affidavit attached hereto, made and sworn by yourself or your legal practitioner stating that you intend to defend this action and have a good defence thereto and (a) either indicating clearly the grounds of your defence; or (b) stating that you intend to file a defence within seven days; and

2. UNLESS you have set out the grounds of your defence in the said affidavit, or have within seven days after filing the said affidavit caused to be served on the plaintiff a defence in the prescribed form, you will not afterwards be allowed to make any defence to the claim which the plaintiff makes on you, the particulars of which are endorsed on the back of this summons, but the plaintiff will be entitled, without giving any proof in support of such claim, to proceed to judgment and execution against you.

If you return the affidavit to the Resident Magistrate at and file and cause to be served a defence as aforesaid within the times specified above, the Resident Magistrate will send you by post notice of the day upon which the case will be tried; and you must then appear either in person or by your legal practitioner before the above-named Court on the day and at the time specified in such notice and in default of such appearance judgment may be given against you.

£ s. d. Amount of claim court fees on issue of summons Plaintiff's legal practitioners costs If you pay the debt and costs as stated in the margin to the Court before the expiration of eight days from the date of service of this summons inclusive of the day of such service and without returning the affidavit of defence you will avoid further costs. If you return the affidavit and then fail to file a defence or fail to appear the costs payable by you will be increased.....TOTAL.....

Dated this day of 19

.....

Resident Magistrate

L . S

(Endorsement on back of above)

STATEMENT OF CLAIM

(in numbered paragraphs)

Dated this day of 19

.....

Plaintiff

Legal Practitioner for the Plaintiff

AFFIDAVIT OF DEFENCE

(Heading)

I, of (or Legal Practitioner for) the above-named defendant make oath and say:

1. I intend to defend this action and have a good defence to the plaintiff's claim.

2. The grounds of my defence are as follows:—

or

3. A statement of defence is necessary and I intend to file such defence within seven days from the filing of this affidavit.

Sworn at

..... District this

day of

19

Before me.....

.....

Name and designation of

Officer administering oath

FORM No. 3

o. vii, r. 2

MEMORANDUM OF CHANGE OF LEGAL PRACTITIONER

(Heading)

To the above-named

The above-named has appointed Mr. to act on his behalf in these proceedings in place of Mr. who previously so acted. Address for service is now

Dated this day of, 19

.....

Signature of retiring legal practitioner.

.....

Signature of new legal practitioner

FORM No. 4

o. vii, r. 3

MEMORANDUM OF DISCHARGE OF LEGAL PRACTITIONER

(Heading)

To the above-named.

The above-named, who has heretofore employed Mr as his legal practitioner in these proceedings, has ceased to employ him and is not now represented by a legal practitioner. His address for service is

Dated this day of, 19,

.....

Signature of retiring legal practitioner.

.....

Signature of party.

FORM No. 5

o. x, r. 3 (3)

DEFENCE

(Heading)

Defence (1) If there are more Defendants than one, give particulars (e.g. Defence of the first-named Defendant).(1)

1. The defendant admits(1) If there are more Defendants than one, give particulars (e.g. Defence of the first-named Defendant).(1)

2. The defendant denies(2) The Defendant should first admit or deny specifically every material allegation of fact in the statement of claim.(2)

3. The defendant will contend.....(3) The Defendant should then set out any other matters whereon he relies.(3)

etc

Dated this day of 19,

.....(4) Signature of defendant or his legal practitioner.(4)

Defendant

Legal practitioner for the Defendant

FORM No. 6

o. xii, r. 1

APPLICATION

(Heading)

To

TAKE NOTICE that the above-named will apply to the Court at o'clock in the noon on the day of 19, for an order that (1) The nature of the order applied for must be stated with precision. Different matters arising in the same proceedings may be dealt with in the same application.(1) on the grounds appearing in the following affidavit (2) If necessary for special reasons, additional affidavits may be used. If this is done, reference to all such affidavits must be made here.(2)

..... (3) Signature of applicant or his legal practitioner.(3)

I, (4) Name of deponent(4) make oath and say: affirmation

1. (5) For general directions as to completion of affidavits see Order XVIII and Form 10 and notes thereto.(5)

2.

(Jurat. See Forms 10, 11, 12 and 13)

FORM No. 7

o. xii, r. 2

APPLICATION MADE ORALLY

(Heading)

Application by for an order that

made on the day of, 19

Directions as to service

Other parties appearing

Evidence taken orally ofby affidavit

Order made

Dated this day of, 19

.....

Resident Magistrate

FORM No. 8

o. xvii, r. 2 (1)

SUBPOENA TO PRODUCE DOCUMENTS ONLY

(Heading)

To

of

.....

You are hereby commanded to produce before, or send to the above-named Court at or before o'clock in the noon on the day of, 19, the following document(s) namely:—

.....

Wilful failure to comply with this order may be treated as a contempt of Court.

Dated this day of, 19

L. S.

.....

Resident Magistrate

FORM No. 9

o. xvii, r. 2 (2)

SUBPOENA TO GIVE EVIDENCE, ETC.

(Heading)

To

of

.....

You are hereby commanded personally to attend before the above-named Court at o'clock in the noon on the day of, 19, to give evidence on behalf of the, and there to remain during the trial of the above-named proceedings or until you have the leave of the Court to depart.

(1) Omit, if no documents are to be brought. If documents are to be brought, the subpoena can only be addressed to one person.(1) And also to bring with you into Court the following document(s), namely:

.....

Wilful failure to comply with this order may be treated as a contempt of Court.

Dated the day of, 19

L. S.

.....

Resident Magistrate

FORM No. 10

o. xviii, r. 3

AFFIDAVIT

(Heading)

I(1) Full names.(1) make oath and say: affirmation

1. I am a(2) Description of deponent.(2) and reside at(3) Address of deponent.(3)

I am of the full age of 21 years or over(4) Age must be stated, if under 21.(4) My age is years

2. (Set out the facts deposed to) Sworn at

Signature, mark or thumb-print

of deponent. Affirmed this day of, 19(5) See also Forms 11, 12 and 13.(5)

Before me,

.....

Name and designation of officer administering oath

FORM No. 11

o. xviii, r. 3

JURAT—ILLITERATE, ENGLISH-SPEAKING

Swornat this day of, 19,Affirmed

I, having first truly, distinctly and audibly read over the contents of the above affidavit (add, if exhibits are referred to in the affidavit, “and explained the nature and effect of the exhibits therein referred to”) to the said deponent who seemed perfectly to understand the same.

Before me,

.....

Name and designation of Officer

administering oath

FORM No. 12

o. xviii, r. 3

JURAT—INTERPRETED BY COURT INTERPRETER

Swornat this day of, 19,Affirmed

through the interpretation of a sworn interpreter of the Court, who has subscribed his name hereto.

.....

Court Interpreter

Before me,

.....

Name and designation of Officer

administering oath

FORM No. 13

o. xviii, r. 3

JURAT—INTERPRETED BY SPECIAL INTERPRETER

Swornat this day of, 19,Affirmed

through the interpretation of who had first been sworn affirmed that he had truly, distinctly and audibly translated the contents of this affidavit (and of the several exhibits therein referred to) to the deponent and that he would truly and faithfully interpret the oath affirmation

about to be administered to the said deponent, and who has subscribed his name hereto.

.....

Special Interpreter

Before me,

Name and designation of Officer

administering oath

FORM No. 14

o. xviii, r. 5

MARK ON EXHIBIT

This is the exhibit marked “..... ” referred to in the affidavit of sworn before me affirmed this day of, 19

.....

Initials of Officer administering oath

FORM No. 15

o. xx, r. 6

NOTICE ENDORSED ON JUDGMENT

To

TAKE NOTICE that, unless you comply with the requirements of the order above written within the time thereby limited, or within four days after the service of this notice on you, whichever be the later, you will be guilty of contempt of Court and will be liable to be committed to prison.

Dated this day of, 19

.....

Resident Magistrate

FORM No. 16

o. xxi, r. 4

WARRANT OF EXECUTION

(Heading)

To: The Sheriff of Malawi.

Whereas in the above case in this Court the said on the day of, last by judgment of the Court recovered against the said the sum of £ together with the sum of £..... for costs.

This is therefore to require you that of the goods and chattels of the said in this District you cause to be levied by distress and sale of the goods and chattels of the said wherever the same may be found within the District of this Court the sum of £..... together with interest thereon at the rate of £..... per annum from the day of 19, and £ costs of execution and your charges about the same and pay to the said the sum aforesaid; and to certify to the Court what you have done by virtue hereof, for which this shall be your warrant.

Given under my hand this day of, 19

L. S.

.....

Resident Magistrate

FORM No. 17

o. xxii, r. 2 (1)

JUDGMENT DEBTOR SUMMONS

(Heading)

To(1) A judgment debtor summons must always be addressed to one individual only. If the judgment is against a firm, any partner bound as such by the judgment may be summoned to be examined, both as regards the firm's affairs and his own. If the judgment is against a corporation, one of its officers may be examined concerning the corporation's affairs.(1)

of

You are hereby summoned to appear before the Court at o'clock of the noon on the day of 19, to be examined respecting your (2) See note(1) above. This part of the form may be varied in the case of a firm or corporation.(2) ability to satisfy the judgment recovered against you herein on the day of, 19

TAKE NOTICE that in default of such appearance a warrant for your arrest may be issued.

Dated this day of, 19

L. S.

.....

Resident Magistrate

FORM No. 18

o. xxii, r. 2 (6)

NOTICE TO DEBTOR

(Heading)

TAKE NOTICE that will at o'clock of the noon on the day of, 19, apply to the Court for an order that you be committed to prison for having wilfully neglected to comply with the order of Court made herein the day of, 19, requiring you to

AND FURTHER TAKE NOTICE that you are hereby required to appear at the time stated to show cause why an order of commitment should not be made, and that in default of such appearance a warrant for your arrest may be issued.

Dated this day of, 19

L. S.

.....

Resident Magistrate

FORM No. 19

o. xxiii, r. 1

ORDER FOR ATTACHMENT BEFORE JUDGMENT

(Heading)

Upon the application of and upon reading the affidavit of filed herein the day of, 19, (or upon hearing the evidence of).

It is ordered that the Sheriff do forthwith seize moveable property which shall be identified by or on behalf of as belonging to to the value of £ as a pledge or surety to answer the just claim of amounting to £..... and costs estimated at £ until the trial of this action and satisfaction of any judgment that may be given against herein.

Dated this day of, 19

L. S.

.....

Resident Magistrate

FORM No. 20

o. xxiii, r. 3

WARRANT OF ARREST BEFORE JUDGMENT

(Heading)

To all police officers of the District Malawi

WHEREAS upon the application of and upon reading the affidavit of filed herein the day of, 19, (or upon hearing the evidence of) it appears to the Court that (1) State particulars of the person to be arrested and of the acts or omissions alleged against him by reason of which he is found liable to arrest before judgment.(1)

.....

.....

You are hereby ordered to arrest the said and to bring him forthwith before the Court and if the Court is not sitting to deliver him to the officer-in-charge of the Civil Prison there to be kept until the next sitting of the Court in order that he may show cause why he should not furnish security in the sum of £ for his personal appearance before the Court until the trial of this action and satisfaction of any judgment that may be given against him herein:

Provided always that the defendant shall not be arrested if he pays to you the said sum of £ to be deposited by you in Court to abide the trial of this action or the further order of the Court.

Dated the day of, 19

L. S.

.....

Resident Magistrate

FORM No. 21

o. xxiii, r. 3

ORDER FOR COMMITMENT BEFORE JUDGMENT

(Heading)

WHEREAS upon the application of it was ordered that do show cause why he should not furnish security in the sum of £ and the said has failed to show such cause or to furnish such security.

It is ordered that the said be detained in the Civil Prison for the term of weeks from the date of his arrest, namely, the day of, 19, unless he sooner gives security to the satisfaction of the Court in the sum of £ for the purposes hereinbefore set out.

Dated the day of, 19

L. S.

.....

Resident Magistrate

FORM No. 21A

G.N. 84/1969

WARRANT OF ARREST AFTER JUDGMENT

In the Magistrate's Court at

Civil Cause No. of 19

Between

..... Plaintiff

versus

..... Defendant

To : All Police Officers

WHEREAS

it appears to the Court that

a judgment debtor of

has failed to answer a summons to appear in Court.

You are hereby ordered to arrest the said judgment debtor and to bring him forthwith before this Court and if the Court is not sitting to deliver him to the Officer-in-Charge of the Civil Prison there to be kept until the next sitting of the Court:

Provided always that the judgment debtor shall not be arrested if he pays to you the sum of £ to be deposited in Court.

Dated the day of 19

(Seal)

.....

Magistrate

FORM No. 22

o. xxiv, r. 3

ORDER OF RELEASE

(Heading)

WHEREAS by virtue of an order of this Court made herein the day of, 19, is detained in the Civil Prison at

It is ordered that the said be forthwith discharged from custody.

Dated the day of, 19

L. S.

.....

Resident Magistrate

FORM No. 23

o. xxviii, r. 5

WARRANT FOR EXECUTION AGAINST EXECUTOR

(Heading)

To: The Sheriff of Malawi.

WHEREAS in the above case in this Court the said A.B. on the day of last by judgment of the Court recovered against the said C.D. as Executor of the Will (or Administrator of the Estate) of E.F., deceased, the sum of £..... together with the sum of £ for costs, AND WHEREAS by the said judgment it was provided that as regards the sum of £ the said judgment should, if not satisfied within the assets of the deceased, be satisfied by the Executor personally, Now this is to require you to execute the said judgment—

(1) by levying the amounts due thereunder by distress and sale of the property of E.F., deceased, in the hands of C.D. as Executor of the Will (or Administrator of the Estate) of the said deceased to be administered;

(2) and if the said C.D. has not so much in his hands to be administered then as regards the said sum of £ (being so much of the amount of the judgment as was ordered to be levied upon the property of the said C.D.) by levying distress and sale of the property of the said C.D. wherever the same may be found within the District of this Court.

TOGETHER with interest thereon at the rate of £ per annum from the day of, 19, and £ costs of execution and your charges about the same and pay to the said A.B. the sum aforesaid; and to certify to the Court what you have done by virtue hereof, for which this shall be your warrant.

GIVEN under my Hand this day of 19

L. S.

.....,

Resident Magistrate

FORM No. 24

o. xxxii, r. 1

APPLICATION FOR LEAVE TO SUE AS A POOR PERSON

(Heading)

Date of application: this day of, 19

I, A.B. make oath and say affirmation

1. I reside at and am a (state occupation).
2. I have a just claim against C.D. of for (here state concisely the claim and cause of action and all the material facts of the case).
3. I desire to bring an action against the said C.D. but am unable to pay the Court fees therefor because (state the reason why applicant is unable to pay the Court fees).
4. I apply for leave to sue the said C.D., as a poor person.

Sworn at Affirmed Signed A.B. this day of 19

Before me,

.....

Resident Magistrate

FORM No. 25

o. xxxii, r. 1

APPLICATION FOR LEAVE TO DEFEND AS A POOR PERSON

(Heading)

Date of application: this day of, 19

I, C.D. make oath and say—affirmation

1. I am a defendant in this action and reside at and am a (state occupation).
2. (a) I have a good defence to this action on the following grounds (state concisely the grounds of defence).

(b) I have a just counterclaim against the plaintiff (here state concisely the counterclaim and all material facts relating thereto).
3. I am unable to pay the Court fees for my defence or counterclaim because (state the reason why applicant is unable to pay the Court fees).
4. I apply for leave to defend (and bring a counterclaim in) this action as a poor person.

SwornatAffirmedSigned C.D.this day of19

.....

Resident Magistrate

FORM No. 26

o. xxxiii, r. 1

NOTICE OF APPEAL

(Heading)

TAKE NOTICE that (1) Insert name of appellant.(1) being dissatisfied with the judgment of the Court at given on the day of, 19, appeals to

the High Court againstthe whole of the said judgment/(2) As may be applicable.(2)such part of the said judgment as decides that

(set out details).

Dated this day of, 19

.....

Appellant

Legal Practitioner for the Appellant

To: The Court at and to

..... (3) Insert name and address of respondent or respondents.(3)

FORM No. 27

o.xxxiii, r.2

NOTICE THAT RECORD IS READY

(Heading)

TAKE NOTICE that the record in the above proceedings is ready, and that the cost of preparing such record is £ s. d. (1) Insert the exact amount.(1)

The number of copies required of the Memorandum of Appeal is (2) Insert number required according to number of parties.(2)

.....

Resident Magistrate

To (3) Insert name and address of appellant.(3)

.....

FORM No. 28

o.x, r.4

JUDGMENT IN DEFAULT OF AFFIDAVIT OF DEFENCE

(Heading)

The defendant not having filed an affidavit of intention to defend herein (or not having filed a defence herein).

It is this day adjudged that the plaintiff recover against the said defendant £ and £ costs.

Dated this day of 19

L. S.

.....

Resident Magistrate

FORM No. 29

WARRANT OF ARREST AFTER JUDGMENT

(Heading)

To all Police Officers of Malawi.

WHEREAS upon the application of

it appears to the Court that

a judgment debtor of

has failed to answer a summons to appear in Court.

You are hereby ordered to arrest the said Judgment Debtor and to bring him forthwith before the Court and if the Court is not sitting to deliver him to the Officer-in-Charge of the Civil Prison there to be kept until the next sitting of the Court:

Provided always that the Judgment Debtor shall not be arrested if he pays to you the sum of £ to be deposited by you in Court to abide the further order of the Court.

Dated the day of 19

.....

Resident Magistrate

(Seal)

The sum of shillings has been deposited in Court to cover the cost of arresting the judgment debtor. You are requested to endorse on the back of this Warrant the amount of time and money expended in bringing the debtor before this Court.

FORM No. 30 G.N. 84/1968

REPUBLIC OF MALAWI

In the Resident Magistrate's Court at

In the Grade

Cause No. of 19

Between

..... Plaintiff

and

..... Defendant

ORDER FOR COMMITMENT AFTER JUDGMENT

To the Sheriff and Officers in Charge of Prisons in Malawi.

WHEREAS THIS COURT on the day of ordered that the above-named defendant be committed to prison for days for wilfully failing to comply with a Court Order that he pay the sum of K

Now THESE PRESENTS command you the Sheriff of Malawi to arrest the defendant and to deliver him to the Officer-in-Charge of the nearest Civil Prison;

AND THESE PRESENTS command the Officer-in-Charge of the Prison to keep the defendant safely in prison for days or until ordered by this Court to release him:

Provided that the defendant shall not be arrested or if arrested or committed to Prison shall be released on payment of K to be forwarded to this court at the expense of the Debtor forthwith.

Dated at this day of 20

L. S.

.....

Resident Magistrate

FORM No. 31

ORDER MADE ON THE HEARING OF A JUDGMENT DEBTOR SUMMONS

(Heading)

WHEREAS on the day of 20 by judgment of the Court the Plaintiff recovered against the Defendant the sum of K (1) Including the costs on issue and hearing of this summons.(1) together with the sum of K for costs and subsequent costs in pursuance thereof have been incurred amounting to K and subsequent payments made by the Defendant amounting to K

AND WHEREAS upon the hearing this day of a judgment debtor summons it appears to the court that the Defendant has(*) Delete those alternatives which do not apply.*/does not have the means to satisfy the said judgment and costs forthwith.

It is therefore ordered that the Defendant pay the said sum of K forth with(*) Delete those alternatives which do not apply.*/within days after the date hereof(*) Delete those alternatives which do not apply.*/by instalments of K on the day of each calendar month after the date hereof(*) Delete those alternatives which do not apply.*/by the following instalments: the first of such instalments to be paid on the day of 20

(2) The date should be that on which the order is made in Court.(2) Dated this day of 20 at

L.S.

.....

Resident Magistrate

SECOND SCHEDULE

COSTS G.N. 5/1981, 44/1982, 11/1990, 43/1996

o.xxx, r. 2

PART I

LEGAL PRACTITIONERS' COSTS

Plaintiff's costs where the sum found due or where the value of the subject matter exceeds

or

Defendant's costs where the sum sued for or value of the subject matter of the judgment exceeds K50 but not K100 K100 but not K200 K200 but not K300 K300 but not K400 K400 but not K500 K500 but not K600 K600 but not K700 K700 but not K800 K800 but not K900 K900 but not K1,000 K1,000 but not K1,500 K1,500 but not K2,000 K2,000 but not K2,500 K2,500 but not K3,000 K3,000 but not K3,500 K3,500 but not K4,000 K4,000 but not K4,500 K4,500 but not K5,000 K5,000 but not K5,500 K5,500 but not K6,000 K6,000 but not K6,500 K6,500 but not K7,000 K7,000 but not K7,500 K7,500

(1) Plaintiff's costs in the above table include instructions, issue of process and, save as otherwise herein provided, every other proceeding down to the issue of execution.

(2) Defendant's costs include instructions, defence and, save as otherwise herein provided, every other proceeding down to the issue of execution.

(3) Where a defendant has stated in his Affidavit of Defence that he intends to file a defence and default is made in filing such defence within the time limited by Order X rule 3 (3), or where, having filed a defence, the defendant fails to appear at the hearing or appears at the hearing and agrees to judgment being given against him, the plaintiff shall be entitled to costs on the above scale increased by 50 per centum.

(4) Plaintiff's and Defendant's costs may be allowed at whatever stage the legal practitioner is retained so long as he is retained before the trial, or if there is no trial, before judgment is entered. Where judgment is not obtained by default and the hearing lasts more than one hour, an additional fee amounting to 20 per centum of the amount recovered in the case of plaintiff's costs and of the amount claimed in the case of the defendant's costs may be added to the above scale.

(5) Separate costs may be allowed in respect of claim or counter-claim.

(6) A refresher fee not exceeding three-quarters of the amount allowed by the above scale may be allowed when the hearing has occupied more than three hours without being concluded; such

refresher fee may be allowed in respect of each period of three hours or part thereof subsequent, to the first three hours.

(6A) In addition to the costs in the above table, the legal practitioner's fee for attending the hearing of any matter before a Magistrate in chambers, either before or during the trial, shall be allowed in an amount not exceeding K20 per day.

(7) In actions between landlord and tenant the above costs may, at the discretion of the Court, be assessed on twelve months's rent of the premises added to the amount of any money claimed for rent, mesne profits or damages.

(8) In addition to the costs in the above table, costs for issuing execution shall be allowed as follows—

KtWhere the amount for which the warrant issues does not exceed K1,000NilWhere the amount for which the warrant issues exceeds K1,000 but does not exceed K2,0002000Where the amount for which the warrant issues exceeds K2,000 but does not exceed K3,0003000Where the amount for which the warrant issues exceeds K3,000 but does not exceed K4,0004000Where the amount for which the warrant issues exceeds K4,000 but does not exceed K5,0005000Where the amount for which the warrant issues exceeds K5,0006000

(9) In addition to the costs in the above table and to the costs allowed in paragraph (8) above, costs for attending at the hearing of Judgment Debtor Summons or a Notice to Debtor issued under Order XXII shall be allowed as follows—

K tWhere the amount due from the Judgment Debtor exceeds K3,5001500In all other cases1000

In addition travelling expenses may be allowed at the rate of kilometrage allowance prescribed from time to time by the Government as being payable to civil servants for use of their personal vehicles for travel on duty.

(10) The above costs may be allowed to a legal practitioner who appears in person as plaintiff or defendant, or to a firm of legal practitioners who appear as plaintiffs or defendants by a member of their firm.

(11) In ex parte applications under section 20 of the Hire Purchase Act the costs shall be as in any other civil cause, except that where the amount claimed exceeds K 1,000 the cost shall be 4 per centum of the amount or K90 whichever shall be the greater.

(12) In cases where service of process is effected by a legal practitioner or by any person in the employment of such legal practitioner or by an agent of such legal practitioner the fees laid down in Item 22 of the Third Schedule shall be payable to the legal practitioner as costs in addition to the costs in the above table.

PART II

DISBURSEMENTS, ETC.

In addition to the above costs the Court may award to the successful party—

- (a) the sum actually expended by him as Court fees;
- (b) any other sum expressly authorized by these Orders and Rules.

PART III

ALLOWANCES TO WITNESSES G.N. 5/1981

(a) Professional persons, owners, directors and managers of a business and persons in receipt of a salary or income exceeding K30,000 per annumIn the discretion of the Court, not exceeding K100 per day (b) Persons whose salary or income exceeds K20,000 but does not exceed K30,000 per annumIn the discretion of the Court, not exceeding K75 per day (c) Other personsIn the discretion of the Court, not exceeding K50 per day (d) The above allowances are additional to any allowance payable under Order XXX.

In granting an allowance to a witness regard should be had to—

- (i) his salary or actual or estimated income or circumstances;
- (ii) the time during which he was absent from his ordinary occupation while obliged to attend Court to give evidence.

THIRD SCHEDULE G.N. 43/1996

FEES

Where the amount claimed or the value of the subject matter of the action exceeds K3,500Where the amount claimed or the value of the subject matter of the action exceeds K1,000 but does not exceed K3,500Where the amount claimed or the value of the subject matter of the action does not exceed K,1000ItemK tKtKt1. Statement of claim or counter-claim2000150012002. Summons to a defendant (for each defendant more than one)1000100010003. Summons to a witness (for each witness named)1000100010004. Notice of any kind (for each person to be notified)1000100010005. Taking an affidavit or declaration1000100010006. Marking an exhibit to an affidavit or declaration1000100010007. Filing an affidavit or declaration100010001000NOTE: No fee is payable under item 5, 6, or 7 in respect of an affidavit of service by any office of the Court.8. Any application not otherwise provided for1000100010009. Commission for any purpose (in addition to expenses of the commission)12001200100010. Memorandum of change or discharge of legal practitioner12001200100011. (a) Certified translation by an interpreter of the Court10 00 plus K2 per 100 words of the English version or any part thereof (b) Checking, correction, and certifying a

translation not made by an interpreter of the court 10 00 plus K2 per 100 words of the English version or any part thereof 12. Judgment or order 1200120010 0013. Filing or issuing any document not herein provided for, otherwise than a statement of defence 10001000100014. Certified copy of any document when prepared by the Court 10 00 plus K2 per 100 words 15. Photostating documents 10 00 per document 16. Certifying copy of document 10 00 per document 17. Application to set aside judgment Half the fee leviable on a statement of claim 18. Application for Judgment Debtor Summons, attachment before judgment, arrest or commitment 15001200100019. Warrant of Commitment or Arrest of Judgment Debtor in default of appearance 15001400140020. Bonds, for every person executing the same (in addition to any stamp fee payable) 10001000100021. Notice of Appeal (from the Courts indicated) 12001200100022. Service of any process or proceeding required to be served by the Court 15001400120023. Registration of any judgment under the Service of Process and Execution of Judgments Act, Cap. 4:04 12001200100024. For attendance of an interpreter (other than a Court interpreter) at any Court if required by a party in a suitor ordered by the Court Such sum as the Court may direct 25. Application for Warrant of Execution 15001200100026. For any search of a case record (per search) 300300300

RULES OF THE HIGH COURT

ARRANGEMENT OF RULES

RULE

ORDER I

APPEALS FROM SUBORDINATE COURTS

1. Service on respondent
2. Notice of hearing

ORDER II

ATTACHMENT OF DEBTS UNDER THE SUBORDINATE COURTS RULES

1. Application how made
2. Contents of affidavit
3. Procedure on hearing

ORDER III

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1. Summons for directions
2. Interlocutory proceedings
3. No affidavit to be used
4. Parties to apply for all directions desired
5. Subsequent applications
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7. Application to dismiss action
8. English Order XXX to cease to have effect
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1. Transfer from Subordinate Court

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2. Disbursements allowed
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1. Probate and administration

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1. Definitions
2. Judgment debtor summons
3. Arrest
4. Mode of application
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O. 1, r. 1

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1. Powers of Court
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4. Compensation
5. Release of property

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GENERAL PROVISIONS AS TO ARREST AND COMMITMENT

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2. Expenses of commitment
3. Discharge of orders for arrest or commitment
4. Discharge of orders in certain other cases
5. No further commitment for same sum
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7. Time
8. Armed Forces
9. Arrest by another Court
10. Duration of imprisonment
11. Effect of imprisonment

ORDER X

SERVICE BY COURT OFFICIAL

1. Proof of service

G.N. 94/1958

96/1960

141/1961

143/1963

76/1964(N)

4/1981

39/1985

45/1996

RULES OF THE HIGH COURT

under s. 67

Citation

The following Orders and Rules may be cited as the Rules of the High Court.

ORDER I

APPEALS FROM SUBORDINATE COURTS

O. 1, r. 1

1. Service on Respondent

On receipt of the copies of a Record of Appeal from a Subordinate Court the Registrar shall—

(a) give notice to the Appellant of the hearing fees payable in respect of the Appeal and demand payment thereof; and

(b) serve the Respondent or Respondents with the copy of the Record of Appeal.

O. 1, r. 2

2. Notice of hearing

On payment of the hearing fees the Registrar shall enter the appeal and fix a date for the hearing thereof and shall give notice to the parties of the date so fixed.

ORDER II

ATTACHMENT OF DEBTS UNDER THE SUBORDINATE COURTS RULES

O. 2, r. 1

1. Application how made

An application by a judgment creditor for attachment of debts under Order XXI rule 5 of the Subordinate Courts Rules may be made ex parte to a Judge in Chambers by affidavit without summons. Above p. 27

O. 2, r. 2

2. Contents of affidavit

The affidavit shall state in what Court the judgment has been recovered or the order made and that the judgment or order is still unsatisfied and to what amount, and that any other person is indebted to the judgment debtor and is within the jurisdiction of the High Court.

O. 2, r. 3

3. Procedure on hearing

On such application the High Court may proceed as though the application had been made under Order XLV of the Rules of the Supreme Court and as though the judgment of the Subordinate Court were a judgment of the High Court.

ORDER III

SUMMONS FOR DIRECTIONS G.N. 4/1981

O. 3, r. 1

1. Summons for directions

(1) Within seven days from the time when the pleadings shall be deemed to be closed, the plaintiff shall take out a summons for directions returnable in not less than seven days.

(2) Where under Order 14 or Order 86 of the Rules of the Supreme Court the plaintiff applies for judgment, the Judge or, as the case may be, the Registrar may deal with such application as if the plaintiff had been entitled to take out and had taken out a summons for directions.

(3) This Rule shall not apply to actions in which the plaintiff has applied for judgment under Order 14 of the Rules of the Supreme Court and directions have been given, or to any proceeding commenced by originating summons, but in any such action or proceeding a summons for directions may be taken out at the instance of any party thereto.

O. 3, r. 2

2. Interlocutory proceedings

(1) Upon the hearing of the summons, or at any later time before judgment, the Judge or, as the case may be, the Registrar shall have power to give any such directions as to proceedings to be taken in the action and as to the costs thereof as he thinks proper:

Provided that no order shall be made upon a summons for directions at the instance of any party to strike out the whole or any part of any pleadings but an application for any such order shall be made by separate summons.

(2) Without prejudice to the generality of the last preceding paragraph, and subject to the proviso thereto, the Judge or, as the case may be, the Registrar may—

(a) make such order as may be just with respect to any of the following matters, that is to say, discovery and inspection of documents, interrogatories, inspections of real or personal property, admissions of fact or of documents, and place of trial;

(b) subject to subrule (3), order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial on such conditions as the Judge or, as the case may be, the Registrar may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined before the Registrar or such other person as may be agreed upon between the parties;

(c) order that evidence of any particular fact or facts, to be specified in the order, shall be given at that trial by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the Judge or, as the case may be, the Registrar may direct;

(d) order that no more than a specified number of expert witnesses may be called;

(e) make such order as may be just with respect to pleadings and particulars.

(3) Where it appears to the Judge or, as the case may be, the Registrar that any party reasonably desires production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit, but the expenses of such witness at the trial shall be specially reserved to the Judge at or after the trial.

O. 3, r. 3

3. No affidavit to be used

No affidavit shall be used on the hearing of the said summons except by special order of the Judge or, as the case may be, the Registrar.

O. 3, r. 4

4. Parties to apply for all directions desired

On the hearing of the summons any party to whom the summons is addressed shall, so far as practicable, apply for any order or directions as to any interlocutory matter or thing, in the action which he may desire.

O. 3, r. 5

5. Subsequent applications

Any application subsequent to the original summons and before judgment for any directions as to any interlocutory matter or thing shall be made under the summons by two clear days' notice to the other party stating the grounds of the application.

O. 3, r. 6

6. Costs of subsequent applications

Any application by any party which might have been made at the hearing of the original summons shall, if granted on any subsequent application, be granted at the costs of the party applying unless the Judge or, as the case may be, the Registrar shall be of opinion that the application could not properly have been made at the hearing of the original summons.

O. 3, r. 7

7. Application to dismiss action

In any action to which rule 1 applies, if the plaintiff does not within seven days from the time when the pleadings shall be deemed to be closed take out a summons for directions under this Order, the defendant shall be at liberty to apply for an order to dismiss the action and upon such application the Judge or, as the case may be, the Registrar may either dismiss the action on such terms as may be

just, or may deal with such application in all respects as if it were a summons for directions under this Order.

O. 3, r. 8

8. English Order XXX to cease to have effect

Order 25 of the Rules of the Supreme Court shall cease to have effect.

O. 3, r. 9

9. First Schedule

The summons for directions shall be in the form set out in the First Schedule.

ORDER IV

TRANSFER OF PROCEEDINGS

O. 4, r. 1

1. Transfer from Subordinate Court

Where an order has been made for the transfer of proceedings from a Subordinate Court to the High Court pursuant to section 11 (a) (vii) of the Act the following provisions shall apply—

(a) The Registrar shall give notice to all parties that the action is proceeding in the High Court.

(b) Within seven days of the service of such notice the plaintiff shall take out a summons for directions under Order III of these Rules.

(c) If the plaintiff fails to take out a summons within the time limited in paragraph (b) the defendant may apply for an order to dismiss the action and upon such application the Judge may either dismiss the action upon such terms as may be just or may deal with the application as if it were a summons for directions under Order III.

ORDER V

FIXED COSTS

O. 5, r. 1

1. Second Schedule

The costs set forth in the Second Schedule shall be allowed in respect of the several matters therein mentioned, in lieu of the costs laid down in the Rules of the Supreme Court.

O. 5, r. 2

2. Disbursements allowed

In addition to the said costs there shall be allowed any disbursements certified by the Registrar to have been properly incurred.

O. 5, r. 3

3. Taxation in lieu of fixed costs

The Judge hearing a summons under Order XIV of the Rules of the Supreme Court may award costs to be taxed in lieu of the fixed costs prescribed by rule 1.

ORDER VI

PROBATE AND ADMINISTRATION

O. 6, r. 1

1. Probate and administration

The Registrar shall have jurisdiction to exercise the powers and authorities of the High Court in the following matters relating to Probate and Administration—

- (a) all matters where the value of the estate does not exceed K10,000; and
- (b) all uncontested matters.

ORDER VII

JUDGMENT DEBTORS

O. 7, r. 1

1. Definitions

In this Order “judgment” means any judgment or Order under which any person is bound to pay to another any sum of money, and “judgment creditor” and “judgment debtor” have corresponding meanings.

O. 7, r. 2

2. Judgment debtor summons

(1) Subject to subrule (10) the judgment creditor, may whether execution has issued or not, summon any judgment debtor with a summons in the form set out in the Third Schedule to be examined as to his ability to pay the judgment debt and as to his property and as to any disposal thereof.

(2) If the judgment debtor is a corporation, any of its officers may be so ordered to appear or if it is a firm any person who is a partner may be likewise ordered to appear.

(3) The order shall be personally served not less than two clear days before the hearing.

(4) At the hearing when the judgment debtor has been examined either party may adduce any additional evidence and the Court may make such order for payment whether by instalments or in one sum by the judgment debtor as may be just, or may make no order.

(5) If a judgment debtor duly ordered to appear under this Rule does not appear, the Court may issue a warrant to bring the judgment debtor before the Court for examination.

(6) Any person wilfully failing or neglecting to comply with any order for payment made under this Rule may be committed to prison for any period not exceeding six months. Application to commit a judgment debtor to prison shall be by Motion, notice of which shall be personally served not less than two clear days before the hearing.

(7) A person imprisoned under subrule (6) shall be released forthwith upon payment of all sums due and payable at the date of payment under the Order for non-compliance with which he was imprisoned, together with such part of any deposits made under Order IX rules (1) and (2) as may actually have been expended.

(8) A person so imprisoned may at any time apply to be released and the Court may order his release on such terms as to re-arrest, security or otherwise, or unconditionally, as may be just.

(9) Any order made under this Rule may be suspended, discharged, or varied by the Court.

(10) In cases where execution may not issue without leave of the Court no summons under this rule shall issue without leave of the Court.

O. 7, r. 3

3. Arrest

(1) If the Court is satisfied that a judgment debtor, with a view to avoiding or delaying payment of the judgment debt or examination of his affairs, has absconded or left Malawi, or is about to do so, or has disposed of or removed or concealed or made away with or handed over to others any of his property, or is about to do so, or has wilfully evaded or attempted to evade service of the process of the Court upon him, he may be arrested on a warrant and examined under rule 2 of this Order and may be detained in prison pending order of the Court.

(2) The Court may in any such case make any order under rule 2 and may in addition—

(a) order the judgment debtor to furnish security for his appearance or for payment of the judgment debt, or

(b) order that he be committed to the civil prison.

(3) Security under this rule may be given by payment into Court or by bond with two sureties who may be required to testify, or in such other manner as the Court may permit. On furnishing security the judgment debtor shall, if in custody, be released.

O. 7, r. 4

4. Mode of application

Application for arrest of a judgment debtor under this rule shall be by Summons in Chambers supported by affidavit.

O. 7, r. 5

5. Costs

Costs shall be according to the scale set out in the Fourth Schedule.

ORDER VIII

ATTACHMENT AND ARREST BEFORE JUDGMENT

O. 8, r. 1

1. Powers of Court

(1) If the Court, after issue of a Writ, is satisfied that a plaintiff has a good cause of action and that the defendant, with intent to defeat or delay the claim of the plaintiff, has absconded or left Malawi, or is about to do so, or has disposed of or removed or concealed or made away with or handed over to others any of his property, or is about to do so, or has wilfully evaded or attempted to evade service of the process of the Court upon him, the Court may—

(a) order his arrest on a warrant and require him to furnish security, in the manner set out in Order VII rule 3 (2) for his appearance and, in default, commit him to prison, or

(b) order that attachment issue against the defendant's property, in all respects as if he were a judgment debtor, save and except that any property seized shall not be sold prior to judgment, unless subject to rapid decay or deterioration, or by leave of the Court.

(2) (a) If any property has been attached under subrule (1) (b), it shall not be necessary to seize it thereafter in execution, but it shall be deemed to have been seized in execution under a warrant of execution delivered to the Sheriff at 7.30 a.m. on the day after the judgment was given, and may be sold accordingly.

(b) For the purpose of security in any subsequent bankruptcy and of claims of judgment creditors inter se, the judgment creditor shall rank and have priority—

(i) if the property has been sold under subrule (1) at any time earlier than 7.30 a.m. on the day after judgment, as if the order of execution had been delivered to the Sheriff and the property seized and sold simultaneously at 7.30 a.m. on the day after judgment;

(ii) if the property is sold at any time after 7.30 a.m. on the day after judgment, as if the order for execution had been delivered to the Sheriff and the property had been seized at 7.30 a.m. on the day after judgment and the property had thereafter been sold at the actual time of sale.

(3) Any order made under this rule may be suspended, rescinded or varied in such manner and on such terms as may be just.

(4) A defendant committed to prison in default of furnishing security shall be released forthwith on furnishing the same at any time.

O. 8, r. 2

2. Mode of application

An application for an order under rule 1 shall be by Summons in Chambers supported by affidavit.

O. 8, r. 3

3. Costs

Costs of proceedings under this Order shall unless otherwise ordered, be added to the judgment debt.

O. 8, r. 4

4. Compensation

If any order has been made under this Order and it later appears that such order was improperly obtained, or that the action was brought without sufficient grounds, the Court may on application by the defendant award against the plaintiff such damages as may be just to compensate the defendant for injury to his property, credit or reputation. If the defendant obtains an order under this rule, he shall be debarred from bringing any action in respect of the same matter.

O. 8, r. 5

5. Release of property

Any property seized or attached under this Order shall be released upon the defendant paying into Court, or giving security for, the value thereof or the amount of the plaintiff's claim, whichever be the less.

ORDER IX

GENERAL PROVISIONS AS TO ARREST AND COMMITMENT

O. 9, r. 1

1. Expenses of arrest

Before any order for the arrest of any person is executed, the party at whose instance it issued shall deposit in Court a sum sufficient to defray the expenses of bringing him before the Court.

O. 9, r. 2

2. Expenses of commitment

Before any order of commitment is made the Court may direct that such commitment will be at the expense of the party, if any, at whose instance it is made, and in such event the order shall not be executed unless the party shall deposit with the appropriate officer a sum sufficient to provide for the subsistence of the person committed for the period of his imprisonment.

O. 9, r. 3

3. Discharge of orders for arrest or commitment

(1) Every order for arrest or order of commitment issued in accordance with Orders VII and VIII shall show on its face the sum due and payable, and on payment thereof together with such part of any deposits made under rule 1 or 2 as may actually have been expended, the order shall be deemed to be discharged and the party, if arrested or committed, shall forthwith be released.

(2) Payments on account of the sum due and payable shall be noted on the order by the Court or the officer in charge of the prison, as the case may be, and, if the order has not been served, it may be amended so as to give credit thereof.

(3) If payment in full is made to the Court while the party is in prison, the Court shall order his release. The Court shall inform the prison, authorities of any payment to account.

(4) If payment in full is made to the officer in charge of the prison, he shall release the prisoner and pay the money into Court.

O. 9, r. 4

4. Discharge of order in certain other cases

(1) An order of arrest or commitment issued under Order VII or VIII shall be deemed to be discharged—

(a) if it appears that the party has been adjudged bankrupt or that a receiving order has been made against him; or

(b) if the party at whose instance the order was made files in Court a request in writing that the party in question be released.

(2) Notice of such discharge shall forthwith be sent by the Court to the officer in charge of the prison, if the party is in prison.

O. 9, r. 5

5. No further commitment for same sum

A debtor shall not be liable to be imprisoned a second time for non-payment of a sum in respect of which an order of commitment has been made and in respect of which he has been imprisoned.

O. 9, r. 6

6. Notice to judgment creditor

The Court shall give notice of any arrest forthwith to the person at whose instance the arrest was ordered.

O. 9, r. 7

7. Time

An order for arrest or commitment may not be executed more than one year after the date thereof, unless renewed by the Court.

O. 9, r. 8

8. Armed forces

An order for the arrest of any member of the armed forces of Malawi or of the armed forces of any Government serving in Malawi may be delivered to the commanding officer or adjutant of his unit, who shall cause him to be arrested and delivered to the Court.

O. 9, r. 9

9. Arrest by another Court

The Court may request any subordinate court to effect any arrest ordered by the Court. Any person so arrested shall be brought before the High Court and shall be dealt with thereby unless payment is made or security given.

O. 9, r. 10

10. Duration of imprisonment

(1) Whenever imprisonment may be ordered under Order VII or Order VIII the term thereof shall not in any case be excessive.

(2) The imprisonment under Order VIII shall not in any case continue after judgment unless the Court shall otherwise order.

O. 9, r. 11

11. Effect of imprisonment

Except in cases where execution may not issue without leave of the Court, imprisonment shall not operate to prevent the issue of execution.

ORDER X

SERVICE BY COURT OFFICIAL

O. 10, r. 1

1. Proof of service

Service of any writ or other document issued in the High Court may be proved by the signature thereon of the officer of the Court, including the officer of a Traditional Court, who effected service and such signature shall be deemed to be that of a proper officer of the Court if the writ or other document also bears the seal or stamp of such Court. The person served shall sign the writ or document but refusal or inability so to sign shall not affect the validity of service. G.N. 263/1969

o. iii, r. 9

FIRST SCHEDULE

SUMMONS FOR DIRECTIONS G.N. 4/1981

Let all parties attend before the Judge/Registrar in Chambers at the High Court, Blantyre on day, the day of 20 on the application of the plaintiff for directions herein, as follows:

- (1) Place, mode and date of hearing.
- (2) Discovery and Inspection.
- (3) Here insert in numbered paragraphs any further directions sought. *

Dated the day of 20

.....

Registrar

This Summons was issued by

(Legal Practitioners for the Plaintiff above-named.)

To:

(Legal Practitioners for the Defendant above-named.)

o. v, r. 1

SECOND SCHEDULE

FOURTEEN DAY COSTS G.N. 4/1981, 45/1996

Kt (a) Where the amount claimed is less than K7,500 (b) Where the amount claimed is K7,500 or more (c) For each extra defendant

JUDGMENT IN DEFAULT OF APPEARANCE OR OF DEFENCE WHERE THE CLAIM IS FOR A DEBT OF LIQUIDATED AMOUNT ONLY OR FOR POSSESSION OF LAND (a) Where judgment is recovered for less than K7,500 (b) Where judgment is recovered for K7,500 or more (c) For each extra defendant against whom judgment is recovered (d) Possession of land— (i) judgment for possession of land and a liquidated sum of less than K7,500 (ii) judgment for possession of land and a liquidated sum of K7,500 or more (iii) for each extra service effected

JUDGMENT UNDER ORDER 14 OF THE RULES OF THE SUPREME COURT (a) Where judgment is recovered for less than K7,500 (b) Where judgment is recovered for K7,500 or more (c) No allowance for extra defendants unless specifically ordered by the Court. (d) Possession of land— (i) judgement for possession of land and a liquidated sum of less than K7,500 (ii) judgment for possession of land and a liquidated sum of K7,500 or more (iii) no allowance for extra defendants unless specifically ordered by the Court.

THIRD SCHEDULE

SUMMONS FOR EXAMINATION OF JUDGMENT DEBTOR

ORDER VII

(Heading)

To:

of

You are hereby summoned to appear before the Court sitting at at o'clock in the noon on the day of 20 to be orally examined as to whether any or what debts are owing to you and whether you have any or what other property or

means of satisfying the judgment obtained herein on the day of 20
and you are hereby required to produce before the Court any books or documents in your possession or
power relating to the matter at the time of the said examination.

Take notice that in default of such appearance a warrant for your arrest may be issued. Dated
this day of 20

.....

Registrar

NOTE—This form may be varied in the case of a firm or corporation to meet the circumstances
of the case.

FOURTH SCHEDULE G.N. 39/1985, 45/1996

| Item Number | Particulars | Amount |
|-------------|--|--|
| 1. | Attending Court on the hearing of a Judgment Debtor Summons issued under Order VII rule 2, whether or not the Judgment Debtor appears, including the drawing and issuing of a Judgment Debtor Summons and Court fees paid or payable in respect of the proceedings | 5000 |
| 2. | Attending Court on making an application for the committal of a Judgment Debtor under Order VII rule 2 (6), whether or not the Judgment Debtor appears, including the drawing and issuing of a Notice of Motion and Court fees paid or payable in respect of the proceedings | 5000 |
| 3. | Attending the Judge in Chambers on an application under Order VII rule 3 (1), whether or not the Judgment Debtor appears, including the drawing and issuing of the Summons, preparing and filing any Affidavit or Affidavits and Court fees and Commissioners for Oaths fees paid or payable in connexion with the proceedings | 7000 |
| 4. | Attending court or a Judge in Chambers on any adjourned hearing of any application made under Order VII | 3000 |
| 5. | Plaintiff or Defendant's Legal Practitioner's costs in making or defending an application under Order VIII rule 1, including the drawing and issuing of any Summons, the preparation and filing of any Affidavit or Affidavits and Court fees and Commissioners for Oaths fees paid or payable in respect of the proceedings and attending hearing on one occasion | 8000 |
| | and in addition for attending any adjourned hearing for each such attendance | 4000 |
| 6. | For any other proceeding or matter under Order VII or Order VIII not included in this Schedule | Such sum as the Judge in Chambers shall allow. |

LEGAL PRACTITIONERS REMUNERATION, TAXATION OF COSTS, AND ALLOWANCES TO WITNESSES RULES

under s. 67 These Rules were made under this section and section 92 of the Nyasaland (Constitution) Order in Council, 1961 (which is now revoked—subsidiary legislation made under it having been saved).*

G.N. 86/1962

6/1981

44/1996

1. Citation

These Rules may be cited as the Legal Practitioners Remuneration, Taxation of Costs, and Allowances to Witnesses Rules.

2. Remuneration of Legal Practitioners

The remuneration of a legal practitioner by his client—

(a) in all non-contentious matters (save where scale or minimum charges have been otherwise prescribed by the High Court) shall be according to the scale allowed respectively for those matters in England; and

(b) in bankruptcy matters shall be according to the scale allowed for those matters in England.

3. Taxation of Costs

(1) Save as otherwise provided in these Rules the costs to be allowed pursuant to section 30 of the Act shall be according to the scale in force for similar matters in England.

(2) Save as otherwise provided in these Rules the practice and procedure currently in force in the High Court in England shall be followed in all matters relating to the taxation of the costs of proceedings in the High Court.

(3) The Registrar of the High Court shall tax all bills of costs of proceedings in the High Court.

(4) Where a legal practitioner acts generally in an action and also appears as counsel therein he shall be allowed both a fee for instructions in respect of his work for acting generally in the action and also a brief fee for appearing as counsel therein.

4.—(1) On taxation of costs the Registrar shall, unless the Court otherwise orders, allow a party to include in his costs such allowances and fees for necessary witnesses as are in accordance with the scale set out below.

(2) The expression “necessary witness” in subrule (1) may include a person who attended court as a witness but who was not in fact called or to whom no subpoena was issued, but shall not include any witness if the Registrar considers that his evidence was not necessary. The necessity to procure the attendance of any person as a witness shall be determined in accordance with the probable normal course of the hearing.

(3) A party who is a necessary witness may include in his costs for taxation his own expenses and allowances as a witness.

(4) In case of attendance for the purposes of two or more distinct proceedings any allowances payable under this rule may be apportioned.

(5) The Court may, in any case, direct that the Registrar shall, on taxation, allow, in respect of any person detained in Malawi for the purpose of attending court as a witness, a special allowance greater than the maximum allowance provided in the Schedule.

SCHEDULE G.N. 6/1981, 44/1996

SCALE OF ALLOWANCES TO WITNESSES

(a) Professional persons, owners, directors and managers of a business and persons in receipt of a salary or income exceeding K 30,000 per annum Not exceeding K 100 per day. (b)

Persons whose salary or income exceeds K 20,000 but does not exceed K30,000 per annum Not exceeding K 75 per day. (c) Other personsNot exceeding K 50 per day. (d) In addition to the above-mentioned allowances the reasonable subsistence and travelling expenses of a witness in respect of his attendance at the trial or hearing may be allowed.

(e) In granting an allowance to a witness regard should be had to his salary or actual or estimated income, the time during which he was absent from his ordinary occupation while obliged to attend at court, and any other relevant circumstances. (f) An expert witness may, in addition, be allowed such fee for qualifying to give evidence as the Registrar or the Court may direct.

TRADITIONAL COURTS (APPEALS TO HIGH COURT) RULES

under s. 67

G.N 164/1963

42/1965

86/1969

263/1969

1. Citation and application

These Rules may be cited as the Traditional Courts (Appeals to High Court) Rules and shall apply to all appeals from Traditional Appeal Courts, Urban Traditional Courts and Grade A.1. Traditional Courts to the High Court. G.N. 86/1969

PART I

APPEALS IN CRIMINAL CASES

2. Petition of appeal

(1) Every appeal shall be made in the form of a petition in writing presented by the appellant or his legal practitioner and every such petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against.

(2) Where the appellant is represented by a legal practitioner the petition shall contain particulars of the matter of law or of fact in regard to which the Traditional Appeal Court or Traditional Court, as the case may be, is alleged to have erred. G.N. 86/1969

3. Appellant in prison

If the appellant is in prison he may present his petition of appeal and the copies accompanying the same to the officer in charge of the prison who shall thereupon forward such petition and copy of the judgment or order to the Registrar of the High Court.

4. Summary dismissal of appeal

(1) On receiving the petition and copy under rule 2, the High Court shall peruse the same, and if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:

Provided that—

(a) no appeal shall be dismissed unless the appellant (if not in custody) or his legal practitioner has had a reasonable opportunity of being heard in support of the same;

(b) no appeal, where the appellant is in custody, shall be dismissed unless the appellant's legal practitioner (if the Court has been notified that he has a legal practitioner) has had such opportunity.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case but shall not be bound to do so.

5. Preparation of record

If the High Court does not dismiss the appeal summarily it shall call upon the Traditional Appeal Court or Traditional Court as the case may be, to cause the record to be prepared and to forward three copies thereof to the Registrar of the High Court. G.N. 86/1969

6. Contents of record

(1) In the case of an appeal from a Traditional Appeal Court, the record of appeal shall contain legible typed copies of the following items arranged in the following order— G.N. 86/1969

(a) the record of the proceedings in the Traditional Court of first instance as submitted to the Traditional Appeal Court;

(b) the notes taken at the hearing of the appeal in the Traditional Appeal Court;

(c) the judgment of the Traditional Appeal Court.

(2) In the case of an appeal from an Urban Traditional Court or Grade A.1. Traditional Court, the record of appeal shall contain—

(a) a copy of the relevant page of the criminal complaints book;

(b) a copy of the record of the proceedings in such Traditional Court (which record shall include the judgment given and particulars of any sentence passed or order given) duly certified in writing by the chairman of the Traditional Court in question to be accurate and complete in all respects;

(c) a copy of any other document necessary for the decision of the appeal.

7. Notice of time and place of hearing

The Registrar of the High Court shall cause notice to be given to the appellant or his legal practitioner and to the respondent, of the time and place at which the appeal will be heard and shall furnish the respondent with a copy of the proceedings and the petition of appeal.

8. Order of the High Court

(1) When a case is decided on appeal by the High Court, it shall certify its judgment or order to the Traditional Appeal Court, or the Traditional Court, from which the appeal was brought. G.N. 86/1969

(2) The Traditional Appeal Court, or the Traditional Court, to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court and, if necessary, the record shall be amended in accordance therewith.

PART II

APPEALS IN CIVIL CASES

9. Notice of appeal

(1) Appeals to the High Court in civil matters shall be brought by giving notice of appeal in Form 1 in the First Schedule.

(2) The appellant may appeal from the whole or any part of the judgment, and the notice of appeal shall state whether the whole or part only, and what part, of the judgment is complained of.

(3) The notice of appeal shall be entitled and filed in the court in which the judgment appealed from was pronounced.

(4) The appellant shall pay the fees prescribed in the Second Schedule for such notice of appeal.

(5) The notice of appeal shall be served by the appellant on all parties directly affected by the appeal or their legal practitioners respectively:

Provided that upon payment of the prescribed fee by the appellant, the court in which the judgment appealed from was pronounced shall, if the appellant so requests, serve or cause to be served the notice of appeal on such parties or their legal practitioners.

10. Cost of record

The appellant shall, within such time as the Traditional Appeal Court directs, deposit a sum fixed to cover the estimated expense of making up and forwarding to the High Court the record of appeal.

11. Security for costs

The appellant shall, within such time as the Traditional Appeal Court directs, deposit such sum as shall be determined by such court or give security therefor by bond with one or more sureties for the due prosecution of the appeal and for the payment of any costs which may be ordered to be paid by the appellant.

12. Preparation of record

(1) When the appellant has complied with the foregoing rules the Traditional Appeal Court shall prepare the requisite number of copies of the record of appeal.

(2) The record of appeal shall contain legible typed copies of the following items arranged in this order—

(a) the record of proceedings in the Traditional Court as submitted to the Traditional Appeal Court;

(b) the notes taken at the hearing of the appeal in the Traditional Appeal Court;

(c) the judgment of the Traditional Appeal Court.

(3) As soon as the copies of the record of appeal are ready the Traditional Appeal Court shall serve the appellant with a notice in Form 2 in the First Schedule.

(4) Upon request by the appellant the court shall supply the appellant with one copy of the record of appeal.

(5) Within fourteen days from the service upon him of the notice referred to in subrule (3), the appellant shall prepare a memorandum in writing setting forth the grounds of appeal and shall forward to the Traditional Appeal Court the number of copies of the memorandum called for in the notice.

13. Record of appeal

On receipt of the copies of the memorandum of appeal, the Traditional Appeal Court shall forward to the High Court the record and memorandum of appeal.

14. Submission by party not appealing

At any time before the hearing of the appeal any party to the appeal may file a declaration in writing that he does not wish to be present in person or by a legal representative on the hearing of the appeal, together with two copies of such arguments as he desires to submit to the High Court, and serve a copy of such declaration and arguments upon every other party and thereupon the appeal shall be dealt with as if the party had appeared.

15. Non-appearance of appellant

(1) If the appellant fails to appear when his appeal is called on for hearing and has not taken action under rule 14, the appeal may be struck out or dismissed with or without costs.

(2) When an appeal has been struck out owing to the non-appearance of the appellant, the High Court may, if it thinks fit, on such terms as to costs or otherwise as it may deem just, direct the appeal to be re-entered for hearing.

16. Non-appearance of respondent

If the respondent fails to appear when the appeal is called on for hearing and has not taken action under rule 14, the High Court may proceed to hear the appeal ex parte.

17. Application to set aside ex parte judgment

(1) Where an appeal has been heard ex parte under rule 16 and any judgment has been given therein adverse to the respondent, he may apply to the High Court to set aside such judgment and to re-hear the appeal.

(2) No application to set aside and re-hear under this rule shall be made after the expiration of twenty-one days from the date of the judgment sought to be set aside:

Provided that a respondent who has failed within the period of twenty-one days to make application under this rule may nevertheless, at any time within a further period of three months thereafter, apply to the High Court on notice to the appellant to set aside such judgment, and the High Court, if satisfied that good and sufficient case has been shown for the application being made out of time, may grant the application and make such order in relation thereto or as to costs as it may deem fit in the circumstances.

(3) Any such application shall be by motion accompanied by an affidavit setting forth the reasons and grounds for the application and the High Court may thereupon in its discretion set aside the judgment and order that the appeal be re-heard at such time and upon such conditions as to costs or otherwise as it may think fit.

18. Matters not expressly provided for

Where no other provision is made by these Rules, the procedure and practice for the time being in force in the Court of Appeal in England shall apply insofar as it is not inconsistent with these Rules, and the forms in use therein may be used with such adaptations as are necessary.

PART III

MISCELLANEOUS

19. Waiver of non-compliance

Non-compliance with these Rules shall not prevent the prosecution of an appeal if the High Court considers that such non-compliance was not wilful and that it is in the interests of justice that non-compliance be waived.

FIRST SCHEDULE

FORM No. 1

NOTICE OF APPEAL r.9

(Appellant) v. (Respondent)

TAKE NOTICE that (1) Insert name of appellant.(1), being dissatisfied with the judgment of the Court at given on the day of, 19, appeals to the High Court against(2) As may be applicable.(2) such part of the said judgment as decides that (set out details)

Dated this day of, 19

.....

Appellant

Legal Practitioner for the Appellant

To: The Court at and to(3) Insert name and address of respondent or respondents.(3)

FORM No. 2

NOTICE THAT RECORD IS READYr. 12

(Appellant) v. (Respondent)

TAKE NOTICE that the record in the above proceedings is ready, and that the cost of preparing such record is K(1) Insert the exact amount.(1)

The number of copies required of the Memorandum of Appeal is(2) Insert number required according to number of parties.(2) .

.....

Clerk of the Court

To:(3) Insert name and address of appellant.(3)

SECOND SCHEDULE

FEES

1. Notice of appeal For these three items a single compendious fee of K3 will be charged 2. Service of any process or proceeding 3. Certified copy of the record of the proceedings of the Traditional Appeal Court 4. For each additional copy of the record of the proceedings of the Traditional Appeal Court K2

COURTS (HIGH COURT) (JURISDICTION, POWERS AND DUTIES OF DISTRICT REGISTRARS) RULES

under s. 67 (1)

G.N. 87/1985

1. Citation

These Rules may be cited as the Courts (High Court) (Jurisdiction, Powers and Duties of District Registrars) Rules.

2. Powers of a District Registrar

With respect to any cause or matter proceeding in a District Registry, the District Registrar shall, subject to any rules of court, exercise the same jurisdiction, powers and duties as are conferred on the Registrar under section 8 of the Act.

SUBORDINATE COURTS (SMALL CLAIMS PROCEDURE) RULES

under s. 67

G.N. 68/1998

PART I

PRELIMINARY

1. Citation

These Rules may be cited as the Subordinate Courts (Small Claims Procedure) Rules.

PART II

INTERPRETATION

2. Interpretation

In these Rules, unless the context otherwise requires—

“Court” means a Subordinate Court established under section 33 of the Courts Act;

“Judgment” includes an order;

“Judgment creditor” means a person entitled to the benefit of any judgment;

“Judgment debtor” means a person bound by any judgment;

“Small Claims” means any civil case in which the subject matter of the claim does not exceed K5,000.

Reference in these Rules to the words “he”, “him”, and “his” shall be construed to include the words “she”, “her” and “hers”, as the case may be.

PART III

COMMENCEMENT OF PROCEEDINGS

3. Application

These Rules shall apply to small claims.

4. Commencement of proceedings

(1) Every action relating to a small claim shall be commenced by Summons which shall be in Form 1.

(2) The Court shall examine the Summons and, if it appears to be in proper form, and if the plaintiff shall have paid the appropriate fees, (including, if applicable, fees for service thereof), shall assign a serial number thereto, date, seal and sign it.

(3) The fees payable on commencement of proceedings shall be as set out in the First Schedule.

PART IV

SERVICE

5. Service

Except as provided in subrules (3), (4) and (5), service of every Summons shall be personal and shall be effected by producing it for inspection and delivering a copy thereof to the person to be served and requiring him to sign the original copy.

(2) Service shall be effected by an officer of the Court or by a legal practitioner representing the party on whose behalf such service is to be effected.

(3) If the person to be served cannot be found after careful search, the Summons may be served by delivering a copy thereof to any adult person at his place of residence or to his employer.

(4) If the person to be served refuses to accept the Summons, a copy thereof may be left near him and his attention directed to it.

(5) Where service cannot be effected in the manner provided by subrule (3) or (4) the serving officer shall affix the duplicate of the Summons to some conspicuous part of the house in which the person to be served ordinarily resides and thereupon the Summons shall be deemed to have been duly served.

(6) Service of every Summons shall be effected at least seven clear days of the date of hearing, unless the Court otherwise orders.

(7) Service of every Summons may be effected at any place, on any week-day and at any time of the day. Service after 4.00 p.m. shall ordinarily be deemed to have been effected on the following work day.

(8) The person serving the Summons shall write on the back of the original copy retained by him the place, date and time when he served it and the name of the person upon whom it was served.

(9) A Summons shall not be served more than twelve months after being issued, unless by leave of the Court, which leave shall not be given unless reasonable efforts have been made to serve the Summons, or for other good reason.

PART V

TRIAL OR HEARING

6. Trial or hearing

(1) All proceedings shall be heard and determined in open Court unless the Court otherwise orders.

(2) A party to the proceedings may appear in person or by a legal practitioner.

(3) If, when the action is called neither party appears, the action may be dismissed.

(4) If the defendant does not appear, the Court may, on proof of due service, hear and determine the action in his absence.

(5) If the plaintiff does not appear, the claim may be dismissed and the Court may hear and determine any counter-claim.

(6) The Court may in its discretion in any case order an adjournment.

(7) Any judgment or order given or made in the absence of a party may, on his application and if good reason for such absence is shown, be set aside and the proceedings may be reheard upon such terms as to costs as the Court shall think fit and notice of such application shall be given to the opposite party.

(8) Any set-off or counter-claim shall be determined by the Court in the course of hearing but without prejudice to the power of the Court to make an order for a separate trial, or for the transfer of the case to be dealt with in accordance with the Subordinate Courts Rules. Cap. 3:02, sub leg. p. 28a

(9) A plaintiff or a defendant may relinquish any portion of his claim or counter-claim respectively in order to bring the claim or counter-claim, as the case may be, within the jurisdiction of small claims under these Rules.

(10) The presiding Magistrate shall, at the commencement of the proceedings, make an appeal to the parties to settle their dispute by conciliation. Should this fail, the Court shall proceed to hear the parties and their witnesses, if any.

(11) The Court shall conduct the trial in such manner as to do substantial justice between the parties.

7. Witnesses

(1) Any party who wishes to compel the attendance of any witness to give evidence at the trial, shall, in sufficient time for service to be effected, apply for a Summons to a Witness to be served on the witness. A Summons to Witness shall be in Form 2.

(2) Any person summoned to attend as a witness who, without lawful excuse, fails to attend as required by the Summons, or who, having attended, departs without having obtained the permission of the Court, or fails to attend after adjournment of the Court after being ordered to attend, shall be liable by order of the Court to a fine not exceeding K100.

(3) A fine imposed may be levied by attachment and sale of any movable property belonging to such witness.

(4) In default of recovery of the fine by attachment and sale the witness may, by order of the Court, be imprisoned as a civil prisoner for a term not exceeding fifteen days unless such fine is paid before the end of the said term.

(5) The High Court may, for good cause shown, remit or reduce any fine imposed under this rule.

8. Swearing of witnesses

The parties and witnesses shall be sworn or affirmed before giving evidence.

9. Evidence and judgment

The Court shall take note in English of the evidence given during the trial.

10. Transfer of proceedings

(1) Any party to an action under these Rules may apply to the presiding Magistrate to transfer the proceedings to another Magistrate; and the presiding Magistrate may, in his discretion, order the transfer.

(2) Where a presiding Magistrate has commenced a trial and is unable for any reason to conclude it, another Magistrate may, with the consent of all parties, continue the trial and give judgment and in the absence of such consent, the case shall be heard afresh.

PART VI

ADJOURNMENT

11. Adjournment

(1) The Court may, from time to time, adjourn the hearing of any case for a suitable period—

(a) if the plaintiff, the defendant or an essential witness is absent, or is otherwise unable or unfit to take part in the proceedings;

(b) if the hearing continues for more than one day;

(c) if the case cannot be started due to lack of time; and

(d) for any other sufficient reason to be recorded on the file.

(2) Before adjourning the case, the Court shall inform the parties and any witnesses who are present of the date to which the case is to be adjourned.

PART VII

JUDGMENTS OR ORDERS

12. Judgments or Orders

(1) Every judgment or order shall be written, dated and signed by the presiding Magistrate and shall take effect as of the date on which it was given or made.

(2) If any judgment or order is delivered in the absence of either the plaintiff or the defendant, a copy of it shall be sent to the absent party.

(3) Judgment by admission or consent of the parties may be recorded by the Court at any time.

(4) Subject to Rule 13, the presiding Magistrate, following a judgment or order, may examine the judgment debtor as to his ability to pay the judgment debt:

Provided that if any instalment is more than one calendar month in arrears, the order for payment of the judgment debt by instalments shall be deemed to be vacated:

Provided further that any person who wilfully fails or neglects to comply with any order for payment under this Rule may be committed to prison for any period not exceeding seven days.

An application to commit a judgment debtor to prison shall be in Form 3.

(5) Any person imprisoned under rule 12 (6) shall be released forthwith upon payment of all sums due and payable at the date of payment under the Order for non-compliance in respect of which he was imprisoned.

(6) Any person so imprisoned may at any time apply to be released and the Court may order his release on such terms as to re-arrest, security or otherwise or unconditionally, as may be just.

(7) Any order made under this Rule may be suspended, discharged, or varied by the Court.

(8) Any imprisonment under this Rule shall not extinguish the judgment debt.

PART VIII

ENFORCEMENT

13. Enforcement

(1) Every person directed by any judgment to do any act shall comply with it without demand.

(2) Every Court Messenger shall have power, in the execution of any lawful warrant or order issued or made by a Court in exercise of jurisdiction conferred by these Rules, to arrest the person named in such warrant or order. Such warrant of arrest shall be in Form 4.

PART IX

COSTS AND COURTS FEES

14. Costs and courts fees

(1) Costs of proceedings under these Rules shall, unless otherwise ordered, be added to the judgment debt.

(2) The Court before which any proceedings specified in these Rules is instituted may, on the grounds of poverty or for any other good cause, remit in whole or in part any fees specified in respect of such proceedings as the Court may think fit.

PART X

APPEALS

15. Appeals

(1) An appeal from a judgment given by Court shall lie to the High Court and an appeal shall be brought by giving notice which shall be in Form 5.

(2) The notice of appeal shall be filed in the trial Court within 14 days from the day on which the judgment appealed from was pronounced.

(3) The appellant shall pay the fees prescribed in the First Schedule.

(4) When the appeal has been filed, the trial court shall cause the case record to be forwarded to the High Court.

FORM 1

MALAWI

In the Magistrate’s Court (Small Claims) at

Civil Cause No., 20

BETWEEN

..... PLAINTIFF

and

..... DEFENDANT

SUMMONS

(RULE 4 OF THE SUBORDINATE COURTS

(SMALL CLAIMS PROCEDURE) RULES)

To:

.....

..... (Home Address)

..... (Business Address)

You are hereby ordered to appear before the above-mentioned Court on the of, 20 at o'clock in the noon to answer the claim of the above-named plaintiff against you that

.....

If you fail to come to Court, judgment may be given against you in your absence.

Dated this day of, 20

(Seal)

.....

Magistrate

See overleaf for Return of Service.

Return of Service

Place of service

Date of service

Time of service

Name of person served

Signature of person served

Name of process server

Signature of process server

FORM 2

MALAWI

In the Magistrate's Court (Small Claims) at

Civil Case No. of 20

(1) Insert name of plaintiff.(1) PLAINTIFF

versus

(2) Insert name of defendant.(2)..... DEFENDANT

SUMMONS TO WITNESS

(RULE 7 (1) OF THE SUBORDINATE COURTS

(SMALL CLAIMS PROCEDURE) RULES)

To:(3) Insert name and address of witness.(3)
of

You are ordered to come to the court house at (4) Insert place where witness is to come.(4)
.....

on(5) Insert day, date and time of hearing.(5) day the

day of, 20 at o'clock in the

noon as witness on behalf of (6) Insert name of person requiring attendance of this witness.(6)
.....

If you fail to come you will be liable to be punished.

Dated this day of 20

(Seal)

.....

Magistrate

FORM 3

MALAWI

In the Magistrate's Court (Small Claims) at

Civil Case No. of 20

(1) Insert name of plaintiff.(1) PLAINTIFF

versus

(2) Insert name of defendant.(2)..... DEFENDANT

NOTICE TO DEBTOR

(RULE 12 (4) OF THE SUBORDINATE COURTS

(SMALL CLAIMS PROCEDURE) RULES)

To:(3) Insert name and address of defendant.(3)

.....

You are ordered to come to the court at (4) Insert place.(4)

on (5) Insert day, date and time of hearing.(5) day the

day of, 20 at o'clock in the

noon to show cause why you should not be committed to prison for having wilfully neglected to comply with the order of the Court made on day of, 20 requiring you to pay the sum of

If you fail to come to Court, an order for your arrest may be issued.

Dated this day of, 20

(Seal)

.....

Magistrate

(6) Insert date of order or award.

FORM 4

MALAWI

In the Magistrate's Court (Small Claims) at

Civil Appeal No. of 20

(1) Insert name of plaintiff.(1) PLAINTIFF

versus

(2) Insert name of defendant.(2)..... DEFENDANT

WARRANT OF ARREST

(RULE 13 (2) OF THE SUBORDINATE COURTS

(SMALL CLAIMS PROCEDURE) RULES)

To all Court Messengers and Police Officers:

WHEREAS (3) Insert name and address of defendant.(3) of was summoned to attend the above Court on the day of, 20, and failed to do so*Delete whichever does not apply.* /attend the above Court on the day of, 20 and went away without first being given the permission of the Court*Delete whichever does not apply.* / failed to attend after an adjournment of the Court after being told by the Court to so attend you are hereby directed to arrest the said (4) Insert name of defendant.(4) and to produce him before this Court in execution of this your Warrant and HEREIN FAIL NOT.

Dated this day of 20

(Seal)

.....

Magistrate

FORM 5

MALAWI

In the Magistrate's Court (Small Claims) at

Civil Case No. of 20

(1) Insert name of appellant.(1) APPELLANT

versus

(2) Name of Respondent.(2)..... RESPONDENT

NOTICE OF APPEAL

(RULE 15 (1) OF THE SUBORDINATE COURTS

(SMALL CLAIMS PROCEDURE) RULES)

TAKE NOTICE that (3) Insert name of appellant.(3) being dissatisfied with judgment of the Court at given on the day of, 20 appeals to the High Court against (4) As may be applicable.(4) the whole of the said judgment

such part of the said judgment as decides that

(set out details)

Dated this day of, 20

.....

Appellant

Legal Practitioner for the Appellant

To: Court at and to

.....

.....(5) Insert name and address of respondent or respondents.(5)

FIRST SCHEDULE

1. Fees payable on commencement of proceedings.K30002. Filing of Appeal and preparation of Court RecordK3000

COURTS (MANDATORY MEDIATION) RULES

under s. 13(1)

G.N. 9/2004

1. Citation

These Rules may be cited as the Courts (Mandatory Mediation) Rules.

2. Application

Subject to rule 3—

(a) these Rules shall apply to civil actions pending before the High Court and subordinate courts; and

(b) all civil actions commenced before the High Court and subordinate courts.

3. Exemption from mediation

These Rules shall not apply to proceedings—

(a) arising out of or relating to or concerning the interpretation or application of the provisions of the Constitution;

- (b) concerning the liberty of an individual;
- (c) commenced under the Subordinate Courts (Small Claims Procedure) Rules; Cap. 3:02, sub. leg. p. 124
- (d) for—
 - (i) judicial review matters;
 - (ii) an injunction;
 - (iii) summary possession of land;
 - (iv) an expedited originating motion;
 - (v) any such matters where, by law or practice, the trial is expedited;
- (e) where the court makes an order on an application by a party requesting the court to exempt the action from these Rules; or
- (f) where the court, in its discretion, so orders.

4. Mandatory mediation

All proceedings to which these Rules apply shall first go through mediation in accordance with these Rules.

5. Purpose and nature of mediation

(1) In conducting any mediation session under these Rules—

(a) the parties shall strive to reduce cost and delay in litigation, and facilitate the early and fair resolution of the dispute; and

(b) the mediator shall facilitate communication between or among the parties to the dispute in order to assist them in reaching mutually acceptable resolution.

(2) Without derogation from the generality of sub-rule (1), the mediator—

(a) shall in an independent and impartial manner do everything necessary to help the parties, to resolve their dispute;

(b) may, where necessary, conduct joint or separate meetings with the parties, and may make recommendations for a settlement;

(c) may, where services of an expert may be obtained at no cost or without expense, or where such services may be obtained at a cost, and if parties agree to pay such costs or expenses, obtain

expert advice on any technical aspect of the dispute, and the advice shall be given in an independent and impartial manner;

(d) shall be guided by principles of objectivity, fairness and natural justice, and shall give consideration to, among other things—

(i) the rights and obligations of the parties;

(ii) the usages of the trade concerned; and

(iii) the circumstances surrounding the dispute, including any previous business practices between the parties;

(e) may, at any stage of the mediation proceedings and in a manner that the mediator considers appropriate, take into account the wishes of the parties, including any request by either of the parties that the mediator should hear oral statements for a speedy settlement of the dispute; and

(f) may, at any stage of the mediation proceedings, make proposals for the settlement of the dispute.

(3) A request for the services of an expert under this rule may be made by the mediator or by any party with the consent of the other party or parties.

6. Mediation coordination

(1) The Assistant Registrar (ADR) shall act as mediation coordinator.

(2) Where under these Rules the Assistant Registrar (ADR) is required to take any action or perform any duty, in respect of action begun in a subordinate court, the taking of such action or performance of such duty shall be done by officers designated by the Chief Justice by notice published in the Gazette.

7. Mediation session

(1) Within fourteen days after the service of defence, in respect of actions begun in the High Court, or within eight days of the filing of an affidavit of defence, in case of actions begun in a subordinate court, the plaintiff shall file with the Assistant Registrar (ADR) a notice in FORM A in Schedule I, stating the name of the mediator and the date of mediation session.

(2) A mediation session shall take place within ninety days after the service of defence, or an affidavit of defence, unless the court orders otherwise.

(3) In considering whether to extend or reduce the period prescribed under sub-rule (2), the court shall take into account all the circumstances, including the number of parties, the state of the pleadings, the complexity of the issues in the action or the stage of the mediation.

(4) The extension of the period under this rule shall not exceed thirty days.

(5) The mediation shall be deemed to have been terminated at the expiry of ninety days prescribed under sub-rule (2), and where the period of mediation has been extended, at the expiry of the extension.

8. Selection of mediator

(1) The parties shall jointly choose a mediator from a list of mediators to be maintained pursuant to rule 9 or any person who is not named on the list.

(2) In choosing mediator under sub-rule (1) the parties shall be assisted by their legal practitioners, or the court where the parties are not so represented.

9. List of mediators, experts and conduct of mediation

(1) The Assistant Registrar (ADR) shall, with the approval of the Chief Justice, compile and maintain a list of mediators and a list of experts.

(2) Mediation under these Rules shall be conducted by a person chosen by the agreement of the parties from the list of mediators compiled and maintained pursuant to sub-rule (1) or, if the parties consent, a person who is not named on the list.

(3) A mediator shall be a fit and proper neutral third party who has had training in mediation.

(4) Every person who conducts a mediation under sub-rule (2), whether named on the list or not, shall comply with the requirement as to the making and giving of a report on the mediation under rule 18.

(5) The Assistant Registrar (ADR), with the prior approval of the Chief Justice, may after according the opportunity to be heard, remove from the list of mediators compiled and maintained under this rule, the name of any mediator who—

- (a) does not comply with rule 18;
- (b) displays bias or prejudice;
- (c) is incompetent;
- (d) negligently performs his or her duties; or
- (e) is guilty of misbehaviour.

(6) The Assistant Registrar (ADR), with the prior approval of the Chief Justice, may remove from the list of mediators and from the list of experts compiled and maintained under this rule, the name of any mediator or expert who does not comply with these Rules.

(7) The list of mediators and list of experts, and every change thereto, shall be published in the Gazette.

(8) Where a mediator has been disqualified before the conclusion of a mediation, the matter shall be transferred to another mediator agreed upon by the parties, who shall proceed with the matter as he or she deems fit.

10. Statement of issues

(1) At least fourteen days before the mediation session, every party shall prepare a statement in FORM B in Schedule I and provide a copy thereof to every other party to the mediation and to the mediator.

(2) The statement referred to in sub-rule (1) shall identify the factual and legal issues in dispute, and briefly set out the position and interest of the party making the statement.

(3) Every party who makes a statement under this rule shall attach to it any material which the party considers of central importance in the matter.

(4) A plaintiff shall include a copy of the pleadings with the copy of the statement which is provided to the mediator.

(5) If it is not practical to conduct a mediation because a party fails to comply with sub-rule (1), the mediator shall cancel the mediation and immediately file with the Assistant Registrar (ADR) a certificate of non-compliance in FORM C in Schedule I.

11. Attendance

(1) The parties and their legal practitioners, if the parties are represented, shall attend the mediation session.

(2) If a third party may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse a party for money paid in satisfaction of all or part of a judgment in the action, the third party and a legal practitioner of the third party, if the third party is represented, may also attend the mediation session, unless the court orders otherwise.

12. Authority to settle

(1) A party to a mediation session shall have authority to settle any matter during the mediation session.

(2) A party who requires the approval of another person before agreeing to a settlement shall, before the mediation session, arrange to have ready means of communication to that other person throughout the session, whether it takes place during or after regular business hours.

13. Failure to attend

If it is not practical to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the mediator shall

cancel the session and immediately file with the Assistant Registrar (ADR) a certificate of non-compliance in FORM C in Schedule I.

14. Non-compliance

(1) Where a certificate of non-compliance is filed, the Assistant Registrar (ADR) shall refer the matter to the Magistrate, Chairperson of the Industrial Relations Court, Registrar or the Judge, as the case may be, concerned with case management.

(2) Where a matter is referred under sub-rule (1), the Magistrate, Chairperson of the Industrial Relations Court, the Registrar or the Judge, as the case may be, concerned with case management may—

- (a) establish a timetable for the action;
- (b) strike out any document filed by a party;
- (c) dismiss the action, if the non-complying party is a plaintiff, or strike out the statement of defence, if the non-complying party is a defendant;
- (d) order a party to pay costs; or
- (e) make any other order that is deemed just.

15. Confidentiality of mediation

(1) All communications at a mediation session, and the notes and records of the mediator, shall be deemed to be confidential.

(2) Without derogation from the generality of sub-rule (1)—

(a) a record, report, settlement agreement, except where its disclosure is necessary for the purpose of implementation and enforcement, and any other documents required in the course of mediation shall be confidential;

(b) a mediator shall not—

(i) disclose information given in the course of the mediation to a person who is not a party to the mediation without the consent of the parties; or

(ii) be a witness in any court proceedings relating to the same matter,

(c) a party to a mediation shall not rely on—

(i) the record of the mediation;

(ii) statement made at the mediation session; or

(iii) any information obtained during the mediation,

as evidence in court proceedings or any other subsequent settlement initiative, except in relation to proceedings brought—

(A) by either party to vitiate the settlement agreement on the grounds of fraud; or

(B) against a mediator relating to his or her conduct of the mediation in terms of rule 9 (5).

16. Settlement agreement

(1) When it appears to the mediator that there exist elements of a settlement which may be acceptable to the parties, the mediator shall formulate the terms of a possible settlement and submit them to the parties for their consideration, and after receiving the observations of the parties, the mediator may reformulate the terms of a possible settlement in the light of those observations and resubmit them to the parties as it appears to him or her expedient.

(2) If the parties reach agreement on a settlement of the dispute—

(a) the mediator shall immediately thereafter draw up a settlement agreement in conjunction with the parties; and

(b) the parties shall sign the settlement agreement in the presence of each other, and the mediator shall also sign the settlement agreement in the presence of the parties.

(3) The mediator shall furnish a copy of the signed settlement agreement to each of the parties.

(4) The signed settlement agreement shall be—

(a) filed in court by the mediator within two days after the signature;

(b) recorded by the court as a judgment of the court,

and may be enforced by the court as its own judgment.

(5) When the parties sign the settlement agreement, the settlement agreement shall be binding on the parties and persons claiming under them.

(6) Where upon the conclusion of mediation no settlement agreement is reached, the court shall continue with the proceedings in the action from the point where and at which the action was referred for mediation.

17. End of mediation

(1) A mediation is ended when—

- (a) the parties execute a settlement agreement;
- (b) the mediator cancels a mediation session under rule 10 (5) and rule 13 for non-compliance on the part of any party;
- (c) the mediator, after consultation with the parties, makes a declaration to the effect that further mediation is not worthwhile;
- (d) it is terminated because parties have failed to pay deposits under rule 21 unless the court orders otherwise;
- (e) the mediation is terminated in terms of rule 7 (5);
- (f) the parties jointly address a declaration to the mediator that the mediation is terminated; or
- (g) a party makes a declaration to the mediator and the other party to the effect that the mediation is terminated.

(2) A declaration under sub-rule (1) may be in writing or orally, but where a declaration is made orally, the mediator shall record it in writing.

18. Mediator's report

The mediator shall, within fourteen days after the mediation is concluded, submit to the Assistant Registrar (ADR) and the parties a written report on the mediation.

19. Exclusion of liability

A mediator is not liable for any act or omission done or performed in good faith in respect of a mediation under these Rules.

20. Mediation fees and expenses

(1) Unless the parties agree otherwise, the expenses of the mediation, including the fees payable to the mediator, reasonable expenses for the experts called, and any other reasonable expenses incurred in connexion with the mediation session and the settlement agreement, shall be shared equally by the parties.

(2) The mediator's fees for the mediation session under these Rules shall not exceed the amount prescribed in Schedule II; but so however that where the dispute is of a nature that is unquantifiable, the fees shall be determined by the Assistant Registrar (ADR).

21. Deposits

(1) The mediator may direct each party to deposit an equal amount as an advance for the expenses referred to in rule 20, which the mediator expects will be incurred.

(2) The mediator may, during the course of the mediation, direct supplementary deposits in an equal amount from each party.

(3) If a deposit required pursuant to sub-rule (1) or (2) is not paid in full by any of the parties within fifteen days of the direction, the mediator may suspend the mediation session or may make a written declaration of termination of the mediation to the parties, effective on the date of the declaration.

(4) Upon termination of the mediation, the mediator shall render an account to the parties of the deposits received, and shall return any unexpended balance to the parties.

22. Appeals

No appeal shall lie against a settlement agreement filed in court under rule 16 (4) (a).

23. Transitional provision

(1) Within one year from the date of promulgation of these Rules, the Assistant Registrar (ADR) shall, in respect of cases which have gone past the stage for reference to mediation prescribed under rule 7, communicate with the parties requesting them to indicate whether they would nonetheless opt for mediation under these Rules.

(2) Where, pursuant to sub-rule (1), parties opt for mediation, the matter shall be referred to mediation under these Rules.

SCHEDULE I r. 7 (1)

FORM A (i)

COURTS ACT

(CAP. 3:02)

COURTS (MANDATORY MEDIATION) RULES

IN THE HIGH COURT OF MALAWI

..... REGISTRY

CIVIL CAUSE NO. OF

PARTIES

NOTICE OF NAME OF MEDIATOR AND DATE OF SESSION

To: The Assistant Registrar (ADR).

1. IT IS HEREBY certified that the parties having consulted have chosen (state name of mediator) as the mediator for the mediation session.

2.(a) the mediator is named in the list of mediators; or

(b) the mediator is not named in a list of mediators, but has been chosen by the parties under rule 8(1).

3. The mediation session will take place on (state date).

Dated this day of, 20.....

.....

Party or Party's Legal Practitioner

(Name, address, telephone number, fax number or e-mail address of the Party or Party's Legal Practitioner):

.....
.....
.....
.....

r. 7 (1)

FORM A (ii)

COURTS ACT

(CAP. 3:02)

COURTS (MANDATORY MEDIATION) RULES

IN THE MAGISTRATE'S COURT

SITTING AT

CIVIL CAUSE NO. OF

PARTIES

NOTICE OF NAME OF MEDIATOR AND DATE OF SESSION

To: The Assistant Registrar (ADR).

1. IT IS HEREBY certified that the parties having consulted have chosen

..... (state name of mediator) as the mediator for the mediation session.

2.(a) the mediator is named in the list of mediators; or

(b) the mediator is not named in a list of mediators, but has been chosen by the parties under rule 8 (1).

3. The mediation session will take place on (state date).

Dated this day of, 20.....

.....

Party or Party's Legal Practitioner

(Name, address, telephone number, fax number and e-mail address of the Party or Party's Legal Practitioner):

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.....
.....

r. 10 (1)

FORM B (i)

COURTS ACT

(CAP. 3:02)

COURTS (MANDATORY MEDIATION) RULES

IN THE HIGH COURT OF MALAWI

..... REGISTRY

CIVIL CAUSE NO. OF

PARTIES

STATEMENT OF ISSUES

(To be provided to mediator and parties at least 14 days before mediation session).

1. Factual and legal issues in dispute.

The Plaintiff (or Defendant) states that the following factual and legal issues are in dispute and remain to be resolved.

(Issues should be stated briefly and numbered consecutively).

2. Party's position and interest (What the party hopes to achieve) (Brief summary).

3. Attached materials:

Attached to this form are the following materials that the Plaintiff (or Defendant) considers of central importance in the matter: (list).

Dated this day of, 20.....

.....

Party's signature or Party's Legal Practitioner's signature

(Name, address, telephone number, fax number and e-mail address of the Party or Party's Legal Practitioner filing statement of issues).

.....
.....
.....
.....

NOTE A: When the plaintiff provides a copy of this form to the mediator, a copy of the pleadings shall also be included.

NOTE B: All communications at a mediation session and the mediator's notes and records shall be deemed to be confidential.

NOTE C: Consequences of non-compliance: Failure to submit a statement of issues may lead to a cancellation of the mediation.

r. 10 (1)

FORM B (ii)

COURTS ACT

(CAP. 3:02)

COURTS (MANDATORY MEDIATION) RULES

IN THE MAGISTRATE'S COURT

SITTING AT

CIVIL CAUSE NO. OF

PARTIES

STATEMENT OF ISSUES

(To be provided to mediator and parties at least 14 days before mediation session).

1. Factual and legal issues in dispute.

The Plaintiff (or Defendant) states that the following factual and legal issues are in dispute and remain to be resolved.

(Issues should be stated briefly and numbered consecutively).

2. Party's position and interest (What the party hopes to achieve) (Brief summary).

3. Attached materials:

Attached to this form are the following materials that the Plaintiff (or Defendant) considers of central importance in the matter: (list).

Dated this day of, 20.....

.....

Party's signature or Party's Legal Practitioner's signature

(Name, address, telephone number, fax number and e-mail address of the Party or Party's Legal Practitioner filing statement of issues).

.....
.....
.....
.....

NOTE A: When the plaintiff provides a copy of this form to the mediator, a copy of the pleadings shall also be included.

NOTE B: All communications at a mediation session and the mediator's notes and records shall be deemed to be confidential.

NOTE C: Consequences of non-compliance: Failure to submit a statement of issues may lead to a cancellation of the mediation.

rr. 13, 17, 20 and 21

FORM C (i)

COURTS ACT

(CAP. 3:02)

COURTS (MANDATORY MEDIATION) RULES

IN THE HIGH COURT OF MALAWI

..... REGISTRY

CIVIL CAUSE NO. OF

PARTIES

CERTIFICATE OF NON-COMPLIANCE

To: The Assistant Registrar (ADR).

I, (name), mediator, certify that this certificate of non-compliance is filed because—

(a) (identify party or parties) failed to provide a copy of a statement of issues to the mediator and the other parties (or to the mediator or to party or parties).

(b) (identify plaintiff) failed to provide a copy of the pleadings to the mediator.

(c) (identify party or parties) failed to attend without good cause a scheduled mediation session.

(d) (identify party or parties) failed to pay fees.

Dated this day of, 20.....

.....

Name of Mediator

(Name, address, telephone number, fax number and e-mail address, if any, of mediator):

.....

.....
.....
.....

rr. 13, 17, 20 and 21

FORM C (ii)

COURTS ACT

(CAP. 3:02)

COURTS (MANDATORY MEDIATION) RULES

IN THE MAGISTRATE'S COURT

SITTING AT

CIVIL CAUSE NO. OF

PARTIES

CERTIFICATE OF NON-COMPLIANCE

To: The Assistant Registrar (ADR).

I, (name), mediator, certify that this certificate of non-compliance is filed because—

(a) (identify party or parties) failed to provide a copy of a statement of issues to the mediator and the other parties (or to the mediator or to party or parties).

(b) (identify plaintiff) failed to provide a copy of the pleadings to the mediator.

(c) (identify party or parties) failed to attend without good cause a scheduled mediation session.

(d) (identify party or parties) failed to pay fees.

Dated this day of, 20.....

.....

Name of Mediator

(Name, address, telephone number, fax number and e-mail address, if any, of mediator):

.....
.....
.....
.....

SCHEDULE II r. 20 (2)

MEDIATOR'S FEES FOR THE MANDATORY MEDIATION SESSION

Value of subject matter Fees claimable Above K5,000 but not exceeding K50,000 5 per cent, subject to a minimum of K1,000 Exceeding K50,000 but not exceeding K100,000 5 per cent, subject to a minimum of K2,500 Exceeding K100,000 but not exceeding K500,000 3 per cent, subject to a minimum of K10,000 Exceeding K500,000 but not exceeding K1,000,000 2 per cent, subject to a minimum of K15,000 Exceeding K1,000,000 and above 1 per cent, subject to a minimum of K20,000 and a maximum of K100,000.

HIGH COURT (COMMERCIAL DIVISION) RULES

under s. 67

G.N. 5/2007

21/2008

ORDER 1

INTERPRETATION AND APPLICATION

O. 1, r. 1

1. Citation

These rules may be cited as the High Court (Commercial Division) Rules.

O. 1, r. 2

2. Overriding objective

(1) These Rules are a procedural code with the overriding objective of enabling the Court to deal with commercial matters justly.

(2) Dealing with case justly includes, so far as is practicable—

(a) ensuring that the parties are on an equal footing;

(b) saving expenses;

- (c) dealing with a case in ways which are proportionate—
 - (i) to the amount of money involved;
 - (ii) to the importance of the case; and
 - (iii) to the complexity of the issues;
 - (d) ensuring that it is dealt with expeditiously and fairly; and
 - (e) allotting to it an appropriate share of the Court's resources,
- while taking into account the need to allot resources to other cases.

(3) The Court shall seek to give effect to the overriding objective when it—

- (a) exercises any power conferred on by these Rules; or
- (b) interprets any rule.

(4) The parties shall help the Court to further the overriding objectives.

O. 1, r. 3

3. Court's duty to manage cases

(1) The Court shall further the overriding objective by actively managing cases.

(2) Active case management includes—

- (a) encouraging the parties to cooperate with each other in the conduct of the proceedings;
- (b) identifying the issues at an early stage;
- (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
- (d) deciding the order in which issues are to be resolved;
- (e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure;
- (f) helping the parties to settle the whole or part of the case;
- (g) fixing timetables or otherwise controlling the progress of the case;
- (h) considering whether the likely benefits of taking particular step justify the cost of taking it;
- (i) dealing with as many aspects of the case as it can on the same occasion;

- (j) making use of technology; and
- (k) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

O. 1, r. 4

4. Application

(1) These Rules shall apply to all proceedings in the High Court (Commercial Division) and all other rules of practice and procedure shall apply to those proceedings subject to the provisions of these Rules.

(2) Subject to Order 1, rule 3, no proceedings shall be commenced in the Commercial Division unless the same relates to a commercial matter.

(3) No commercial matter over which the Commercial Division has jurisdiction in terms of these Rules shall be commenced in any other Court or Division of the High Court.

O. 1, r. 5

5. Interpretation

In these Rules, unless the context otherwise requires—

“commercial matter” means a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature, whether contractual or not, including but not limited to—

- (a) the formation or governance of a business or commercial organization;
- (b) the contractual relationship of a business or commercial organization;
- (c) liabilities arising from commercial or business transactions;
- (d) the restructuring or payment of commercial debts;
- (e) the winding up of companies or bankruptcy of persons;
- (f) the enforcement or review of commercial arbitration award;
- (g) the enforcement of foreign judgments of commercial matters subject to the provisions of the law;
- (h) the supply or exchange of goods and services;
- (i) banking, negotiable instruments, international credit and similar financial services;
- (j) insurance services; or

(k) the operation of stock and foreign exchange markets.

In the event of any doubt as to whether a matter is commercial or not, the Judge at the outset or during the course of the action, shall have power to resolve the issue of opinion and the Judge's decision shall be final;

"Commercial Division" means the division of the High Court dealing with commercial matters;

"Court" means the commercial division and includes a Judge sitting in court or chambers and a Registrar dealing with matters with which he has authority and jurisdiction to deal;

"folio" means seventy-two (72) words, each figure being counted as one word;

"Judge" means the Judge of the Commercial Division and includes the Judge-in-Charge of the Commercial Division;

"Judge-in-Charge" means the Judge responsible for the day to day management of the Commercial Division;

"Mandatory Mediation Rules" means the High Court (Commercial Division) (Mandatory Mediation) Rules, 2007, and any other replacement rules.

"originating summons" means every summons other than a summons in a pending cause or matter;

"pleading" does not include a petition, summons, originating motion;

"Registrar" means the Registrar of the Commercial Division and includes a Deputy Registrar and an Assistant Registrar;

"Rules of the Supreme Court" means the 1999 edition of the Rules of the Supreme Court 1965; and

"writ" means writ of summons.

O. 1, r. 6

6. Jurisdiction

Subject to these Rules or any other written law, the Commercial Division shall have jurisdiction to deal with, try and determine any commercial matter whereof the amount in dispute or the value of the subject matter is not less than one million Kwacha (K1,000,000):

Provided that where the matter concerns bankruptcy, winding up of a company or other applications related to commercial matters the amount in dispute or value of the subject matter shall not matter.

ORDER 2

MODE OF BEGINNING PROCEEDINGS

O. 2, r. 1

1. Mode of beginning proceedings

Subject to the provisions of any written law or these Rules, proceedings in the Commercial Division may be begun by writ, originating summons, originating motion or petition.

O. 2, r. 2

2. Proceedings which may be begun by writ or originating summons

(1) Except in the case of proceedings which by these Rules or by or under any Act are required to be begun by writ or originating summons or are required or authorized to be begun by originating motion or petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.

(2) Proceedings—

(a) in which the sole 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, contract or other document, or some other question of law; or

(b) in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 7 or Order 8 of these Rules or for any other reason considers the proceedings more appropriate to be begun by writ.

O. 2, r. 3

3. Proceedings which should commence by originating summons

Proceedings by which an application is to be made to the Court under any Act shall be commenced by originating summons except where by these Rules or by or under any Act the application in question is expressly required or authorized to be made by other means.

This rule shall not apply to an application made in pending proceedings.

ORDER 3

WRITS OF SUMMONS PROCEDURE

O. 3, r. 1

1. Form of writ

Every writ shall be in Form 1 contained hereto.

O. 3, r. 2

2. Indorsement of claim

Before a writ is issued it shall be indorsed with a full statement of claim and where the action is brought to enforce a right to recover possession of goods or real property, the statement of claim shall show the value of the goods.

O. 3, r. 3

3. Indorsement of capacity

Before a writ is issued it shall be indorsed—

(a) where the plaintiff sues in a representative capacity, with a statement of the capacity in which he sues; or

(b) where a defendant is sued in a representative capacity, with a statement of the capacity in which he is sued.

O. 3, r. 4

4. Indorsement of legal practitioner and address

(1) Before a writ is issued, it shall be indorsed—

(a) where the plaintiff sues through a legal practitioner, with the plaintiff's address and the legal practitioner's name or firm and his business and physical address within the jurisdiction and also (if the legal practitioner is the agent of another) the name or firm and business address of his principal; or

(b) where the plaintiff sues in person, with the address of his place of residence and, if his place of residence is not within the jurisdiction or if he has no place of residence, the address of a place within the jurisdiction at or to which documents for him may be delivered or sent.

(2) The address for service of a plaintiff shall be—

(a) where he sues through a legal practitioner, the business address (to which may be added a numbered box at a post office) of the legal practitioner indorsed on the writ or where there are two such addresses so indorsed, the business and physical address of the legal practitioner who is acting as agent for the other; or

(b) where he sues in person, the address within the jurisdiction indorsed on the writ.

(3) Where a legal practitioner's name is indorsed on a writ, he shall, if any defendant who has been served with or who has acknowledged service of the writ requests him in writing so to do, declare in writing whether the writ was issued by him or with his authority or privity.

(4) If a legal practitioner whose name is indorsed on a writ declares in writing that the writ was not issued by him or with his authority or privity, the Court may on the application of any defendant who has been served with or who has acknowledged service of the writ, stay all proceedings in the action begun by the writ.

O. 3, r. 5

5. Issue of writ

(1) Before a writ is issued it must be accompanied with a list of documents in Form 2 contained hereto that the plaintiff intends to produce at trial.

(2) Issue of a writ takes place upon its being signed and sealed by an officer of the registry out of which it is issued.

(3) No writ shall be sealed unless at the time of the tender thereof for sealing, the person tendering it leaves at the registry at which it is tendered, a copy thereof signed, where the plaintiff sues in person, by him or, where he does not so sue, by or on behalf of his legal practitioner.

(4) Upon the writ being issued the Judge-in-Charge shall give initial directions in Form 3 contained hereto.

O. 3, r. 6

6. Duration of writ

For the purposes of service, a writ is valid in the first instance for four (4) months beginning with the date of issue.

O. 3, r. 7

7. Renewal of writ

(1) Where the Court is satisfied on an application under Order 3, rule 5 that, despite the making of all reasonable efforts, it may not be possible to serve the writ within four (4) months, the Court may, if it thinks fit, extend the validity of the writ for such period, not exceeding twelve (12) months, as the Court may specify.

(2) Before a writ, the validity of which has been extended under this rule is served, it shall be marked with an official stamp showing the period for which the validity of the writ has been so extended.

ORDER 4

PLEADINGS

O. 4, r. 1

1. Pleadings

The pleadings in an action in the Commercial Division shall be in the form of points of claim, or of defence, counterclaim, defence to counterclaim or reply, as the case may be, and shall be as brief as possible.

O. 4, r. 2

2. Particulars of pleadings

(1) Subject to paragraph (2), every pleading shall contain the necessary particulars of a claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies;

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies; and

(c) where a claim for damages is made against a party pleading, particulars of any facts on which the party relies in mitigation of, or otherwise in relation to, the amount of damages.

(2) Where it is necessary to give particulars of debt, expenses or damages and those particulars exceed three (3) folios, they shall be set out in a separate document referred to in the pleading and the pleading shall state whether the document has already been served and, if so, when, or is to be served with the pleadings.

(3) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.

(4) Where a party alleges as fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of paragraph (3), the Court may, on such terms as it thinks just, order that party to serve on any other party—

(a) where he alleges knowledge, particulars of the facts on which he relies; and

(b) where he alleges notice, particulars of the notice.

(5) An order under this rule shall not be made before service of the defence unless, in the opinion of the Court, the order is necessary or desirable to enable the defendant to plead or for some other special reason.

(6) Where the applicant for an order under this rule did not apply by letter for the particulars he requires, the Court may refuse to make the order unless the Court is of the opinion that there were sufficient reasons for an application by letter not having been made.

(7) Where particulars are given pursuant to a request, or order of the Court, the request or order shall be incorporated with the particulars, each item of the particulars following immediately after the corresponding item of the request.

O. 4, r. 3

3. No unnecessary particulars

Without prejudice to Order 4, rule 2 no particulars shall be applied for or ordered in an action except such particulars as are necessary to enable the party applying to be informed of the case he has to meet or as are for some other reason necessary to secure the just, expeditious and economical disposal of any question at issue in the action.

ORDER 5

PROCEDURE AFTER SERVICE OF WRIT OF SUMMONS

O. 5, r. 1

1. Acknowledgment of service

(1) Upon service of the writ of summons, a defendant who does not intend to contest the proceedings but desires to have a stay of execution shall, within fourteen (14) days from the date of service of the writ of summons, file with the appropriate registry an acknowledgment of service in Form 4 contained hereto indicating his intention not to contest the proceedings and to have a stay of execution and there shall be an automatic stay of execution for seven (7) days.

(2) Any application to continue the stay of execution shall be filed with the Court within the seven (7) days of the automatic stay.

O. 5, r. 2

2. Service of defence and list of documents

Upon service of the writ of summons a defendant who intends to contest the proceedings shall file with the Court and serve upon the plaintiff within twenty-one (21) days from the date of service of the writ of summons a defence and a list of documents in Form 2 contained hereto to be produced at trial.

O. 5, r. 3

3. Service of reply and defence to counterclaim

Any reply to defence or defence to counterclaim shall be filed and served within, seven (7) days of service of the defence or defence to counterclaim as the case may be.

O. 5, r. 4

4. Closure of pleadings

(1) The pleadings in an action shall be deemed to be closed—

(a) at the expiration of seven (7) days after service of the reply or, if there is no reply but only a defence to counterclaim, after service of the defence to counterclaim; or

(b) if neither a reply nor a defence to counterclaim is served, at the expiration of seven (7) days after service of the defence.

(2) The pleadings in an action are deemed to be closed at the time provided by paragraph (1) notwithstanding that any request or order for particulars has been made but has not been complied with at that time.

O. 5, r. 5

5. Mandatory mediation

(1) Within seven (7) days from the time the pleadings are deemed to be closed the matter shall proceed to mandatory mediation and all parties shall lodge statements as provided for by rule 6 of the Mandatory Mediation Rules.

(2) The mediation process shall be in accordance with the Mandatory Mediation Rules.

O. 5, r. 6

6. Date of mediation session

The Judge shall, within two (2) days from the time the pleadings are deemed to be closed, issue a notice in Form 5 to the parties advising the date of the mediation session, which shall in any event not be more than twenty-one (21) days from the date the pleadings are deemed to be closed.

ORDER 6

DEFAULT OF ACKNOWLEDGMENT OF SERVICE AND DEFAULT OF PLEADINGS

O. 6, r. 1

1. Claim for liquidated demand

(1) Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to file and serve a defence and list of documents, the plaintiff may, after the prescribed time enter final judgment against that defendant for a sum not exceeding that claimed by the

writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

(2) A claim shall not be prevented from being treated for the purposes of this rule as a claim for a liquidated demand by reason only that part of the claim is for interest.

O. 6, r. 2

2. Claim for unliquidated damages

Where a writ is indorsed with a claim against a defendant for unliquidated damages only, then, if that defendant fails to file and serve a defence and list of documents, the plaintiff may, after the prescribed time, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any.

O. 6, r. 3

3. Claim for detention of goods

Where a writ is indorsed with a claim against a defendant relating to the detention of goods only, then, if that defendant fails to serve and file a defence and list of documents, the plaintiff may, after the prescribed time at his option enter either—

(a) interlocutory judgment against that defendant for delivery of the goods or their value to be assessed and costs; or

(b) interlocutory judgment for the value of the goods to be assessed and costs.

O. 6, r. 4

4. Claim for possession of land

(1) Where a writ is indorsed with a claim against a defendant for possession of land only, then, subject to paragraph (2) if that defendant fails to file and serve a defence and list of documents, the plaintiff may, after the prescribed time enter judgment for possession of the land as against that defendant and costs, and proceed with the action against the other defendants, if any.

(2) Where there is more than one defendant, judgment entered under this rule shall not be enforced against any defendant unless and until judgment for possession of the land has been entered against all the defendants.

O. 6, r. 5

5. Mixed claims

Where a writ issued against any defendant is indorsed with two or more of the claims mentioned in the foregoing rules and no other claim, then, if that defendant fails to file and serve a

defence and list of documents, the plaintiff may, after the prescribed time, enter against that defendant such judgment in respect of any such claim as he would be entitled to enter under those rules if that were the only claim indorsed on the writ, and proceed with the action against the other defendants, if any.

O. 6, r. 6

6. Other claims

(1) Where a writ is indorsed with a claim of a description not mentioned in rules 1 to 4 then, if any defendant fails to file and serve his defence and list of documents, the plaintiff may, after the prescribed time, apply, by summons, for judgment against the defendant.

(2) Where a writ issued against a defendant is indorsed as aforesaid, but by reason of the defendant's satisfying the claim or complying with the demands thereof or any other like reason it has become unnecessary for the plaintiff to proceed with the action, then, if the defendant fails to file and serve a defence and list of documents, the plaintiff may, after the prescribed time, enter judgment with the leave of the Court against that defendant for costs.

O. 6, r. 7

7. Prescribed time

For the purposes of this Order "prescribed time" in relation to a writ issued against a defendant means the time limited for the defendant to file and serve a defence and list of documents or, if within that time the defendant has returned to the appropriate registry an acknowledgment of service containing a statement to the effect that he does not intend to contest the proceedings, the date on which the acknowledgment was received at the appropriate registry.

O. 6, r. 8

8. Proof of service of writ

Judgment shall not be entered against a defendant under this Order unless—

- (a) the defendant has acknowledged service on him of the writ; or
- (b) an affidavit is filed by or on behalf of the plaintiff proving due service of the writ on the defendant; or
- (c) the plaintiff produces the writ indorsed by the defendant's legal practitioners with a statement that he accepts service of the writ on defendant's behalf.

ORDER 7

SUMMARY JUDGMENT

O. 7, r. 1

1. Application for summary judgment

(1) Where in an action to which this rule applies a writ has been served on a defendant and the defendant has filed and served his defence and list of documents, a plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for final judgment against the defendant.

(2) This rule shall not apply to a matter to which Order 8 applies.

O. 7, r. 2

2. Manner of an application under rule 1

(1) An application under rule 1 shall be made by summons in Form 6 contained hereto, supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.

(2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.

(3) The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than ten (10) clear days before the return day.

O. 7, r. 3

3. Judgment for plaintiff

(1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue, question or dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

(2) The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action.

O. 7, r. 4

4. Leave to defend

(1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.

(2) Rule 2 (2) applies for the purposes of this rule as it applies for the purposes of that rule.

(3) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it deems just.

(4) On the hearing of such an application, the Court may order a defendant showing cause or, where that defendant is a body corporate, any director, manager, secretary or other similar officer thereof, or any person purporting to act in any such capacity—

(a) to produce any document;

(b) if it appears to the Court that there are special circumstances which makes it desirable that he should do so, to attend and be examined on oath.

O. 7, r. 5

5. Application for summary judgment on counterclaim

(1) Where a defendant to an action begun by writ has served a counterclaim on a plaintiff, then, subject to paragraph (3) the defendant may, on the ground that the plaintiff has no defence to a claim made in the counterclaim, or to a particular part of such a claim, apply to the Court for judgment against the plaintiff on that claim or that part.

(2) Rules 2, 3 and 4 shall apply in relation to an application under this rule as they apply in relation to an application under rule 1 but with the following modifications, that is to say—

(a) reference to the plaintiff and defendant shall be construed as references to the defendant and plaintiff respectively;

(b) the words in rule 3 (2) “any counterclaim made or raised by the defendant in” shall be omitted; and

(c) the reference in rule 4 (3) to the action shall be construed as a reference to the counterclaim to which the application under this rule relates.

(3) This rule shall not apply to a counterclaim which includes any such claim as is referred to in rule 1 (2).

O, 7, r. 6

6. Directions

Where the Court—

(a) orders that a defendant or a plaintiff have leave (whether conditional or unconditional) to defend an action or counter-claim, as the case may be, with respect to a claim or a part of a claim; or

(b) gives judgment for a plaintiff or a defendant on a claim or part of a claim but also orders that execution of the judgment be stayed pending the trial of a counterclaim or of the action, as the case may be,

the Judge shall give directions as to the further conduct of the matter as if he was presiding over a scheduling conference as provided for in Order 13 of these Rules.

O. 7, r. 7

7. Costs

(1) If a plaintiff makes an application under rule 1 where the case is not within this Order or if it appears to the Court that the plaintiff knew that a defendant relied on a contention which would entitle him to unconditional leave to defend, then, without prejudice to Order 62 of the Rules of the Supreme Court, and, in particular, to paragraphs (1) to (3) of rule 8 of that Order, the Court may dismiss the application with costs and may, if the plaintiff is not an assisted person, require the costs to be paid by him forthwith.

(2) The Court shall have the same power to dismiss an application under rule 5 as it has under paragraph (1) to dismiss an application under rule 1, and that paragraph shall apply accordingly with the necessary modifications.

O. 7, r. 8

8. Right to proceed with residue of action or counterclaim

(1) Where on an application under rule 1 the plaintiff obtains judgment on a claim or a part of a claim against any defendant, he may proceed with the action as respects any other claim or as respects the remainder of the claim or against any other defendant.

(2) Where on an application under rule 5 a defendant obtains judgment on a claim or part of a claim made in a counterclaim against the plaintiff, he may proceed with the counterclaim as respects any other claim or as respects the remainder of the claim or against any other defendant to the counterclaim.

O. 7, r. 9

9. Judgment for delivery up of chattel

Where the claim to which an application under rule 1 or rule 5 relates is for the delivery up of a specific chattel and the Court gives judgment under this order for the applicant, it shall have the same

power to order the party against whom judgment is given to deliver up the chattel without giving him an option to retain it on paying the assessed value thereof as if the judgment had been given after trial.

O. 7, r. 10

10. Setting aside judgment

Any judgment given against a party who does not appear at the hearing of an application under rule 1 or rule 5 may be set aside or varied by the Court on such terms as it thinks just.

O. 7, r. 11

11. Disposal of case on point of law

(1) The Court may, upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that—

(a) such question is suitable for determination without a full trial of the action; and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this rule unless the parties have either—

(a) had an opportunity of being heard on the question; or

(b) consented to an order or judgment on such determination.

(4) Nothing in this rule shall limit the power of the Court under Order 18, rule 19, of the Rules of the Supreme Court or any other provision of these Rules.

ORDER 8

ACTIONS FOR SPECIFIC PERFORMANCE, ETC.: SUMMARY JUDGMENT

O. 8, r. 1

1. Application

(1) In any action commenced by writ indorsed with a claim—

(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase, exchange, mortgage or charge of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages;

- (b) for rescission of such an agreement; or
- (c) for the forfeiture or return of any deposit made under such an agreement,

the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for final judgment.

(2) An application may be made against a defendant under this rule whether or not he has acknowledged service of the writ in the action.

O. 8, r. 2

2. Manner of application under rule 1

(1) An application under rule 1 shall be made by summons in Form 6 contained hereto supported by an affidavit verifying the facts on which the cause of action is based and stating that in the deponent's belief there is no defence to the action.

(2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.

(3) The summons shall set out or have attached thereto minutes of the judgment sought by the plaintiff.

(4) The summons and a copy of the affidavit in support with any exhibit referred to therein shall be served on the defendant not less than four (4) clear days before the return day.

O. 8, r. 3

3. Judgment for plaintiff

Unless on the hearing of an application under rule 1—

- (a) the Court dismisses the application;
- (b) a defendant satisfies the Court that there is an issue or question in dispute which ought to be tried; or
- (c) that there ought for some other reason to be a trial of the action, the Court may give final judgment for the plaintiff in the action.

O. 8, r. 4

4. Leave to defend

(1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.

(2) Unless the Court otherwise orders, an affidavit for the purposes of paragraph (1) may contain statements of information or belief with the sources and grounds thereof.

(3) The Court may give a defendant against whom such an application is made leave to defend the action either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.

(4) On the hearing of such an application the Court may order a defendant showing cause or, where the defendant is a body corporate, any director, manager, secretary or other similar officer thereof, or any person purporting to act in any such capacity—

(a) to produce any document; or

(b) if it appears to the Court that there are special circumstances which make it desirable that he should do so, to attend and be examined on oath.

O. 8, r. 5

5. Directions

Where the Court orders that a defendant have leave to defend the action, the Judge shall give directions as to the further conduct of the matter as if he was presiding over a scheduling conference as provided in Order 13 of these Rules.

O. 8, r. 6

6. Cost

If a plaintiff makes an application under rule 1 where the case is not within this Order, or if it appears to the Court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, then, without prejudice to Order 62 of the Rules of the Supreme Court, and, in particular, to paragraphs (1) to (3) of rule 8 of that Order, the Court may dismiss the application with costs and may, if the plaintiff is not an assisted person, require the costs to be paid by him forthwith.

O. 8, r. 7

7. Setting aside judgment

Any judgment given against a defendant who does not appear at the hearing of an application under rule 1 may be set aside or varied by the Court on such terms as it thinks just.

O. 8, r. 8

8. Application for summary judgment on counterclaim

(1) Where a defendant has served a counterclaim on the plaintiff including any claim such as is specified in rule 1 (1), the defendant may apply to the Court for judgment on the ground that the plaintiff has no defence to the claim.

(2) Rules 2 to 7 shall apply in relation to an application under paragraph (1) as if the counterclaim were an action.

ORDER 9

ORIGINATING SUMMONS PROCEDURE

O. 9, r. 1

1. Forms of summons

(1) Every originating summons (other than an ex parte summons) shall be in Form 7 contained hereto and every ex parte summons shall be in Form 8 contained hereto.

(2) The party taking out an originating summons (other than an ex parte summons) shall be described as a plaintiff, and the other parties shall be described as defendants.

O. 9, r. 2

2. Contents of summons

Every originating summons shall include a statement of the questions on which a plaintiff seeks the determination or direction of the Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy, and shall at the time of filing be accompanied by affidavit evidence to be relied on at the hearing.

O. 9, r. 3

3. Duration and renewal of summons

(1) For purposes of service, an originating summons is valid in the first instance for four (4) months beginning with the date of issue.

(2) Subject to paragraph (3) where an originating summons has not been served on the defendant the Court may by order extend the validity of the originating summons from time to time for such period not exceeding four (4) months at any one time.

(3) Where the Court is satisfied on an application under paragraph (2) that, despite the making of all reasonable efforts, it may not be possible to serve the originating summons within four (4) months, the Court may, if it thinks fit, extend the validity of the originating summons for such period, not exceeding twelve (12) months, as the Court may specify.

(4) Before an originating summons, the validity of which has been extended under this rule, is served, it shall be marked with an official stamp showing the period for which the validity of the originating summons has been so extended.

O. 9, r. 4

4. Ex parte originating summons

Rules 1 (1) and 2 shall, so far as applicable, apply to ex parte originating summonses; but, save as aforesaid, the foregoing rules of this Order shall not apply to ex parte originating summonses.

O. 9, r. 5

5. Procedure after service of originating summons

(1) Upon being served with an originating summons a defendant who intends to contest the proceedings shall, within fourteen (14) days from the date of service, file an affidavit in opposition.

(2) If the defendant does not intend to contest the proceedings but desires to have a stay of execution shall, within fourteen (14) days from the date of service of the originating summons, file with the appropriate registry an acknowledgment of service in the prescribed Form 9 contained hereto, indicating his intention not to contest the proceedings and to have a stay of execution and there shall be an automatic stay of execution for seven (7) days.

(3) A plaintiff on whom a copy of a defendant's affidavit evidence has been served under paragraph (1) may, within fourteen (14) days of such service file in Court further affidavit evidence in reply and shall in that event serve copies thereof on that defendant,

(4) No other affidavit shall be received in evidence without the leave of the Court.

(5) The provisions of this rule apply subject to any direction by the Court to the contrary.

O. 9, r. 6

6. Directions, etc., by Court

(1) The Court by whom an originating summons is heard may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the Court makes an order under this paragraph against a defendant who does not appear at the hearing, the order may be varied or revoked by a subsequent order of the Court on such terms as it thinks just.

(2) In any case where the Court does not dispose of any originating summons altogether at a hearing or order the cause or matter begun by it to be transferred to some other Court or make an order under rule 10, the Court shall give such directions as to the further conduct of the proceedings as it thinks best adapted to secure the just, expeditious and economical disposal thereof.

(3) Without prejudice to the generality of paragraph (2), the Court shall, at as early a stage of the proceedings on the summons as appears to it to be practicable, consider whether there is or may be a dispute as to fact and whether the just, expeditious and economical disposal of the proceedings can accordingly be secured by hearing the summons on oral evidence or mainly on oral evidence and, if it thinks fit, may order that no further evidence shall be filed and that the summons shall be heard on oral evidence or partly on oral evidence and partly on affidavit evidence, with or without cross-examination of any of the deponents, as it may direct.

(4) Without prejudice to the generality of paragraph (2) and subject to paragraph (3) the Court may give directions as to the filing of evidence and as to the attendance of deponents for cross-examination.

(5) The Court may, at any stage of the proceedings order that any affidavit, or any particulars of any claim, defence or other matter stated in any affidavit, shall stand as pleadings or that points of claim, defence or reply be delivered and stand as pleadings.

O. 9, r. 7

7. Adjournment of summons

The hearing of the summons by the Court shall not be adjourned unless it is necessary and such adjournment shall be to a particular date, as may be appropriate, and the powers of the Court under rule 6 may be exercised at any resumed hearing.

O. 9, r. 8

8. Application affecting party who has failed to acknowledge service

Where in a cause or matter begun by originating summons an application is made to the Court for an order affecting a party who has failed to acknowledge service of the summons, the Court hearing the application may require to be satisfied in such manner as it thinks fit that the party has so failed.

O. 9, r. 9

9. Counterclaim by defendant

(1) A defendant to an action begun by originating summons who has acknowledged service of the summons and who alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of any matter (whenever and however arising) may make a counterclaim in the action in respect of that matter instead of bringing a separate action.

(2) A defendant who wishes to make a counterclaim under this rule must at the first or any resumed hearing of the originating summons by the Court but, in any case, at as early a stage in the proceedings as is practicable, inform the Court of the nature of his claim and, without prejudice to the powers of the Court under paragraph (3) the claim shall be made in such manner as the Court may direct under rule 6 or rule 10.

(3) If it appears on the application of a plaintiff against whom a counterclaim is made under this rule that the subject matter of the counterclaim ought for any reason to be disposed of by a separate action, the Court may order the counterclaim to be struck out or may order it to be tried separately or make such other order as may be expedient.

O. 9, r. 10

10. Continuation proceedings as if cause or matter begun by writ

(1) Where, in the case 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.

(2) Where the Court decides to make such an order, it shall proceed as if it was at a scheduling conference.

(3) This rule applies notwithstanding that the cause or matter in question could not have been begun by writ.

(4) Any reference in these rules to an action begun by writ shall, unless the context otherwise requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this rule to continue as if the cause or matter had been so begun.

O. 9, r. 11

11. Failure to comply with rules or Court orders

If any party to a cause or matter begun by originating summons, or a counterclaim under rule 9, does not comply with this Order, or with any order or direction of the Court as to the conduct of the proceedings, the Court may order that the cause or matter or counterclaim be dismissed or, as the case may be, the defendant be debarred from adducing such evidence in the cause or matter or counterclaim as the Court may specify, or (if it thinks appropriate) that the defence or counterclaim be struck out and judgment entered accordingly.

O. 9, r. 12

12. Abatement etc., of action

Order 34, rule 9 of the Rules of the Supreme Court, shall apply in relation to an action begun by originating summons as it applies in relation to an action begun by writ.

ORDER 10

ORIGINATING MOTIONS AND MOTIONS

O. 10, r. 1

1. Application

The provisions of this Order apply to all motions subject, in the case of originating motions of any particular class, to any special provisions relating to motions of that class made by these rules or by or under any Act.

O. 10, r. 2

2. Notice of motion

(1) Except where an application by motion may properly be made ex parte, no motion shall be made without previous notice to the parties affected thereby, but the Court, if satisfied that the delay caused by proceeding in this ordinary way would or might entail irreparable or serious mischief may make an order ex parte on such terms as to costs or otherwise, and subject to such undertaking, if any, as it thinks just; and any party affected by such order may apply to the Court to set it aside.

(2) Unless the Court gives leave to the contrary, there must be at least two (2) clear days between the service of notice of a motion and the day for hearing the motion.

O. 10, r. 3

3. Form and issue of notice of motion

(1) The notice of an originating motion shall be in Form 10 contained hereto and the notice of any other motion in Form 11 contained hereto.

(2) Where leave has been given under rule 2 (2) to serve short notice of motion, that fact shall be stated in the notice.

(3) The notice of a motion shall include a concise statement of the nature of the claim made or the relief or remedy required.

(4) Order 3, rule 4 of the Rules of the Supreme Court, shall, with the necessary modifications, apply in relation to notice of an originating motion as it applies in relation to a writ.

(5) Issue of the notice of an originating motion takes place upon its being sealed by an officer of the office out of which it is issued.

O. 10, r. 4

4. Service of notice of motion with writ or originating summons

Notice of a motion in an action may be served by the plaintiff on the defendant with the writ of summons or originating summons or at any time after service of such writ of summons, whether or not the defendant has acknowledged service in the action.

O. 10, r. 5

5. Adjournment of hearing

The hearing of any motion shall not be adjourned unless it is necessary and such adjournment shall be to a particular date and on such terms, if any, as the Court thinks fit.

ORDER 11

PETITIONS

O. 11, r. 1

1. Application

The provisions of this rule apply to petitions by which proceedings in the commercial division are commenced, subject, in the case of petitions of any particular class, to any special provisions relating to petitions of that class made under these Rules or under any written law.

O. 11, r. 2

2. Contents of petition

(1) Every petition must include a concise statement of the nature of the claim made or the relief or remedy required in the proceedings commenced thereby.

(2) Every petition shall include at the end thereof a statement of the names of the persons, if any, required to be served therewith or, if no person is required to be served, a statement to that effect.

(3) Order 3, rule 4 of these Rules, shall, with the necessary modifications, apply in relation to a petition as it applies in relation to a writ.

O. 11, r. 3

3. Presentation of petition

A petition may be presented by leaving it at any of the registries of the Court.

O. 11, r. 4

4. Fixing time for hearing petition

(1) A Judge shall fix a day and time for the hearing of a petition.

(2) Unless the Court otherwise directs, a petition which is required to be served on any person shall be served on him not less than seven (7) days before the day fixed for the hearing of the petition.

O. 11, r. 5

5. Applications not to be made by petition

No application in any cause or matter may be made by petition.

ORDER 12

SERVICE OF PROCESSES AND DOCUMENTS

O. 12, r. 1

1. Service of processes and documents

The provisions of Orders 10, 11 and 65 of the Rules of the Supreme Court shall govern service of originating processes and documents issued or filed in the Court subject to any specific provisions in these Rules or any other written law.

O. 12, r. 2

2. Service of documents by fax or electronic means

Notwithstanding the provisions of Orders 10, 11 and 65 of the Rules of the Supreme Court, a document may be served by facsimile (fax) or other means of electronic communication,

O. 12, r. 3

3. Service by fax

(1) Subject to paragraph (2), where a document is to be served by fax—

(a) a party who is to be served or his legal representative shall previously have indicated in writing to the other party serving—

(i) that he is willing to accept service by fax; and

(ii) the fax number which should be used;

(b) if the party on whom the document is to be served is acting by a legal representative, the fax shall be sent to the legal representative's business address; and

(c) a fax number—

(i) provided in writing expressly for the purpose of accepting service where the party to be served is acting in person; or

(ii) set out on the writing paper of the legal representative of the party who is to be served; or

(iii) set out on an originating process or a response to a claim filed with the Court, shall be taken as sufficient written indication for the purposes of paragraph 3 (1) (a).

(2) A legal representative's business address shall be within the jurisdiction and in the physical location of his office where a fax number is given in conjunction with the business address number shall be deemed to be at the business address.

O. 12, r. 4

4. Service by other electronic means

(1) Subject to paragraph (2), service by other electronic means may take place only where—

(a) a party serving the document and the other party on whom it is to be served are both acting by legal representatives;

(b) the document is served at the legal representative's business address; and

(c) the legal representative who is to be served has previously expressly indicated in writing to the party serving his willingness to accept service by this means and has provided—

(i) his e-mail address; or

(ii) other telephonic link number.

(2) A legal representative's business address shall be within the jurisdiction and is the physical location of his office. Where an electronic address or identification is given in conjunction with the business address, the electronic address shall be deemed to be at the business address.

O. 12, r. 5

5. Copy by post not required

Where a document is served by fax or other electronic means, a party serving the document shall not be required in addition to send a copy by post, but where it is proved that the document was not received then the Court may, on any application arising out of the non-receipt, take account of the fact that a hard copy was not sent.

ORDER 13

AMENDMENT OF PLEADINGS AND DOCUMENTS

O. 13

13. Amendment of pleadings and documents

All amendments of pleadings and documents shall be with the leave of the Court.

ORDER 14

SCHEDULING CONFERENCE

O. 14, r. 1

1. Application

The provisions of this Order shall apply to all scheduling conferences.

O. 14, r. 2

2. Directions at a scheduling conference

At a scheduling conference the Judge may—

(a) make such order as may be just with respect to any of the following matters, that is to say, interrogatories, inspections of real or personal property, admissions of fact or of documents, exchange of witness statements and place of trial;

(b) subject to rule 3, order that any particular fact may be proved by affidavit, or that the affidavit of any witness may be read at the trial on such conditions as the Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined before the Judge or such other person as may be agreed upon between the parties;

(c) order that evidence of any particular fact, to be specified in the order, shall be given at that trial by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the Judge may direct;

(d) order that no more than a specified number of expert witnesses may be called; or

(e) make such order as may be just with respect to pleadings and particulars.

O. 14, r. 3

3. Certain witnesses not to give evidence by affidavit

Where it appears to the Judge that any party reasonably desires production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit, but the expenses of such witness at the trial shall be especially reserved to the Judge at or after the trial.

O. 14, r. 4

4. Form of directions

Without prejudice to the generality of the provisions of this Order, directions issued by the Judge may be in the form set out in Form 12 contained hereto.

O. 15, r. 1

ORDER 15

PRE-TRIAL CONFERENCE

1. Pre-trial conference

(1) There shall be a pre-trial conference not later than fourteen (14) days before the date of hearing at which the Judge shall ascertain that the parties have complied with the directions given at the scheduling conference,

(2) The parties shall lodge a pre-trial check list in Form 13 contained hereto not later than two (2) days before the pre-trial conference with copies to other parties.

O. 15, r. 2

2. Failure to comply with directions

Where a party has failed to comply with any of the directions, the Judge may make the following orders—

- (a) dismiss the action, if the non-complying party is a plaintiff; or
- (b) strike-out the defence, if the non-complying party is a defendant; or
- (c) order a party to pay costs; or
- (d) make any other order that is deemed just.

ORDER 16

EVIDENCE

O. 16, r. 1

1. Power of Court to control evidence

(1) The Court may control the evidence by giving directions as to—

- (a) the issues on which it requires evidence;
- (b) the nature of the evidence which it requires to decide those issues; and
- (c) the way in which the evidence is to be placed before the Court.

(2) The Court may use its power under this rule to exclude evidence that would otherwise be admissible.

(3) The Court may limit cross-examination.

O. 16, r. 2

2. Evidence of witness-general rule

The general rule is that any fact which needs to be proved by the evidence of a witness shall be proved—

- (a) at trial, by their oral evidence given in public; and
- (b) at any other hearing, by their evidence in writing.

O. 16, r. 3

3. Evidence by video link or other means

The Court may allow a witness to give evidence through a video link.

O. 16, r. 4

4. Requirement to serve witness statements for use at trial

(1) A witness statement is a written statement signed by a person which contains the evidence, and only that evidence, which that person shall be allowed to give orally.

(2) The Court may order a party to serve on the other parties any witness statement of the oral evidence which the party serving the statement intends to rely on in relation to any issues of fact to be decided at the trial.

(3) The Court may give directions as to—

- (a) the order in which witness statements shall be served; and
- (b) whether or not the witness statements shall be filed.

O. 16, r. 5

5. Use at trial of witness statements which have been served

(1) If—

- (a) a party served a witness statement; and
- (b) he wishes to rely at trial on the evidence of the witness who made the statement, he shall call the witness to give oral evidence unless the Court orders otherwise.

(2) Where a witness is called to give oral evidence under paragraph (1), his witness statement shall stand as his evidence in chief unless the Court orders otherwise.

(3) A witness giving oral evidence at trial may with the leave of the court—

- (a) amplify his witness statement; and

(b) give evidence in relation to new matters which have arisen since the witness statement was served on the other parties.

(4) The Court will give leave under paragraph (3) only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement.

(5) If a party who has served a witness statement does not call the witness to give evidence at trial, the Court shall disregard the witness statement and any other party may put in the witness statement as hearsay evidence.

O. 16, r. 6

6. Evidence in proceedings other than at trial

The general rule is that evidence at hearings other than the trial is to be by witness statement or unless the court, a practice direction or any other enactment requires otherwise.

O. 16, r. 7

7. Order for cross-examination

(1) Where, at a hearing other than the trial, evidence is given in writing, any party may apply to the Court for leave to cross-examine a person giving the evidence.

(2) If the Court gives leave under paragraph (1) but the person in question does not attend as required by the order, his evidence may not be used unless the Court has given leave.

O. 16, r. 8

8. Form of witness statement and affidavit

A witness statement shall comply with the requirements set out in the relevant practice direction issued by the Chief Justice.

O. 16, r. 9

9. Witness summaries

(1) A party who is required to serve a witness statement for use at trial but is unable to obtain it once, may apply, for leave to serve a witness summary instead.

(2) A “witness summary” means a summary of—

(a) the evidence, if known, which would otherwise be included in a witness statement; or

(b) if the evidence is not known, the matters about which a party serving the witness summary proposes to question the witness.

(3) Unless the Court orders otherwise, a witness summary shall—

- (a) include the name and address of the intended witness; and
- (b) be served within the period in which a witness statement would have had to be served.

(4) Where a party serves a witness summary, so far as practicable, Order 16 rule 4 (requirement to serve witness statement for use at trial), Order 16 rule 5 (3) (a) (amplifying witness statements), and Order 16 rule 8 (form of witness statements), shall apply to the summary.

O. 16, r. 10

10. Consequences of failure to serve witness

If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the Court, then the witness may not be called to give oral evidence.

O. 16, r. 11

11. Cross-examination on a witness statement

Where a witness is called to give evidence at trial, he may be cross-examined on his witness statement.

O. 16, r. 12

12. Use of witness statements for other purposes

(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.

(2) Paragraph (1) shall not apply if and to the extent that—

- (a) the witness gives consent in writing to some other use of it;
- (b) the Court gives leave for some other use; or
- (c) the witness statement has been put in evidence at a hearing held in public.

O. 16, r. 13

13. Availability of a witness statement for inspection

(1) A witness statement which stands as evidence in chief shall be open to inspection during the course of the trial unless the Court otherwise directs.

(2) Any person may ask for a direction that a witness statement is not open to inspection.

(3) The Court may not make a direction under paragraph (2) unless it is satisfied that a witness statement should not be open to inspection because of—

- (a) interests of justice;
- (b) public interest;
- (c) the nature of any expert scientific evidence in the statement;
- (d) the nature of any confidential information (including information relating to personal financial matters) in the statement; or
- (e) the need to protect the interests of any child or patient.

(4) The Court may exclude from inspection words or passages in the statement.

O. 16, r. 14

14. False statements

(1) Proceedings for contempt of Court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

(2) Proceedings under this rule may be brought only—

- (a) by the Attorney General; or
- (b) with the leave of the Court.

O. 16, r. 15

15. Affidavit evidence

(1) Evidence shall be given by affidavit, instead of or in addition to a witness statement if this is required by the Court, a provision contained in any other rule, a practice direction or any other enactment.

(2) Nothing in these Rules shall prevent a witness giving evidence by affidavit, at a hearing other than the trial, if he chooses to do so in a case where paragraph (1) does not apply, but the party putting forward the affidavit may not recover the additional cost of making it from any other party unless the court orders otherwise.

O. 16, r. 16

16. Form of affidavits

An affidavit shall comply with the requirements set out in the relevant practice direction.

O. 16, r. 17

17. Affidavit made outside the jurisdiction

(1) A person may make an affidavit outside the jurisdiction in accordance with—

- (a) this Order; or
- (b) the law of the place where he makes the affidavit.

O. 16, r. 18

18. Notice of admit facts

(1) A party may serve notice on another party requiring him to admit the facts, or the part of the case of the serving party, specified in the notice.

(2) A notice to admit facts shall be served no later than twenty-one (21) days before the trial.

(3) Where the other party makes any admission in response to the notice the admission may be used against him only—

- (a) in the proceedings in which the notice to admit is served; and
- (b) by the party who served the notice.

(4) The Court may allow a party to amend or withdraw any admission made by him on such terms as it thinks just.

O. 16, r. 19

19. Notice to admit or produce documents

(1) A party shall be deemed to admit the authenticity of a document disclosed to him under discovery and notification of documents unless he serves notice that he wishes the document to be proved at trial.

(2) A notice to prove a document shall be served—

- (a) by the latest date for serving witness statements; or
- (b) within seven (7) days of disclosure of the document, whichever is later.

ORDER 17

ORDERS FOR INTERIM REMEDIES

O. 17, r. 1

1. Orders for interim remedies

(1) The Court may grant the following interim remedies—

- (a) an interim injunction;
- (b) an interim declaration;
- (c) an order—
 - (i) for the detention, custody or preservation of relevant property;
 - (ii) for the inspection of relevant property;
 - (iii) for the taking of a sample of relevant property;
 - (iv) for the carrying of an experiment on or with relevant property;
 - (v) for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly; and
 - (vi) for the payment of income from relevant property until a claim is decided;
- (d) an order authorizing a person to enter any land or building in the possession of a party to the proceeding for the purposes of carrying out an order under subparagraph (c);
- (e) an order (referred to as a “freezing injunction”)—
 - (i) restraining a party from removing from the jurisdiction assets located there; or
 - (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;
- (f) an order directing party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction;
- (g) an order (referred to as a “search order”) requiring a party to admit another party to premises for the purpose of preserving evidence, etc.);
- (h) an order for disclosure of documents or inspection of property before a claim has been made;
- (i) an order in certain proceedings for disclosure of documents or inspection of property against a non-party;
- (j) an order interim payment under rule 17 (6) for payment by a defendant on account of any damages, debt or other sum (except costs) which the Court may hold the defendant liable to pay;

(k) an order for a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund;

(l) an order permitting a party seeking to recover personal property to pay money into court pending the outcome of the proceedings and directing that, if he does so, the property shall be given up to him;

(m) an order directing a party to prepare and file accounts relating to the dispute; or

(n) an order directing any account to be taken or inquiry to be made by the Court.

(2) The Court may issue a witness summons requiring a witness to produce documents to the Court at the hearing or on such date as the court may direct.

(3) In paragraph (1) (c) and (f), "relevant property" means property (including land) which is the subject of a claim or as to which any question may arise on a claim.

(4) In paragraph 1 (1) "document" includes electronic document.

(5) The fact that a particular kind of interim remedy is not listed in paragraph (1) shall not affect any power that the Court may have to grant that remedy.

(6) The Court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind.

O. 17, r. 2

2. Time when an order for an interim remedy may be made

(1) An order for an interim remedy may be made at any time, including—

(a) before proceedings are started; or

(b) after judgment has been given.

(2) However—

(a) paragraph (1) shall be subject to any rule, practice direction or other written law which provides otherwise;

(b) the Court may grant an interim remedy before commencement of a matter only if—

(i) the matter is urgent; or

(ii) it is otherwise necessary to do so in the interests of justice;

and

(3) Where the court grants an interim remedy before a matter is commenced, it may give directions requiring a matter to be commenced.

O. 17, r. 3

3. How to apply for an interim remedy

(1) The Court may grant an interim remedy on an application made ex parte if it appears to the Court that there are good reasons for not hearing the other party.

(2) An application for an interim remedy shall be supported by evidence, unless the Court orders otherwise.

(3) If an applicant makes an application, the evidence in support of the application shall state the reasons why notice was not given to the party.

O. 17, r. 4

4. Application for an interim remedy where there is no related claim

This rule shall apply where a party wishes to apply for an interim remedy but—

(a) the remedy is sought in relation to proceedings which are taking place, or will take place, outside the jurisdiction; or

(b) the application is made for an order for disclosure, inspection, etc., before a matter has been commenced.

O. 17, r. 5

5. Inspection of property before commencement or against a non-party

(1) This rule shall apply where a person makes an application for—

(a) inspection, etc., of property before commencement; or

(b) inspection, etc., of property against a non-party.

(2) The evidence in support of such an application shall show, where practicable by reference to any originating process prepared in relation to such proceedings.

(3) A copy of the application and a copy of the evidence in support shall be served on—

(a) a person against whom the order is sought; and

(b) every party to the proceedings other than the applicant.

O. 17, r. 6

6. Interim payments general procedure

(1) A plaintiff may not apply for an order for an interim payment before the end of the period for service of defence applicable to the defendant against whom the application is made.

(2) A plaintiff may make more than one application for an order for an interim payment.

(3) A copy of an application for an order for an interim payment must—

(a) be served at least fourteen (14) days before the hearing of the application; and

(b) be supported by evidence.

(4) If a defendant to an application for an order for an interim payment wishes to rely on written evidence at the hearing, he shall—

(a) file the written evidence; and

(b) serve copies on every other party to the application, at least seven (7) days before the hearing of the application.

(5) If the applicant wishes to rely on written evidence in reply, he shall—

(a) file the written evidence; and

(b) serve a copy on the respondent, at least three (3) days before the hearing of the application.

(6) This rule shall not require written evidence—

(a) to be filed if it has already been filed; or

(b) to be served on a party on whom it has already been served.

(7) The Court may order an interim payment in one sum or in instalments.

O. 17, r. 7

7. Conditions to be satisfied and matters to be taken into account for interim payments

(1) The Court may make an order for an interim payment only if—

(a) a defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to a plaintiff;

(b) the plaintiff has obtained judgment against the defendant for damages to be assessed or for a sum of money (other than costs) to be assessed;

(c) it is satisfied that, if the claim went to trial, the plaintiff would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for interim payment; or

(d) the following conditions are satisfied—

(i) the plaintiff is seeking an order for possession of land (whether or not any other order is also sought); and

(ii) the Court is satisfied that, if the case went to trial the defendant would be held liable (even if the claim for possession fails) to pay the plaintiff a sum of money for the defendant's occupation and use of the land while the claim for possession was pending.

(2) The Court shall not order an interim payment of more than the admitted amount at one third (1/3) of the likely amount of the final judgment.

(3) The Court shall take into account—

(a) contributory blame; and

(b) any relevant set-off or counterclaim.

O. 17, r. 8

8. Powers of Court relating to order for interim payment

(1) Where a defendant has been ordered to make an interim payment, or has in fact made an interim payment (whether voluntarily or under an order), the Court may make an order to adjust the interim payment.

(2) The Court may in particular—

(a) order all or part of the interim payment to be repaid;

(b) vary or discharge the order for the interim payment;

(c) order a defendant to reimburse, either wholly or partly, another defendant who has made an interim payment.

(3) The Court may make an order under paragraph (2) (c) only if—

(a) the defendant to be reimbursed made the interim payment in relation to a claim in respect of which he has made a claim against the other defendant for a contribution, indemnity or other remedy; and

(b) where the claim or part to which the interim payment relates has not been discontinued or disposed of, the circumstances are such that the Court could make an order for interim payment under rule 7.

(4) The Court may make an order under this rule without an application by any party if it makes the order when it disposes of the claim or any part of it.

(5) Where—

(a) a defendant has made an interim payment; and

(b) the amount of the payment is more than his total liability under the final judgment or order,

the Court may award him interest on the overpaid amount from the date when he made the interim payment.

O. 17, r. 9

9. Restriction of disclosure of an interim payment

The fact that a defendant has made an interim payment, whether voluntarily or by court order, shall not be disclosed to the trial judge until all questions of liability and the amount of money to be awarded have been decided or unless the defendant agrees.

O. 17, r. 10

10. Interim injunction to cease if matter is stayed

If—

(a) the Court has granted an interim injunction other than a freezing injunction; and

(b) the matter is stayed other than by agreement between the parties, the interim injunction shall be set aside unless the Court orders that it should continue to have effect even though the matter is stayed.

O. 17, r. 11

11. Security for costs

(1) A defendant or respondent to any proceedings may apply under this rule for security for his costs of the proceedings.

(2) An application for security for costs shall be supported by written evidence.

(3) Where the Court makes an order for security for costs, it may—

(a) determine the amount of security; and

(b) the time within which the security shall be given.

O. 17, r. 12

12. Conditions to be satisfied

(1) The Court may make an order for security for costs under rule 11, if—

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) (i) one or more of the conditions in paragraph (2) apply; or

(ii) any written law permits the Court to require security for costs.

(2) The conditions referred to in paragraph (1) (b) (i) include—

(a) the plaintiff is resident out of the jurisdiction;

(b) the plaintiff is a company or other body (whether incorporated inside or outside Malawi) and there is reason to believe that it may be unable to pay the defendant's costs if ordered to do so;

(c) the plaintiff has changed his address since the claim was commenced with a view to evading the consequences of the litigation;

(d) the plaintiff failed to give his address in the originating process, or gave an incorrect address in that process;

(e) the claimant is acting as a nominal party, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so; or

(f) the plaintiff has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

O. 17, r. 13

13. Security for costs other than from the plaintiff

A defendant may seek an order against someone other than a plaintiff, and the Court may make an order for security for costs against that person if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order and the person has assigned the right to the claim to the plaintiff with a view to avoiding the possibility of a costs order being made against him.

O. 17, r. 14

14. Security for costs of an appeal

The Court may order security for costs of an appeal against—

(a) an appellant; or

(b) a respondent who also appeals on the same grounds as it may order security for costs against a plaintiff under this Order.

ORDER 18

APPEALS IN INTERLOCUTORY APPLICATIONS

O. 18

18. No appeal in interlocutory applications

No appeal shall lie against the decision of a Judge in an interlocutory matter unless the decision has the effect of completely disposing of a matter.

ORDER 19

SUBMISSIONS

O. 19, r. 1

1. Submission in interlocutory application

In all interlocutory applications the parties shall file and serve skeleton arguments to be relied upon at least two (2) days before the hearing of the application.

O. 19, r. 2

2. Submission after trial

Where the parties are required at the conclusion of a trial to make written submissions, they shall file the same within fourteen (14) days from the last day of trial.

ORDER 20

JUDGMENT

O. 20

The Court shall deliver its judgment within sixty (60) days from the last day of trial.

ORDER 21

FEE PAYABLE IN THE COMMERCIAL DIVISION

O. 21

The Commercial Division shall levy the fees as set out in the Schedule of Fees contained hereto.

ORDER 22

TRANSITION

O. 22, r. 1

1. Transfer of matter

(1) Any commercial matter pending in the High Court at the commencement of these Rules over which the Commercial Division may have jurisdiction in terms of these Rules may be transferred to the Commercial Division.

(2) Any commercial matter which is partly heard by a Judge who has been assigned to the Commercial Division shall be transferred to the Commercial Division for the Judge who heard it to finalize the hearing.

(3) Any commercial matter in respect of which trial or hearing was concluded but at the commencement of these Rules there is no Judge seized of the matter shall be transferred to the Commercial Division.

O. 22, r. 2

2. No transfer of certain heard commercial matters

Where a commercial matter is partly heard but the Judge seized of the matter has not been assigned to the Commercial Division, then the Judge so seized of the matter shall conclude the matter.

O. 22, r. 3

3. Conclusion of non-commercial matter

Where a Judge who has been assigned to the Commercial Division is seized of a non-commercial matter which is partly heard or pending judgment then the Judge shall conclude such non-commercial matter notwithstanding that the Judge has been assigned to the Commercial Division.

O. 22, r. 4

4. Fees payable on transfer

Where a commercial matter has to be transferred to the Commercial Division, the plaintiff or an applicant shall pay a transfer fee of one and half per cent (1.5%) of the claim or value of the subject matter in dispute up to a maximum of one hundred fifty thousand Kwacha (K150,000) or unquantifiable claims or matters a fee of one hundred fifty thousand Kwacha (K150,000) shall be payable upon transfer to the Commercial Division.

O. 22, r. 5

[Deleted by G.N. 21/2008]

SCHEDULE OF FORMS

FORM 1 (O. 3, r. 1)

Use black ink and capital letters

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No. of 20.....

BETWEEN

..... PLAINTIFF

AND

..... DEFENDANT

WRIT

(SPECIALLY ENDORSED)

TO: THE DEFENDANT [name]

of [address]

THIS WRIT OF SUMMONS has been issued against you by the above-named plaintiff in respect of the claim set out on the back.

WE COMMAND YOU within 21 days after the service of this Writ on you, inclusive of the day of service, you must either satisfy the claim or file with this Court a defence and list of documents. If you do not intend to contest the proceedings you must within 14 days after service of this Writ on you inclusive of the day of service return the accompanying Acknowledgement of Service to the appropriate registry stating therein that you do not intend to contest the proceedings but desire a stay of execution.

TAKE NOTICE that if you fail to satisfy the claim or to file a defence and list of documents or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

WITNESS The Honourable

Chief Justice of the High Court of Malawi, the day of , 20.....

.....

Registrar

Dated this day of , 20.....

(Signed)

[Plaintiff/Legal Practitioner for the Plaintiff]

If, within the time for returning the Acknowledgement of Service, the defendant pays the amount claimed and K for costs and, if the plaintiff obtains an order for substituted service, the additional sum of K further proceedings will be stayed.

The money must be paid to the plaintiff, his legal practitioner or agent.

THIS WRIT was issued by

of legal practitioner for the said

plaintiff whose address for service is

or

THIS WRIT was issued by the said plaintiff who resides at and

is (state occupation)

and (if the plaintiff does not reside within the jurisdiction) whose address for service

is

Use black ink and capital letters

FORM 2 (O. 3, r. 5/O. 5, r. 2)

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No. of 20.....

BETWEEN

..... PLAINTIFF

AND

..... DEFENDANT

LIST OF DOCUMENTS

The following is a list of the documents relating to the matters in question in this action which are or have been in the possession, custody or power of the above-named plaintiff [or defendant] [name] and which is served in compliance with Order 3, rule 5 [or Order 5 rule 2] and the order herein dated the day of , 20.....

1. The plaintiff [or defendant] has in his possession, custody or power the documents relating to the matters in question in this action enumerated in Schedule 1 hereto.
2. The plaintiff [or defendant] objects to produce the documents enumerated in Part 2 of the said Schedule 1 on the ground that [stating the ground of objection].
3. The plaintiff [or defendant] has had, but has not now, in his possession, custody or power the documents relating to the matters in question in this action enumerated in Schedule 2 hereto.
4. Of the documents in the said Schedule 2, those numbered in that Schedule were last in the plaintiff's [or defendant's] possession, custody or power on [stating when] and the remainder on [stating when].

[Here state what has become of the said documents and in whose possession they now are].

5. Neither the plaintiff [or defendant], nor his legal practitioner nor any other person on his behalf, has now, or ever had, in his possession, custody or power any document of any description whatever relating to any matter in question in this action, other than the documents enumerated in schedules 1 and 2 hereto.

SCHEDULE 1

PART 1

Use black ink and capital letters

[Here enumerate in a convenient order the documents (or bundles of documents, if of the same nature, such as invoices) in the possession, custody or power of the party in question which he does not object to produce, with a short description of each document or bundle sufficient to identify it.]

PART 2

[Here enumerate as aforesaid the documents in the possession, custody or power of the party in question which he objects to produce.]

SCHEDULE 2

[Here enumerate as aforesaid the documents which have been, but at the date of service of the list are not, in the possession, custody or power of the party in question.]

Dated the day of , 20.....

NOTICE TO INSPECT

Take notice that the documents in the above list, other than those listed in Part 2 of Schedule 1 [and Schedule 2], may be inspected at [the office of the legal practitioner of the above-named [plaintiff] [defendant] (insert address) or as may be] on the

day of 20....., between the hours of and

To the defendant [or plaintiff] [name] and his legal practitioner.

Served the day of 20....., by

of legal practitioner for [plaintiff] [defendant].

FORM 3 (O. 3, r. 5)

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No. of 20.....

BETWEEN

..... PLAINTIFF

AND

..... DEFENDANT

INITIAL DIRECTION

Pursuant to Order 3 rule 5 (4) of the High Court (Commercial Division) Rules it is hereby ordered as follows:

1. Effective this date, this case is assigned to Honourable Justice

..... and to the individual calendar designated below.

2. All future documents filed in this case shall bear the Judge's name beneath the case number in the caption. On filing any chamber application or document related thereto, one copy for the Judge must be delivered to clerk to the Court along with the original.

3. Within 14 days of service, the plaintiff shall file proof of service of the writ of summons with the plaintiff's list of documents, this Initial Direction, and any other Order issued by the Judge.

4. If the defendant is not contesting the proceedings but desires to apply for a stay of execution, the defendant shall file an Acknowledgment of Service of the Writ of Summons within 14 days of service indicating his intention not to contest the proceedings and his intention to apply for a stay of execution and there shall be an automatic stay of execution for 7 days. Any application to extend the period of stay must be filed with the Court within the said 7 days of stay.

5. If the defendant intends to contest the proceedings, the defendant shall file and serve a defence and a list of documents within 21 days from the date of service of the Writ of Summons.

6. Any reply to defence, defence to counterclaim, rejoinders, etc., shall be filed and served within 7 days of service of the defence or pleading last preceding the pleading sought to be filed, as the case may be.

7. Pleadings shall be deemed to be closed on the expiry of 7 days from the date the defence is served or, where subsequent pleadings are served in terms of clause 6 hereof, 7 days from the date of service of the last pleading.

8. Within 7 days from the closure of pleadings the matter shall proceed to mandatory mediation and all parties to this action shall lodge statements as provided for by Rule 6 of the Courts (Commercial Division) (Mandatory Mediation) Rules.

Dated this day of, 20.....

.....

Judge-in-Charge

Use black ink and capital letters

FORM 4 (O. 5, r. 1)

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No. of 20.....

BETWEEN

..... PLAINTIFF

AND

..... DEFENDANT

ACKNOWLEDGMENT OF SERVICE OF WRIT OF SUMMONS

PART 1(Your) (defendant's)

full namePART 2 (Do you) (Does the defendant)The whole of the plaintiff 's claim?intend to contest:

(tick as appropriate)Part of the plaintiff's claim?None of the plaintiff's claim?NOTE: If you the defendant intends to contest these proceedings or any part of the claim you must within 21 days file and serve a defence and list of documents. Failure to do this may result in a default judgment being entered.

PART 3If you have said that you do not intend to contest the whole, or part, of the plaintiff's claim will you (the defendant) be asking the court for a stay of execution?YesNoNOTE:If you tick yes there shall be an automatic stay of execution for a period of 7 days.

PART 4I acknowledge that (I have) (the defendant has) been served with a copy of the Writ of Summons.Signed Date

defendant (legal practitioner for the defendant) (authorized officer)

Address to which documents about this case should be sent:

Legal Practitioner's referenceTelephone No.FaxNo

When completed this form should be returned to the registry which issued the writ.

Use black ink and capital letters

FORM 5 (O. 5, r. 6)

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No.of 20.....

(Before Honourable Justice.....)

BETWEEN

..... PLAINTIFF

AND

..... DEFENDANT

NOTICE OF MEDIATION

TAKE NOTICE that the pleadings herein having been closed the matter is set down for mediation on day of , 20..... ato'clock in the..... noon before Honourable Justice in Chambers.

Dated the day of..... , 20.....

.....

Honourable Justice

TO : The plaintiff and his legal practitioners.

: The defendant and his legal practitioner.

Use black ink and capital letters

FORM 6 (O. 7, r. 2/O. 8, r. 2)

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No. of 20.....

(Before Honourable Justice)

BETWEEN

..... PLAINTIFF

AND

..... DEFENDANT

SUMMONS

LET ALL PARTIES attend before Honourable Justice in Chambers on day, the day of 20..... at o'clock in the noon on the hearing of an application on the part of the plaintiff for final judgment against the defendant on the whole part of the plaintiff's claim on the ground that the defendant does not have an arguable defence on the merits to the plaintiff's claim.

TAKE NOTICE that the affidavit of attached hereto and served herewith shall be read in support of the application.

ANY affidavit in opposition must be filed and served at least 3 clear days before the above-mentioned return date.

Dated the day of , 20.....

.....

Honourable Justice

TO: The defendant/defendant's legal practitioners.

Use black ink and capital letters

FORM 7 (O. 9, r. 1)

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No. of 20.....

BETWEEN

..... PLAINTIFF

AND

..... DEFENDANT

ORIGINATING SUMMONS

To:

of:

LET ALL PARTIES concerned attend before a Judge in Chambers on day, the day of , 20..... at o'clock in the..... noon, on the determination of this summons.

By this summons, the plaintiff claims against the defendant

[or seeks the determination of the Court on the following questions, namely,

..... or as may be].

The grounds on which the plaintiff seeks the above-stated relief/remedy are as follows:

.....

TAKE NOTICE that the affidavit of attached hereto and served herewith shall be read in support of the application.

LET THE DEFENDANT, within 14 days after service of this summons on him, counting the day of service, return the accompanying Acknowledgment of Service to the appropriate registry.

If the defendant does not acknowledge service, such judgment may be given or order made against or in relation to him as the Court may think just and expedient.

Dated the day of , 20.....

.....

Registrar

NOTE: This summons may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with the above date unless renewed by order of the Court.

This summons was taken out by

of legal practitioner for the said plaintiff whose address is

as stated above

[or

This summons was taken out by of agent for of legal

practitioner for the said plaintiff whose address is as stated above]

[or

where the plaintiff sues in person. This summons was taken out by the said plaintiff who resides at the above-named address or as may be and (if the plaintiff does not reside within the jurisdiction) whose address for service is]

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

Use black ink and capital letters

FORM 8 (O. 9, r. 1)

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No. of 20.....

IN THE MATTER OF

AND

IN THE MATTER OF

BETWEEN

..... APPLICANT

AND

..... RESPONDENT

EX PARTE ORIGINATING SUMMONS

LET ALL PARTIES concerned attend before a Judge in Chambers on day, the day of , 20..... at o'clock in the..... noon, on the hearing of an application by [name of applicant] for the following declarations, orders or relief

The grounds on which the plaintiff seeks the above-stated relief/remedy are as follows:

.....

TAKE NOTICE that the affidavit of attached hereto and served herewith shall be read in support of the application.

Dated the day of , 20.....

.....

Registrar

This summons was taken out by of [agent for of] legal practitioner for the applicant whose address is

Use black ink and capital letters

FORM 9 (O. 9, r. 5)

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No.of 20.....

BETWEEN

..... PLAINTIFF

AND

..... DEFENDANT

ACKNOWLEDGMENT OF SERVICE OF ORIGINATING SUMMONS

PART 1(Your) (defendant's)

full namePART 2 (Do you) (Does the defendant)The whole of the plaintiff 's claim?intend to contest:

(tick as appropriate)Part of the plaintiff's claim?None of the plaintiff's claim?NOTE: If you the defendant intends to contest these proceedings or any part of the claim you must within 14 days file and serve an affidavit in opposition. Failure to do this may result in a default judgment being entered.

PART 3If you have said that you do not intend to contest the whole, or part, of the plaintiff's claim will you (the defendant) be asking the court for a stay of execution?YesNoNOTE:If you tick yes there shall be an automatic stay of execution for a period of 7 days.

PART 4I acknowledge that (I have) (the defendant has) been served with a copy of the origination summons.Signed Date

defendant (legal practitioner for the defendant) (authorized officer)

Address to which documents about this case should be sent:

Legal Practitioner's referenceTelephone No.Fax No.

When completed this form should be returned to the appropriate registry.

Use black ink and capital letters

FORM 10 (O. 10, r. 3)

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No. of 20.....

IN THE MATTER OF

AND

IN THE MATTER OF

BETWEEN

..... APPLICANT

AND

..... RESPONDENT

NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Court will be moved before a Judge in Chambers on day, the day of , 20..... at the sitting of the Court or so soon thereafter as counsel can be heard, by counsel on behalf of [name of applicant] for an order that

.....

[or for the following relief; namely]

And that the costs of and incidental to this application may be paid by

And further take notice that the grounds of this application are:

.....

.....

.....

Dated the day of , 20.....

Signed:

Legal practitioner for the applicant of for the

above-named [applicant] whose address is

.....

To:

of:

Use black ink and capital letters

FORM 11 (O. 10, r. 3)

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No. of 20.....

[heading as in cause or matter]

NOTICE OF MOTION

TAKE NOTICE that [pursuant to the leave of Honourable Justice given on the day of 20.....] the Court [or Honourable Justice] will be moved on the day of 20....., at o'clock, or so soon thereafter as counsel can be heard, by counsel for the above-named plaintiff [or defendant] that and that the costs of the application be provided for.

The grounds on which the plaintiff seeks the above-stated relief/remedy are as follows:

.....
.....
.....

Dated the day of..... , 20.....

Signed:

Legal practitioner for the applicant of for the above-named [applicant] whose address is

.....

To:

Legal practitioner for the:

Use black ink and capital letters

FORM 12 (O. 14, r. 4)

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No. of 20.....

(Before Honourable Justice)

BETWEEN

..... PLAINTIFF

AND

..... DEFENDANT

DIRECTIONS

1. Signed statements of factual witnesses to be exchanged under Order 38, rule 2A of the Rules of the Supreme Court not later than [DATE].

Unless otherwise ordered, the statement to stand as the evidence in chief of the witness at the trial.

2. Experts' reports to be exchanged under Part IV of Order 38 of the Rules of the Supreme Court not later than [DATE] and to be agreed as far as possible.

Unless otherwise ordered such reports to be confined to issues of

.....

[Within days of exchange the experts shall meet and, pursuant to O. 38, r. 38 of the Rules of the Supreme Court, identify those parts of their evidence which are in issue and prepare a joint report indicating those parts of their evidence on which they are, and those parts on which they are not, in agreement.]

3. The parties to be at liberty to apply to call as expert witnesses at the trial experts whose reports they have exchanged pursuant to the preceding direction, such application to be made not earlier than 2 weeks, and not later than weeks, after such exchange.

[OR]

3. If the experts' reports cannot be agreed, the parties shall be at liberty to call expert witnesses at the trial limited to [number] for each party and to experts whose reports have been exchanged in accordance with the preceding direction.

Supplementary reports, if any, to be exchanged not later than [DATE]

4. Interrogatories under O. 26, r. 1 (1) of the Rules of the Supreme Court, if any, to be served not later than [DATE].

5. The action to be tried by Judge alone on [DATE].

6. A signed Pre-Trial Check-List in standard Form 13 to be lodged by each party with the Clerk to the Court not later than 2 days before the pre-trial conference.

7. Paginated trial bundles to be agreed not later than 3 weeks before the fixed date and lodged not later than 14 days before the start of the trial.

8. Costs in the cause.

Dated the day of, 20.....

.....

Honourable Justice

Use black ink and capital letters

FORM 13 (O. 15, r. 1)

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No. of 20.....

(Before Honourable Justice)

BETWEEN

..... PLAINTIFF

AND

..... DEFENDANT

PRE-TRIAL CHECK-LIST

Pleadings

- 1 (a) Do you intend to make any amendment to your pleading?
- (b) If so, when?

Interrogatories

- 2 (a) Are any interrogatories outstanding?
- (b) If so, when served and upon whom?

Evidence

- 3 (a) Have all orders in relation to expert, factual and hearsay evidence been complied with? If not, specify what remains outstanding.
 - (b) Do you intend to serve/seek leave to serve any further report or statement? If so, when and what report or statement?
 - (c) Have all other orders in relation to oral evidence been complied with?
 - (d) Do you require any further leave or orders in relation to evidence? If so, please specify and say when you will apply.
- 4 (a) What witnesses of fact do you intend to call? [NAMES]
 - (b) What expert witnesses do you intend to call? [NAMES]
 - (c) Will any witness require an interpreter? If so, which?

Documents

- 5 (a) Have all orders in relation to discovery been complied with?
 - (b) If not, what orders are outstanding?
 - (c) Do you intend to apply for any further orders relating to discovery?
 - (d) If so, what and when?
6. When did you lodge paginated bundles of fully legible documents for the use of counsel and the Court? [DATE].

Dated the day of , 20.....

Signed:

Legal practitioner for the plaintiff/defendant

of for the above-named

plaintiff/defendant whose address is

.....

SCHEDULE OF FEES

1. SERVICE Fee Payable Kt1. For service by an officer of the court of summons, petition, answer, motion paper, notice, warrant, decree, order or other document on a party, or witness 4,000 002. FILING OF DOCUMENTS2. On filing any of the following originating processes— 1.5% of the claim of value of the subject matter in dispute with a maximum K150,000 (for K10,000,000 claim) (a) Writ of Summons; (b) Originating Summons; (c) Originating Motion; (d) Petition;3. On filing any interlocutory summons, motion, notice or application not particularly charged herein 1,000 004. On filing any affidavit other than an affidavit of service 1,000005. On filing every affidavit of service 750006. On filing a decree or order 2,000007. On motion for new trial 1,000008. On filing a Notice of Adjournment of a hearing rendered necessary by default of either party 2,000009. On filing a Writ of Fieri Facias and attendant Praecipe 3,000003. APPEAL TO THE DIVISION10. On lodging notice of appeal 2,500,0011. On filing motion for leave to appeal 1,000 0012. On filing application for security 2,000 0013. On filing an order for leave to appeal 1,000 0014. On the hearing of an appeal where judicial relief or assistance is sought, but not the recovery of money 1,000 0015. On the hearing of an appeal in matters other than those specified in item 141% per cent of the amount involved but in no case less than K2,500 Fee Payable Kt16. On every application, motion, order or rule not particularly charged 1,000004. APPEAL FROM THE DIVISION TO THE SUPREME COURT OF APPEAL17. On motion for leave to appeal 5,0000018. On filing application for security 5,0000019. On filing an order for leave to appeal 2,0000020. On filing Notice of Appeal 5,0000021. On application for an order to amend Notice of Appeal 2,0000022. On every application, motion, order or rule not particularly charged 2,000005. MISCELLANEOUS23. On taxation of any bill of costs7,000 0024. On every deposition taken before trial2,500 0025. For taking inventory (per hour, with maximum of K30,000 per diem) 5,0000026. For Commissioning an affidavit500 0027. For Commissioning every exhibit to an affidavit 1000028. For certifying signature or seal2,500 0029. For attesting a signature, or administering an oath, or receiving a declaration or affirmation 2,500 0030. For certifying copy of a document1,000 00 For Court record on (each page)100 0031. For an official certified translation of any document2,500 0032. For attaching documents under official seal2,500 0033. For affixing the seal of the Court to any document not in a proceeding 2,5000034. On reference to the archives5,000 0035. For attendance at a sale— (a) at request of parties interested or of local authorities if absent less than two hours 10,00000 (b) at request of parties interest, for each additional hour or part thereof (with a maximum per day of K10,000)36. For communication between two Courts

2,5000037. For communication in writing to a foreign consulate or to local or foreign authority
..... 10,00000

Fee PayableKt38. For receiving report of survey, filing original and making certified copy of request, order and report of survey 2,5000039. For attendance of the Registrar or other officer of the Court at any other Court, office or Tribunal, such sum as the Court may direct, and reasonable travelling expenses, not exceeding per diem 10,0000040. For filing request for survey and issuing order for survey . . 2,5000041. For attendance of an interpreter at any Court, if required by a party in a suit, or ordered by the Court for each hour or part of an hour 2,5000042.

On any search, including inspection, of any case record, or register 1,0000043. No fees shall be payable by the Government in respect of suits instituted by or against the Government.44. No fees shall be payable by the Department of Legal Aid in respect of a suit instituted by or against a person who has been granted legal aid under the Legal Aid Act.

HIGH COURT (COMMERCIAL DIVISION) (MANDATORY MEDIATION) RULES

under s. 67

G.N. 6/2007

1. Citation

These Rules may be cited as the High Court (Commercial Division) (Mandatory Mediation) Rules.

2. Application

Subject to rule 3 these Rules shall apply to all proceedings commenced by way of writ of summons in the Commercial Division.

3. Exemption from mediation

These Rules shall not apply to proceedings—

- (a) for any such matters where by law or practice, the trial is expedited;
- (b) where there is an application for summary judgment;
- (c) where there is an application for judgment on admissions;
- (d) where the Court makes an order on an application by a party requesting the Court to exempt the action from these Rules; or
- (e) where the Court, in its discretion, so orders.

4. Mandatory mediation

All proceedings to which these Rules apply shall first go through mediation in accordance with these Rules.

5. Purpose and nature of mediation

(1) In conducting any mediation session under these Rules—

(a) the parties shall strive to reduce cost and delay in litigation, and facilitate an early and fair resolution of disputes; and

(b) the Judge shall facilitate communication between or among the parties to the dispute in order to assist them in reaching a mutually acceptable resolution.

(2) Without derogation from the generality of subrule (1), the Judge—

(a) shall, in an independent and impartial manner, do everything necessary to help the parties to resolve their dispute;

(b) may, where necessary, conduct joint or separate meetings with the parties and may make recommendations for a settlement;

(c) may, where services of an expert may be obtained at no cost or without expense, or where such services may be obtained at a cost, and if parties agree to pay such costs or expenses, obtain expert advice on a technical aspect of the dispute, which advice shall be given in an independent and impartial manner;

(d) shall be guided by principles of objectivity, fairness and natural justice, and shall give consideration to, among other things—

(i) the rights and obligations of the parties;

(ii) the usages of the trade concerned; and

(iii) the circumstances surrounding the disputes, including any previous business practices between the parties;

(e) may, at any stage of the mediation proceedings and in a manner that the Judge considers appropriate, take into account the wishes of the parties, including any request by either of the parties that the Judge should hear oral statements for a speedy settlement of the dispute; and

(f) may, at any stage of the mediation proceedings, make proposals for the settlement of the dispute.

(3) A request for the services of an expert under this rule may be made by the Judge or by any party with the consent of the other party or parties.

6. Statement of issues

(1) Within seven (7) days from the time the pleadings are deemed to be closed, every party shall prepare a statement in FORM A contained hereto and provide a copy to every other party to the mediation and to the Judge.

(2) The Judge shall, within two (2) days from the time the pleadings are deemed to be closed issue a notice to the parties advising the date of the mediation session.

(3) The statement referred to in subrule (1) shall identify the factual and legal issues in dispute and briefly set out the position and interest of the party making the statement.

(4) Every party who makes a statement under this rule shall attach to it any material which the party considers of central importance in the matter.

(5) If it is not practical to conduct a mediation because a party fails to comply with subrule (1) , the Judge, seized of the case may—

(a) dismiss the action, if the non-complying party is a plaintiff, or strike out the defence, if the non-complying party is a defendant;

(b) order a party to pay costs; or

(c) make any other order that is deemed just.

7. Attendance

(1) The parties and their legal practitioners, if the parties are represented, shall attend the mediation session.

(2) If a third party may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse a party for money paid in satisfaction of all or part of a judgment in the action, the third party and a legal practitioner of the third party may also attend the mediation session, unless the Court orders otherwise.

8. Authority to settle

(1) A party to a mediation session shall have authority to settle any matter during the mediation session.

(2) A party who requires the approval of another person before agreeing to a settlement shall, before the mediation session, arrange to have ready means of communication to that other person throughout the session, whether it takes place during or after regular business hours.

9. Failure to attend

If it is not practical to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the Judge, seized of the case may—

(a) dismiss the action, if the non-complying party is a plaintiff, or strike out the defence, if the non-complying party is a defendant;

(b) order a party to pay costs; or

(c) make any other order that is deemed just.

10. Confidentiality

(1) All communications at a mediation session and the mediation notes and records of the Judge shall be deemed to be confidential.

(2) Without derogation from the generality of subrule (1)—

(a) a record, report, settlement agreement, except where its disclosure is necessary for the purpose of implementation and enforcement, and any other documents required in the course of mediation shall be confidential;

(b) a Judge shall not—

(i) disclose information given in the course of the mediation to a person who is not a party to the mediation without the consent of the parties; or

(ii) be a witness in any Court proceedings relating to the same matter;

(c) a party to a mediation shall not rely on—

(i) the record of the mediation;

(ii) statement made at the mediation session; or

(iii) any information obtained during the mediation,

as evidence in Court proceedings or any other subsequent settlement initiative, except in relation to proceedings brought by either party to vitiate the settlement agreement on the grounds of fraud.

11. Settlement agreement and appeals

(1) Where it appears to the Judge that there exist elements of a settlement which may be acceptable to the parties, the Judge shall formulate the terms of a possible settlement and submit them to the parties for their consideration, and after receiving the observations of the parties, the Judge may reformulate the terms of a possible settlement in the light of those observations and resubmit them to the parties as it appears to him expedient.

(2) If the parties reach agreement on a settlement of the dispute—

(a) the Judge shall immediately thereafter draw up a settlement agreement in conjunction with the parties; and

(b) the parties shall sign the settlement agreement in the presence of each other, and the Judge shall also sign the settlement agreement in the presence of the parties.

(3) The Judge shall furnish a copy of the signed settlement agreement to each of the parties and shall be deemed to be a judgment of the Court and may be enforced as such.

(4) No appeal shall lie against a settlement agreement under rule 11 (3).

12. Failure to reach agreement

Where upon the conclusion of mediation no settlement agreement is reached, the action shall be referred to another Judge who shall continue with the proceedings from the point where and at which the action was referred for mediation.

13. Duration of mediation

A mediation period shall not exceed a period of fourteen (14) days from the date of the first session of mediation.

14. End of mediation

(1) A mediation shall end when—

(a) the parties execute a settlement agreement;

(b) the Judge cancels a mediation session under rule 6 (4) and rule 9 for non-compliance on the part of any party;

(c) the Judge, after consultation with the parties, makes a declaration to the effect that further mediation is not worthwhile;

(d) the parties jointly address a declaration to the Judge that the mediation is terminated;
or

(e) a party makes a declaration to the Judge and the other party to the effect that the mediation is terminated.

(2) A declaration under subrule (1) may be in writing or orally, but where a declaration is made orally, the Judge shall record it in writing.

Use black ink and capital letters

FORM A

COURTS ACT

(CAP. 3:02)

HIGH COURT (COMMERCIAL DIVISION) (MANDATORY MEDIATION) RULES

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

..... Registry

Commercial Case No. of 20.....

(Before Honourable Justice)

BETWEEN

..... PLAINTIFF

AND

..... DEFENDANT

STATEMENT OF ISSUES

(To be provided to Judge and parties at least seven (7) days from the time pleadings are deemed to be closed)

1. Factual and legal issues in dispute:

The Plaintiff (or defendant) states that the following factual and legal issues are in dispute and remain to be resolved:

(Issues should be stated briefly and numbered consecutively)

2. Party's position and interest (What the party hopes to achieve) (Brief summary)

3. Attached materials:

Attached to this form are the following materials that the plaintiff (or defendant) considers of central importance in the matter: (list).

Dated this day of , 20.....

.....

Party's Signature or Party's Legal Practitioner's Signature

(Name, address, telephone number, fax number and e-mail address of the party or Legal Practitioner of the party filing statement of issues).

.....
.....
NOTE A: All communications at a mediation session and the Judges notes and records shall be deemed to be confidential.

NOTE B: Consequences of noncompliance: Failure to submit a statement of issues may lead to—

- (1) dismissal of action, if the non-complying party is a plaintiff; or striking out of defence, if the non-complying party is a defendant;
- (2) an order that a party pays costs; or
- (3) any other order that the Court deems fit.

COURTS (HIGH COURT) (PROCEDURE ON THE INTERPRETATION OR APPLICATION OF THE CONSTITUTION) RULES

under s. 67

G.N. 20/2008

PART I

PRELIMINARY

1. Citation

These Rules may be cited as the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules.

2. Application

These Rules shall apply to all proceedings on the interpretation or application of the Constitution which are certified by the Chief Justice in accordance with section 9 (3) of the Act.

PART II

CERTIFICATION

3. Certification

(1) The Chief Justice shall certify proceedings under section 9 (3) of the Act if the proceedings involve—

- (a) a matter under section 89 (1) (h) of the Constitution;

- (b) the determination of the constitutionality of an Act of Parliament or part thereof;
 - (c) the determination of the constitutionality of an act or omission of an organ of State or other person;
 - (d) a dispute between organs of State or public authorities concerning the status, powers or functions of those organs of State or public authorities as provided by the Constitution;
 - (e) the determination of the relationship between the Constitution and a treaty or part thereof; or
 - (f) the enforcement and protection of the Constitution.
- (2) The certification by the Chief Justice under subrule (1) shall be in Form 1 of the Schedule.

PART III

COMMENCEMENT OF PROCEEDINGS

4. Commencement of proceedings

Any proceedings under these Rules shall be commenced by an originating motion in Form 2 of the Schedule, within fourteen days after certification by the Chief Justice pursuant to section 9 (3) of the Act; but so however that—

- (a) in the case of a referral by the President under section 89 (1) (h) of the Constitution, the proceedings shall be commenced by a notice of referral; and
- (b) in the case of a referral by any other court under rule 8, the proceedings shall be commenced by a notice of referral in Form 3 of the Schedule.

PART IV

PLEADINGS

Division 1

General Proceedings

5. Originating motion

(1) Every originating motion under rule 4 shall be signed by the plaintiff or his legal practitioner, and shall contain a concise statement indicating—

- (a) the provision or provisions of the Constitution which the Court must interpret or apply; and
- (b) sufficient particulars of the relief sought.

(2) Every originating motion under rule 4 shall be supported by affidavit.

6. Notice to defend, etc.

(1) A defendant who wishes to defend the whole or any part of an originating motion under rule 4 shall, within seven days after service of the originating motion, inclusive of the day of service, give notice of his intention to defend.

(2) The defendant who has given notice of intention to defend an originating motion shall file with the Court, and serve on the plaintiff and, if the Attorney General is not a party to the proceedings, on the Attorney General, an affidavit in opposition within fourteen days from the date of the notice of his intention to defend, and the affidavit shall contain a concise statement of the defence to the originating motion.

(3) The plaintiff may file with the Court and serve on the defendant an affidavit in reply, if any, to the affidavit in opposition within seven days after the service of the affidavit in opposition.

(4) Upon the defendant filing an affidavit in opposition or the plaintiff filing an affidavit in reply, as the case may be, the Registrar shall, within fourteen days from the date of the filing an affidavit in opposition or the filing an affidavit in reply, as the case may be; set down the matter for a pre-hearing conference where the Court shall give directions on the further conduct of the proceedings.

(5) Where a defendant has not given notice of intention to defend an originating motion or has not filed an affidavit in opposition within the prescribed time, the Registrar shall, within seven days after the expiry of the prescribed time, set down the matter for a pre-hearing conference where the Court shall give directions on the further conduct of the proceedings.

(6) The Court shall hear the originating motion within twenty-one days after the directions given pursuant to subrule (5).

Division 2

Referral by the President

7. Referral by the President

(1) Every referral by the President under section 89 (1) (h) of the Constitution shall be signed and sealed by the President, and shall contain a concise statement of facts indicating the provision or provisions of the Constitution forming the basis of the referral, and the referral shall be filed with the Court for certification by the Chief Justice under section 9 (3) of the Act.

(2) The Court shall, within seven days of the filing of the referral pursuant to subrule (1)—

(a) cause to be published in the Gazette, and at least two daily newspapers of wide circulation in Malawi; and

(b) place at conspicuous places at the court,

a notice of the referral, and the Court shall invite written arguments from any interested person, who shall file arguments with the Registrar within fourteen days from the date of the notice.

(3) The Registrar shall, within fourteen days after the expiry of the period referred to in subrule (2), set down the matter for a pre-hearing conference where the Court shall give directions on the further conduct of the matter.

(4) The referral shall be heard within twenty-one days from the date of the pre-hearing conference.

Division 3

Reference by other Courts

8. Referrals by other courts

(1) Where a referral to the Court in relation to any matter on the interpretation or application of the Constitution is necessary as determined by an original court, the Judge or Magistrate or Chairperson of the original court shall, within seven days from the date of the determination, submit the referral in Form 3 of the Schedule to the Chief Justice for certification under section 9 (3) of the Act.

(2) Where the original court has made a referral under subrule (1), the proceedings in the original court shall be stayed pending a decision of the Court.

(3) Where a referral has been certified by the Chief Justice under subrule (1), the Registrar shall, within fourteen days from the date of the certification, set down the matter for a pre-hearing conference where the Court shall give directions on the further conduct of the matter.

(4) The Court shall hear the reference within twenty-one days from the date of the pre-hearing conference.

(5) The decision of the Court shall be remitted to the original court which shall decide the proceedings before it in accordance with the decision of the Court.

PART V

SERVICE

9. Service

(1) Every originating motion or referral shall be served personally.

(2) Personal service shall be effected by producing and leaving a copy of the document with the person to be served.

(3) Every originating motion or referral that is under these Rules required to be served personally may, instead of being served personally, be served by post.

(4) For purposes of subrule (3) service by post—

(a) shall be effected by sending the originating motion or referral to the usual or last known address of the person to be served;

(b) be deemed to have been effected seven days from the date of sending the originating motion or referral by registered mail or by courier service.

(5) Every referral made by a court under rule 8 shall be served by the Registrar on all persons in the original proceedings and the addresses for service shall be those given by the parties in the original proceedings.

(6) Every process under these Rules shall be served on the Attorney General, whether or not the Attorney General is a party to the proceedings.

(7) A legal practitioner representing a party may serve or accept service on behalf of the party.

PART VI

AMICUS CURIAE

10. Amicus curiae

Any person interested in any matter before the Court may, with the permission of the Court, be admitted as an amicus curiae upon such terms and conditions as the Court may determine.

11. Application by amicus curiae

An application to be admitted as an amicus curiae shall—

(a) briefly describe the interest of the amicus curiae in the proceedings;

(b) briefly identify the position to be taken by the amicus curiae in the proceedings; and

(c) briefly set out the legal arguments to be advanced by the amicus curiae, their relevance to the proceedings and the reasons for believing that the arguments will be useful to the Court.

12. Submissions by amicus curiae

An amicus curiae shall, upon being admitted, lodge written submissions with the Court in accordance with the terms and conditions determined by the Court pursuant to rule 10.

PART VII

DECISION OF THE COURT

13. Decision of the Court

(1) Every Judge shall deliver a decision in respect of proceedings under these Rules within thirty days of the conclusion of the proceedings.

(2) Notwithstanding subrule (1), a Judge may elect to concur with a decision of another Judge, and such concurrence shall constitute a decision for purposes of this rule.

SCHEDULE

FORMS

FORM 1 r. 3

COURTS (HIGH COURT) (PROCEDURE ON INTERPRETATION OR APPLICATION OF THE CONSTITUTION) RULES

CERTIFICATION BY THE CHIEF JUSTICE

(under s. 9 (3) of the Act)

* delete as appropriate*Presidential Referral Number of,
20....* delete as appropriate*Reference Number of,
20.... beingCivil/Criminal Case Number of, 20....before
His/Her Worship/Honourable Justicesitting at
.....* delete as appropriate*The proceedings
registered as Civil/Criminal Cause Number
of....., 20.... are hereby certified as having compliedwith section 9
(3) of the Act.Dated the day of,
20.....

Chief Justice

FORM 2 r. 4

COURTS (HIGH COURT) (PROCEDURE ON INTERPRETATION OR APPLICATION OF THE CONSTITUTION) RULES

NOTICE OF ORIGINATING MOTION

Case No.

In the matter of—.....
(Applicant)and.....

(Respondent)Take notice that the above-named applicant applies to the Court for an order in the following terms—(a)

.....(b)

.....(c)

.....and that the

affidavit of, annexed hereto, will be used in support thereof. Submitted for the certification of the Honourable the Chief Justice under section 9 (3) of the Act. Date at: this day of, 20.....

Applicant/Legal Practitioner for the Applicant Court.

To: The Registrar of the above-named Court.

FORM 3 r. 4

COURTS (HIGH COURT) (PROCEDURE ON INTERPRETATION OR APPLICATION OF THE CONSTITUTION) RULES

REFERRAL BY A COURT

Reference Number of, 20.... being Civil/Criminal Case Number of, 20.... before His/Her Worship/Honourable Justice sitting at

The original court being of the opinion that a [matter] on the [interpretation or application] of the Constitution has arisen in the above proceedings in respect of the following question or issue—(a)

.....(b)

.....(c)

..... submits this [Referral] for the certification of the Honourable the Chief Justice under section 9 (3) of the Act. Dated the day of, 20.....

Magistrate/Judge