IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO 3277 OF 2003

BETWEEN:

JAYSHREE PATEL.....PLAINTIFF

and

KHUZE KAPETA(male).....1ST DEFENDANT
KAKA HOLDINGS LTD..... 2ND DEFENDANT

CORAM: Chimasula Phiri J.
Kauka of Counsel for the Plaintiff
Kadwa of Counsel for the Defendants
L. Beni - Court Clerk.

Chimasula Phiri J.

RULING

This is the defendants' application to discharge the order of injunction made on 16th December 2003 and extended on 9th February 2004 restraining the defendants either by themselves, their servants, agents or whomsoever from trespassing upon the plaintiff's land and conducting construction works thereon.

This application is supported by an affidavit sworn by Mr Kadwa on 24th March 2004. The main basis for the application is that since the injunction order was granted there has been material change of the circumstances. He has deponed that the offices of the District Commissioner, Mangochi and the Regional Lands Office(South) have both confirmed that the land in question is vacant. A letter from the Lands Office is exhibited dated 27th February 2004 and reads as follows:-

> *"Our records show that the land is vacant. You can recommend any application of lease to this office if customary consultation is done. And it will be submitted to* ***THE LAKESHORE DEVELOPMENT COMMITTEE*** *for approval". This letter is addressed to the District Commissioner, Mangochi.*

Mr Kadwa has stated in his affidavit that the Regional Commissioner for Lands (South) confirmed that the 1st defendant's application for lease had actually been sent for Ministerial approval. The letter that is exhibited from the Regional Lands Officer(S) is dated 2nd March, 2004. It reads as follows:

> *"I am pleased to inform you that your application has been recorded and will be referred to the Lakeshore Development Committee before Ministerial approval".*

With respect to Mr Kadwa, I understand this letter differently. In my view the letter talks of a two tier process starting after the application has been recorded as having been received namely, firstly making reference to the Lakeshore Development Committee, and secondly submitting the application to the Minister with recommendation or comments of the Lakeshore Development Committee for Ministerial approval. My understanding of the letter is that no more than receiving and recording of Mr Kapeta's application had been done as at 2nd March, 2004. The letter also spelt out future activities to be done by the Regional Commissioner of Lands(South) namely the two tier steps outlined above. Mr Kadwa has stated that the 1st defendant successfully consulted with the Chief and the village headman of the area where the parcel of land in question is situate. He has exhibited the Customary Land Consultation with Chief Form. The details on this form include the full particulars of the 1st defendant and those of the Chief and Village headman namely Nankumba and Namakoma respectively. Importantly the form gives a brief description of the property as follows:

> *"Customary land comprising uncompleted cottage.....situate or near...."*

An observation should be made that this form has important sections relating to acquisition, lease or if the land is proposed for temporary use. In these sections the Chief and the village headman are supposed to indicate that there is no objection to the proposed acquisition and that no compensation is payable. Where compensation is payable the amount should be shown. If the land is acquired for leasehold interest similar details as those for outright acquisition are filled. In the exhibited form no such details were filled by Chief Nankumba and village headman Namakoma.

There is space provided for the date and signatures of the Chief and village headman. In this exhibit the date of 10th November, 2003 appears for both. They equally pended their names and embossed their official stamps respectively.

The last part of the form is like a jurat where the District Commissioner is supposed to confirm that he has read over and explained to the Chief and village headman. The District Commisioner is supposed to date and sign (preferably to include official stamp). In this exhibit the District Commissioner did not do either or both of these aspects. Attached to this form is a site plan showing the exact location and measurement of the land. It shows date of 3rd November 2003 whether it is for the drawing or checking of the drawing, it does not really matter. Mr Kadwa has deponed that village headman Namakoma has confirmed that the piece of land in issue does not belong to the plaintiff and that the village headman prefers the 1st defendant to be given title to the same. He has exhibited a letter from the village headman addressed to the District Commissioner with copies to the plaintiff, 1st defendant and the Regional Commissioner of Lands (South).

Mr Kadwa has deponed that the plaintiff does not have title to the land and she did not construct the "uncompleted cottage" referred to in the Customary Land Consultation with Chief Form. Further that the plaintiff unlawfully purported to sell the "uncompleted cottage" to the defendants,. He has challenged that the plaintiff does not have a **locus standi** and cannot maintain the injunction herein. He has prayed that the injunction order be discharged.

The plaintiff opposes the application. There is an affidavit of Mr Kauka. He has stated that the letters exhibited by Mr Kadwa from the Regional Lands Commissioner (South) earlier on quoted in this ruling were followed by a letter dated 9th March 2004 from the District Commissioner, Mangochi to the Regional Lands Commissioner(South). The letter is exhibited. It reads as follows:-

> ***"Stop Order of Lease Application at Namakoma village, Traditional Authority Nankumba by Khuze Kapeta.***
>
> *I write to request your office to withhold the process of a lease application of Mr Khuze Kapeta, a plot which is situated at*

Namakoma village, Traditional authority Nankumba in Mangochi district.

We had a meeting with Mrs Jayshree Patel and her lawyer on 9th March 2004. The District Commissioner Mr K. D. Dakamau and Mr F. M. Saiti, the Estate Management Assistant were present.

At the end of this meeting this office established that Mrs J. Patel is the ***bona fide*** *owner of the plot mentioned above and the structure thereon and that the process of her application was withheld because of the injunction order against Khuze Kapeta and Kaka Holdings.*

Therefore in view of the above, we have decided to request your good office to stop processing Mr Khuze Kapeta's lease application.

You might be aware that the office of the District Commissioner recommended Mr Khuze Kapeta's application on the directions from your good office – your letter reference number SR/LA/G/03 dated 27th February 2004 refers and we are seeking your direction on how we can go about in recommending Mrs J. Patel's application.

Your quick response in this regard will highly be appreciated".

Another letter has been exhibited dated 17th March 2004 from the District Commissioner addressed to the plaintiff. It reads as follows:

"Land Lease Application at Namakoma Village, T. A. Nankumba, Mangochi.

We write in connection to the above-mentioned subject.

This office has noted with great concern that you have deployed security personnel to guard property at Namakoma village, T. A. Nankumba and, on the land in dispute, claiming that authority to do that has been granted by us or indeed the District Commissioner. We have felt it necessary to put the record correct.

Our letter reference number LS 436D/10 addressed to Regional Commissioner for Lands & Valuation(S)and attentioned to Mr O. C. Mlozi, simply requested the office to withhold further processing of Mr Khuze Kapeta's lease application forms since the land in which

this property stands is on dispute between yourself and Mr Khuze Kapeta. We also sought direction on how we could recommend your application following your request on the last meeting with the District Commissioner – Mangochi on 9th March 2004. Apparently, the direction was sought in view of a copy of what you termed as permanent injunction the court granted against Mr Kapeta. You were requested to present the same to Regional Commissioner for Lands (S) for their direction since this office could not interpret the said legal document.

We shall therefore, greatly appreciate if you could bring things back to normal until we get correct advice from Lands.

K. D. Dakamau
DISTRICT COMMISSIONER
cc: The Commissioner for Lands (S), P/Bag 568, Blantyre.
: Mr Khuze Kapeta, P. O. Box 311031, Blantyre.
: Village Headman Namakoma, T/A Nankumba, Mangochi.
: T/A NANKUMBA, Mvumba Headquarters, Box 1, Mvumba, Monkey Bay.

The plaintiff has contended that these facts have not been made known to the court.

Both lawyers addressed the court on the law in relation to these facts. Mr Kadwa relied on his affidavit. On the law he relied on **Halsburys Laws of England** – 4th Edition at page 523 for the proposition that "the general rule is that if a plaintiff applies for an injunction is respect of a violation of a common law right and the existence of that right or the fact that its violation is denied, he/she must establish his/her right at law". Mr Kadwa has submitted that the plaintiff has never established her right to the land and the circumstances demand that the injunction order be dissolved.

Mr Kauka has submitted that an injunction being a specie of equitable relief, the defendant when applying for its discharge, must come to court with clean hands. He has stated that the hands of the defendants are very dirty and have brought facts before the court intended to mislead the court. He has attacked the

exhibits of Mr Kadwa's affidavit as a fabrication. He has firstly challenged the assertion that the land was vacant. I take the view that both counsel do not understand and appreciate the meaning of the letter dated 27th February 2004 from the Regional Lands Commissioner(South) to the District Commissioner, Mangochi particularly where it reads:

"Our records show that the land is vacant....."

I presume there is constant communication between these two offices in so far as land lease applications are concerned and the officers therein are in no doubt as to the meaning of that statement. It has a technical meaning namely that no lease has yet been granted to anybody so as to give someone leasehold title from that customary land or public land regardless of whether or not structures or fixtures stand on that land. It would therefore be wrong for one to assume that vacant land is nobody's land. Vacant land according to this context may exist where it is possessed, occupied and used under customary law land rights and the occupier thereof has not processed any lease application. If the occupier applies for a land lease, the land ceases to be vacant upon grant of lease. For practical purposes this commences from the time the applicant for a lease has accepted the Minister's offer of a lease. Acceptance is done by payment of fees and duties as communicated in the offer of lease. The true meaning of this letter is that as at 27th February 2004 the piece of land in question was still customary land and that if there was any recommendation to lease that customary land, the Chief and the village headman would have to be consulted before the Lakeshore Development Committee vets the lease application. In essence the letter merely asserts the practice of leasing land in the Mangochi Lakeshore area. Mr Kadwa's argument that the land was vacant is misplaced because even by looking at the consultation with Chiefs Form exhibited to his own affidavit and dated 10th November, 2003 shows that the property is customary land comprising uncompleted cottage. At that date there was already a structure on the land. There is no evidence in Mr Kadwa's affidavit that between 10th November 2003 and 27th February 2004 this structure had been pulled down. The defendants cannot rely on this letter to confirm the physical outlook that the land was vacant. So too the argument of Mr Kauka is misplaced on whether or not the land was vacant. As I have stated earlier, this vacancy relates to the technical aspect of existence or non-existence of a lease.

Mr Kauka's second argument in his submissions is that if it is correct that the 1st defendant realised in February/March 2004 that the plaintiff did not have title to this land, how could the 1st defendant apply for a land lease on 10th November 2003? Mr Kauka's submission is that the 1st defendant may have falsified the document he used to apply for a lease with an ulterior motive. Another observation which I make in relation to the same lease application for Mr Khuze Kapeta is that the site plan was either drawn and/or checked on 3rd November 2003. This is in line with the legal requirement that a person cannot apply for a lease of land which cannot be identified with specific particulars relating to size and locality. It must have been known by at least 3rd November 2003 that Mr Khuze Kapeta was going to apply for a lease for the land in his name, hence the site plan clearly stipulates this aspect. It does not come to me as a surprise or shock that on 10th November 2003 he applied for a lease in his name. What has not been explained by the 1st defendant and which indeed raised eyebrows is the fact that on 26th and 27th November 2003 the defendants sent to the plaintiff bank cheques to the tune of K3.5 million in a payment for purchase of that land. The answer to this question is probably beyond the current application. In my view it would only be best dealt with in the substantive action. My view is that it cannot be justly and fairly dealt with on mere affidavit evidence without cross-examination to establish the exact nature of the engagement that existed between the plaintiff and the defendants.

Mr Kauka has submitted further that the defendants should not at all be making this application to this court because they are in contempt. He has relied on he case of **Chuk v Cremer (1846)** Coop.temp.Cott 205 cited in note 52/1/12 of the Order 52 Rule 1 of the Rules of the Supreme Court. My understanding of this law is that the court has a discretion whether or not to hear a contemnor who has not purged his contempt and in deciding whether to bar a litigant the court should adopt a flexible approach, accordingly where a contemnor not only fails to comply with an order of the court, but for example, makes if clear that he will continue to defy the court's authority, whatever the outcome of the appeal, the court is entitled to exercise its discretion to decline to entertain his appeal – see **X Ltd vs Morgan Grompian (publishers) Ltd [1990]** 2 ALL ER 1 – House of Lords. I would wish to distinguish the present application from the given legal position regarding a person who has been in contempt of a court order. I am aware that contempt of court proceedings at the instance of the plaintiff against the defendants are pending in this court. The court has not yet decided on these proceedings. It would be unfair and unjust at this stage for the court to regard the defendants as already condemned contemnors. In short the defendants are entitled to be heard in this application. Moreover, at all times I requested the defendants to observe the terms of the injunction order during the pendence of the committal proceedings, the

defendants have willingly obliged and at least the court has not received any reports alleging non-compliance of the conditions spelt by the court. The law as stated above is that the court, in the exercise of its discretion, should have a human face and consider issues with maturity and good understanding. The court should not be bent to be vindictive because a litigant seems to be disrespecting its order. In short I will consider the application on its merits and without any bias or prejudice.

Mr Kauka has submitted that the issue in this matter is not about title but interests and that this question has been conclusively adjudicated upon by Honourable Justice Chipeta and is not **res judicata**. Mr Kauka says the application is frivolous, vexatious and an unfortunate abuse of court process. Mr Kadwa took great exception to the strongly worded submission of Mr Kauka particularly in the suggestion that the defendants manufactured the exhibits and implying that they are liars. He insisted that the plaintiff has not established her title to the land in question. He submitted that the letters exhibited in the affidavit in opposition to the discharge of the injunction order do not show title for the plaintiff but merely confirm existence of a dispute between the plaintiff and the defendants. Furthermore the issue of **res judicata** does not arise because these issues were not raised before Honourable Justice Chipeta.

The question I would probably pause to the defendants is how does this dispute between the parties hereto arise, if it is not for the landed interest of the plaintiff? Believing that this is customary land, there cannot be dispute that no documentary title can exist. Then looking at the exhibit of the defendants in the form of the letter from village headman Namakoma to the District Commissioner, Mangochi with copies as earlier mentioned – vide **Exhibit DEK 4** there should be no doubt that the village headman had earlier on sanctioned the processing of a land lease for the plaintiff. This letter shows change of heart for the village headman. Unfortunately, the lawyer for the defendants has not addressed me on customary law of the area relating to the powers of the Chief or village headman to withdrawal allocation of possession, occupation and use rights of customary land for this court to properly decide on whether or not village headman Namakoma could legally exercise the powers he purported to exercise in that letter. In the absence of such facts and legal position I would safely assume that the plaintiff had sufficient interest warranting legal protection in the form of injunction order. The next question for determination would be whether the defendants have established that the injunction was obtained on wrong principles of law or on suppression of material facts or such that circumstances now exist as would make it inequitable to continue with the injunction order.

The legal principles to be followed in applications for an interlocutory injunctions are trite. In the case of **Mobil Oil (MW) PVT Limited vs Petroda (Malawi) Limited and persons unknown** civil cause number 3471 of 2000 (High Court – unreported) Honourable Justice Kapanda echoed the sentiments in the celebrated case of **American Cynamid Company vs Ethicon Ltd** [1975] AC 396. I have equally almost always cherished with fond memories of Justice Chatsika as expressed in the case of **Mobil Oil (Malawi) Limited vs Leonard Mutsinze** – Civil Cause number 1510 of 1992 the principles upon which an application for an injunction will be considered. The usual purpose of an interlocutory injunction is to preserve the **status quo** until the rights of the parties have been determined in the action. The plaintiff must establish that he has a good arguable claim to the right he seeks to protect.

In the present case the plaintiff is contending that she has possession, occupancy and use rights of customary land at Namakoma village where she has constructed uncompleted cottage. At this stage she does not need to establish more than this because the other principle for consideration is that the court must not attempt to decide this claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried. Therefore, even on the basis of **Exhibit DEK 4** the plaintiff would have succeeded in showing that there are serious issues to be tried. For example, who built the uncompleted cottage structure, how did the plaintiff get into possession, occupation and use of this land? It would be folly on the part of this court if it believed that **Exhibit DEK 4** has explained it all. In fact **Exhibit DEK 4** has further muddled the issues to be resolved because the 1st defendant has now come into the fighting arena as contesting against the plaintiff. Finally, there is the issue of balance of convenience who of the two has a better interest than the other or would damages be an adequate remedy or would damages be easy to quantify and pay? The court granted the injunction order after considering all these aspects. In the current application the added dimension for consideration is to consider if the order was irregularly obtained by suppression of facts or it has now become apparent that the injunction was founded on a decision which was wrong in law or there has been material change of circumstances since the injunction was first granted.

Did the plaintiff suppress any facts to the court relating to this parcel of land? The defendants rely on **Exhibit DEK 4** to show that the land did not belong to the plaintiff but her father's deceased driver known as Wilson. Is there credible evidence to that effect? The defendants rely on **Exhibit DEK 4.** Unfortunately, **Exhibit DEK 4** only raises the issues but does not provide evidence proving the

issues raised. These would be the issues for deeper probe during actual trial and not now on mere affidavit evidence. Have the defendants demonstrated that there has been material change in the circumstances? Material change in my view would be grant of a lease otherwise the land is still vacant as per letter of 27th February 2004. Neither the plaintiff nor the defendants have acquired leasehold interest in the land since the injunction order was made. Lease applications for the plaintiff and 1st defendant are in abeyance. The defendants cannot be favoured with a discharge order because it is not sufficient for them just to state that they are in the same boat as that of the plaintiff i.e. that both have pending lease applications. Equity will recognise the earlier vested interests of the plaintiff and put her on a higher ranking than the 1st defendant. It is clear from **Exhibit DEK** 4 that the defendants followed the plaintiff on the premise of contract of sale for the parcel in question. It cannot then lie in equity that the defendant can challenge the interest of the plaintiff unless the defendants can prove, fraud duress or fundamental mistak e. There was no coercion on the part of the plaintiff. Equally, if at all there was a fundamental mistake, it was not common to both parties and/or was not induced by the plaintiff. So far such issues would actually be better reserved for actual trial than be scratched on the surface by affidavit evidence.

In conclusion, I do not see any good reason for this court to discharge the injunction order as prayed for by the defendants. The balance of convenience favours the continuation of the injunction order. This will provide a window for the Department of Lands to fairly consider the lease applications for both the plaintiff and the 1st defendant without giving the 1st defendant undue hope and expectation that he will be granted lease of the parcel. If the defendants feel so strongly about certain position, they would be at liberty to cross-apply for an injunction order too. I dismiss the summons with costs to the plaintiff.

MADE in chambers this 6th day of April 2004 at Principal Registry in Blantyre.

Chimasula Phiri

JUDGE