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**IN THE MALAWI SUPREME COURT OF APPEAL**

**PRINCIPAL REGISTRY**

**M.S.C.A CIVIL CAUSE NO. ... OF 2009**

**(Being High Court Civil Cause No.510 of 2004)**

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**BETWEEN**

FARMERS WORLD LIMITED .....APPLICANT

AND

CHAMWABVI GROUP LIMITED.....1<sup>ST</sup> RESPONDENT

15

KAMZATI M. CHOMBO .....2<sup>ND</sup> RESPONDENT

**CORAM: HON.JUSTICE NYIRENDA**

Counsel for the Plaintiff, Msowoya

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Counsel for the Defendant, Chinula/Nkhoma

Court interpreter, Chulu

Date: 01/03/04

Time: 8.30am

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**RECORD OF COURT PROCEEDINGS**

**COURT:** Matters being discussed to determine appropriate course of action ie. In Chambers or in open court depending on how the 1<sup>st</sup> and 2<sup>nd</sup> defendants look at what the real issues are.

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Court to be advised when parties are ready to be heard.

A.K.C. NYIRENDA

**JUDGE**

10 01/03/04

**CORAM: HON.JUSTICE NYIRENDA, J**

15 Counsel for the Plaintiff, Msowoya  
Counsel for the Defendants,  
Court Interpreter, Chulu

Date: 05/07/04

Time: 9:00a.m

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**Msowoya:** This application is under Order 29 r 1. Application is by tenours World for injunction the respondent ie Chamwabvi Group and Kamzati Chombo as

per our affidavit and summons. Plaintiff would have proceeded on O.S but because on separate instances have threatened to close the ware houses. I had a meeting with Respondent of 1<sup>st</sup> respondent Mrs Msaliwa who threatened to demolish buildings and 2<sup>nd</sup> Respondent also threatens to close the shops.

Application is on Order 29 r 1 which gives this court to powers grant injunction in any matter or course before trial. Purpose of injunction is preserve the status quo of parties. Order 29 r 1 paragraph 12.

Principles to be applied are in the case of American Cyanamid - 1975 Applicants summary.

1. Establish good and arguable claim
2. Not to determine merits of matter
3. Balance of convenience on court's discretion.

Applicants argues that they have an arguable claim as affidavit shows. Applicants' shops have to be opened every day to supply farmers. If shops were closed there would suffer damage irreparable .

Plaintiff makes an understanding as to damages on these grounds applicants seeks an injunction as prayed for.

Applicants will make interparte application within days as  
5 cost may order to allow respondents to challenge the injunction.

**Court:** Upon hearing counsel for the plaintiff and upon reading the affidavit of counsel Austin Msowoya on behalf  
10 thereof and certifying that the matter is indeed one of urgency this court grants the injunction prayed for in terms of the plaintiff's prayer and on the undertaking by the plaintiff as to damages.

15 The injunction being exparte, it shall subsist for 14 days and is subject to a further order of this court by way of an interparte application.

Made in Chambers at Lilongwe this 5<sup>th</sup> day of July 2004.

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A.K.C. Nyirenda

## **JUDGE**

### **CORAM: HON.JUSTICE NYIRENDA**

5 Counsel for the Plaintiff, Msowoya  
Counsel for the Defendant, Katuya  
Court interpreter, L.N. Msiska

Date: 07/09/04 Time: 8.30am

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**Katuya:** Under order 28 we were to give 14 clear days to defendant but defendant has had only one clear day to hear O summons as regards summons for injunctions thee has been only one clear day to defendant's which is  
15 why I seek courts directions under Order 28 and 29 RSC.

**Chombo:** On legal matters I am not conversant. The matter starts way back. There has been different parties who have tried to bring this into the matter but nothing  
20 has happened. When we were served with injunction on 5<sup>th</sup> July acknowledge receipt in 11 days which I did. The 1<sup>st</sup> respondent has accepted quite. Looking at the silence of 1<sup>st</sup> Respondent I pray to court to consider my time was to

have this matter resolved and looks at silence of 1<sup>st</sup>  
Respondent.

**Court:** Parties with the court agree on adjournment of  
5 the case to 7<sup>th</sup> October, 2004.

A.K.C. Nyirenda

**JUDGE**

10 **CORAM: HON.JUSTICE NYIRENDA**

Counsel for the Plaintiff, Msowoya

Counsel for the Defendant, Katuya/Chombo

Court interpreter, Chulu

15 Date: 07/10/04 Time: 8.30am

**Msowoya:** Applicant's tenants for property in Kasungu  
plot No. 124. The applicant in argument with 1<sup>ST</sup>  
Respondent leased those premises from 1<sup>st</sup> July 2002  
20 renewable yearly next 2<sup>nd</sup> Respondent wrote to applicant  
claiming that there is the title holder of property thereby  
said rentals be paid to him. Applicant ruling that there  
would be sent from two parties sought the determination

of who is the owner and in the interim obtained injunction to a vest the threats to seal property which would have prejudiced business of applicant. Injunction was granted subject to interparte summons until final determination of  
5 matter. Injunction was on order 29 RSC and also American Cyanamid Case. Objective is to preserve status quo on a balance of convenience.

In the case at hand the applicant faced with the  
10 possibility of two suits and possibility of premises being sealed by either of the parties seeks the continuation of people to a vest losing out on bus. Also the applicant has no interest in the interpleader process but to clarify the position. As at present matter is unresolved and two  
15 respondents continue to make adverse claims to property. We seek that injunction be continued with.

1<sup>st</sup> Respondent: For reasons that will become clear in interpleader summons the position of 1<sup>st</sup> Respondent is  
20 that the injunction obtained by applicant to continued until substantive matter is dealt with.

2<sup>nd</sup> Respondent, Chombo: As stated on 7<sup>th</sup> September, 2004 unlike the two parties I am lay in masters of law but looking this issue it was taken me 4 years trying to resolve it with 1<sup>st</sup> Respondent amicably. Several avenues  
5 have been taken, Adjudication Office, Lands Office, D.C. Kasungu and no response has been made by first Respondent although communications were made to them. I am not very impressed by their silence all these years although they have come to sight meetings called  
10 by God. Today is their first response. Their delaying pattern must discouraged by this court because it has cost me time and money to come to this point. I would have loved if this case be dealt with today. I travel from Kasungu and wish to claim costs so far for travelling.

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Let the injunction continue until the matter is resolved.

Court: Injunction to continue until the determination of the matter at hand.

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Signed

A.K.C Nyirenda



## **JUDGE**

07/10/04

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### **INTERPLEADER SUMMONS**

Katuya: 1<sup>st</sup> Respondent has not filed an affidavit but going by affidavit of Mr. Msowoya on behalf of applicant it is clear that there are facts in dispute between 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent. Exhibit FW11 shows it all. The issues cannot be decided here and now because there would be intricate questions of evidence. In addition supposing sheds are on plots of 2<sup>nd</sup> and 1<sup>st</sup> Respondents who is entitled to receive the rentals? Who becomes the legal owner of the sheds. Supposing sheds were built by 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent never contributed nothing, whether he can claim legal title to them.

O 17 r5 RSC gives court discretion to have matter fully tried if there be facts indispite. If there be in an issue it can be tried. In matter be stated and tried then a full trial as if by court is ordered.

All I am saying is that from applicant's affidavit this matter has a lot of issues to be properly determined. I therefore pray that court must order that this matter be  
5 tried in an ordinary way.

**Mr Chombo:** I have made personal constraints with the people responsible for Chamwabvi several times nothing past. In fact by "FW 16" I wrote to the Financial  
10 Controller of Chamwabvi as of that date seeking resolution of this matter I have also made copies of all the correspondence in this matter to them all this time. The other problem is that where I live is where the 1<sup>st</sup> Respondent is and if 1<sup>st</sup> Respondent was serious about  
15 the matter being resolved communication started in 2002 but there has been no response from the 1<sup>st</sup> Respondent. Their lack of response is not surprising now.

**Court:** It is clear to this court that the first respondent  
20 has negligently failed to respond to this action despite having been made aware of these proceedings well in good time. While the prayer for a trial is well within Order 17 such should not be used as a way to delay process at

the expense of any of the parties to the proceedings. In all fairness to this matter the conduct of the 1<sup>st</sup> Respondent is that they must be condemned in costs of this action because even if the court were to order a trial  
5 the case would not at all take off because apart from starting for a full trial the 1<sup>st</sup> respondent has not responded to the issue in the matter. Strictly speaking the 1<sup>st</sup> Respondent should not even have been heard because really there is no basis upon which they could be heard in  
10 the absence of any response.

In the matter of this matter the realising the implication it might have on the parties if only safe to allow a full resolution of the issues for which reason the 1<sup>st</sup>  
15 Respondent's prayer is allowed the opportunity to respond to the action within the next 14 days upon which trial of the matter will proceed by way of case started. Upon failure by the 1<sup>st</sup> respondent to so do the case will proceed for determination on the basis of what is now on  
20 record from the applicant and even 2<sup>nd</sup> Respondent.

It is for all these reasons that the 1<sup>st</sup> respondent is also condemned his cost to date for both the applicant and

the 2<sup>nd</sup> Respondent which must be paid on or before the date of hearing of the matter.

-Costs be agreed or taxed by the Registrar soonest.

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Date of hearing to be determined before the court now.

MADE in Chambers this 7<sup>th</sup> day of October, 2004

10 A.K.C Nyirenda  
**JUDGE**

15 **CORAM: HON.JUSTICE NYIRENDA**

Counsel for the Plaintiff, Msowoya

Counsel for the 1<sup>st</sup> Defendant, Mussa

Counsel for the 2<sup>nd</sup> Defendant, Nkhoma

Court interpreter, Gonaulunji

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Date: 29/11/04

Time: 9.00am

**Mussa:** As indicated matter was by way of interpleader by plaintiff main issue was of ownership of ware houses

rented by plaintiff. There is affidavit by Chinula which says ware houses was confused because of conflicting advise from DC who said rent was to go to 1<sup>st</sup> defendant and then he also said to 2<sup>nd</sup> defendant leaving plaintiff in  
5 limbo.

Secondarily para 4 says controversy is on ware house but by 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent did not take any steps to stop constructing. In effect the 2<sup>nd</sup> Respondent  
10 had given assurance to 1<sup>st</sup> Respondent that ware house could be built. We can conclude that such silence meant 2<sup>nd</sup> Respondent allowed 1<sup>st</sup> Respondent to build ware house which reliance led to detriment on part of 1<sup>st</sup> Respondent therefore though not explicit in affected of  
15 Chinula this raised proprietary stopped. Doctrine says if one party knowingly encourages and another act, acquires to the action of that other party.

1<sup>st</sup> defendant acted vigilant to develop the land while 2<sup>nd</sup>  
20 Respondent knew of defendant choose to be silent. Should law allow someone to benefit from his slagish attitude.

1<sup>st</sup> Respondent acknowledges that the land was for the 2<sup>nd</sup> Defendant. But when it was being developed 2<sup>nd</sup> Respondent ought to have stopped such defendant. Since 2<sup>nd</sup> Defendant is insisting on return of land I adopt the prayer in our affidavit or in the alternative any other remedy to make well the expense incurred by the 1<sup>st</sup> Respondent with the acquiesce of the 2<sup>nd</sup> Respondent.

**Nkhoma:** There is affidavit in opposition and skeletal arguments. Main issue raised is that whatever is attached to the soil is part of the soil I refer MVG 2<sup>nd</sup> page of arguments 833 2 MW on this basis since 1<sup>st</sup> Respondent has concluded that land is that of 2<sup>nd</sup> Respondent as follows that 2<sup>nd</sup> Respondent is owner of ware house because they can not be separated from the land.

Land is leased and only way can be disposed is for breach and of covenant see section 14 of Land Act. Here 1<sup>st</sup> Defendant is clearly not owner and has not acquired any title land is scares; this is not grand to evading land of others.

Adverse poses R Act ie Title by Prescription to do so you need to apply to 4 and RES under 134(2).

(1) Peaceful occupation

5 (2) Application to the 1<sup>st</sup> Respondent has not applied for ownership.

1<sup>st</sup> Respondent has shown that they are not interested in ware house by asking that they be demolished- an  
10 indication that 1<sup>st</sup> Respondent is not interested in land. I pray therefore this court orders that ware house which are part of the Land belong to 2<sup>nd</sup> Respondent. Lease of the land was attached to affidavit is support of 2<sup>nd</sup> Respondent affidavit.

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## **REPLY**

Possibility of compensation should not arise because the  
1<sup>st</sup> Respondent has used the land for all these years  
20 without anything paid to the 2<sup>nd</sup> Respondent. 1<sup>st</sup> Respondent will therefore be benefitting from this illegal conduct.

That said if the court were of the view that 2<sup>nd</sup> Respondent pay something then the ... of rent comes in from the time the 1<sup>st</sup> Respondent moved out of the land. Rental would have to be determined, to determine now  
5 much ought to be paid from the ware house.

## **REPLY**

Political might of 1<sup>st</sup> Respondent was not substantiated

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- Ali Wake Attorney General Civil Case No 1355/93
- Gondwe vs Attorney General Civil Case No. 261/93
- Aboobalar vs Attorney General

15 Arguments that use of political connections were not upheld by court- matters were still caught within Limitation Act.

20 Court should look at section 22 of Deeds Reg. Act which says registration if Deed does not vest property- that i.e only evidence of title. It does not talk of good title. In the instant case there is affidavit of 2<sup>nd</sup> Respondent original



lease - that is only evidence of title but did not vest property to 2<sup>nd</sup> defendant.

5 **CORAM: HON.JUSTICE NYIRENDA**

Counsel for the Plaintiff, Chilenga

Counsel for the Defendant,

Court interpreter, Gonaulinji

10 Date: 29/06/06 Time: 9:00am

**Chilenga:** I seek leave to appeal to the supreme court in terms of Order 331 SC of DPP Rules since decision as made in chambers. I pray accordingly.

15

A.K. C. Nyirenda

**JUDGE**

20/06/08

20 **COURT RULING**

Leave to appeal is granted. Whether the appellant would adduce fresh evidence before the court of Appeal is a matter that would have to be determined by that court on an appropriate application by the appellant.

5 Made in Chambers this 13<sup>th</sup> day of July, 2006

A.K. C. Nyirenda  
**JUDGE**