IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 3234 OF 2006

BETWEEN:

LEXUS DEVELOPMENTS LIMITED…….……PLAINTIFF

- AND -

MR MISHACK S KANJANGA…..……...…..……1ST DEFENDANT

- AND –

DIAB INVESTIMENTS LIMITED……...……2ND DEFENDANT

- AND -

MOHAMED DIAB……...……3RD DEFENDANT

- AND -

MOHAMED YOUSSEF …….4RD DEFENDANT

- AND –

ATTORNEY GENERAL ……...……5TH DEFENDANT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA

Mr Khondiwa, of Councel, for the plaintiff

Mr Kanjanga, absent, unrepresented

Mr Nankhuni, of Counsel, for the 2nd, 3rd and 4th defendant

Attorney General – absent

R U L I N G

Manyungwa, J

INTRODUCTION:

This is the plaintiffs application for the extension of an ex-parte order of interlocutory injunction restraining the 1st and 2nd defendants and other persons unknown by themselves, their agents or servants or whosoever from entering, clearing of otherwise developing 3.00 hectares of land or part thereof on Title No. Bwaila 47/930 situate in Lilongwe . I must hasten to mention that the plaintiff was on 28th November, 2006 granted an ex-parte order of injunction by my learned brother judge, Justice Potani, which was valid for 14 days subject to an inter-parties injunction, hence the instant application. There are two affidavits in support of the application sworn by Mr Kassam Okhai, and a further a supplementary affidavit in support sworn by Mr Khondiwa, counsel for the plaintiff and the plaintiff also filed skeleton arguments. The 2nd defendant filed an affidavit in opposition sworn by Messrs Mohamed Diab and Mohamed Youssef and also took out summons on application to ***inter alia*** add parties, as defendant under Order 15 rule 4 of Rules of Supreme Court, dissolve an injunction under Order 29, for disposal of a case on a point of law under 14(A) and to strike out an action under orders 18 and 53 of the Rules of Supreme Court. On 2nd March. 2007, I heard the inter-parties application after which ruling was reserved, and I now proceed to give my ruling.

THE EVIDENCE:

It was deponed by Mr Kassam Okhai in his affidavits that he is a director of Kier and Cawder (Blantyre) Limited, a majority shareholder in the plaintiff company which was incorporated on 15th May 1996 under Registration Number 4393 as is evidenced by the company's Certificate of Registration marked as exhibit "KO1". In 1999 the plaintiff entered into a Lease Agreement with the Minister responsible for Land matters for a term of 99 years with effect from 1st May 1999 in respect of 3.00 hectares of land on Title Number Bwaila 47/930, a copy of which was exhibited and marked as exhibit "KO2". It is stated that the plaintiff further obtained a lease certificate in respect of the same land dated 6th March, 2000 exhibited as exhibit "KO3". On 14th

February, 2000, the shareholders of the plaintiff company invited Keir and Cawder (Blantyre) Limited to invest in the company for purposes of developing the said leased piece of land. The invitation was duly accepted by the said Kier and Cawder (Blantyre) Limited and the parties accordingly signed a Memorandum of Understanding and Agreement, a copy of which dated 14th February, 2000 is exhibited and marked as exhibit "KO4". It is further stated that as a result of the aforesaid arrangement, Kier and Cawder (Blantyre) Limited now holds 80% of the shares while the remaining 20% shares are held equally by Mrs Msaukiranji Mkandawire and Mr Leornard Mengezi, representing JC Properties, as is evidenced by a copy of a return of allotment of shares of the plaintiff company marked as exhibit "KO5". Further, in addition to costs related to the acquisition of the leased land, Kier and Cawder (Blantyre) Limited is also responsible for arranging finance for the plaintiff company for purposes of construction, architectural drawings and all related activities to the development of the leased land. It is further stated that by a letter dated 26th May, 1999 the Ministry of Lands, Housing, Physical Planning and Surveys required the plaintiff to pay a deposit and other related payments before the land would formally be allocated to the plaintiff as is evidenced by a copy of a letter dated 26th May, 1999 marked and exhibited as exhibit "KO7". By another letter dated 18th June, 2004, the Regional Commissioner for Lands further reminded the plaintiff to arrange payment of the shortfall of MK245, 815.50 which the plaintiff duly complied with as is evidenced by a copy of the said letter dated 18th June, 2004 and a general receipt dated 22nd September 2004 marked and exhibited as exhibit "KO8" and exhibit "KO9" respectively. Further, the plaintiff contends that it had also been paying city rates to the City Assembly in respect of the said land.

It is further stated that the plaintiff company has always desired to speed up development of the leased land as permitted by resources and within the legal requirements, and that the plaintiff's plans to develop the land involve a lot of financial resources and the implementation thereof has been affected and delayed by the high interest rates that have hitherto prevailed in the economy. By a letter dated 19th October, 2005 the plaintiff informed the Ministry of Lands that its development plans in respect of the leased land had been submitted to Lilongwe City Assembly for approval as is exhibited by a copy of a letter dated 19th October 2005 marked as exhibit "KO10". Further, by a letter dated 6th December, 2005 the Ministry of Lands responded to the plaintiff's letter of 19th October, 2005 and requested copies of the offer of the lease and the layout

from the plaintiff so as to determine whether the leased land was affected by a new layout and to see any remedial measures that could be taken, the said letter is marked exhibit "KO11". It is further stated that upon receipt of exhibit "KO11", the plaintiff requested his architect Mr Michael Lwanda through a letter dated 14th December, 2005 to send to the Secretary for Lands a copy of the said layout, as is evidenced by exhibit "KO12". The plaintiff contends that since then, it has never received any further communication from the Ministry responsible for Land matters, and that the plaintiff is only waiting for the approval by the City Assembly before it can construction on the land which will comprise a shopping complex, banks, a lodge, conference and recreation centres.

The plaintiff further states that it was surprised to learn that some unknown persons had invaded the leased land and have started cleaning the same for development. Further, upon investigations the plaintiff learned that the persons that had invaded the land in question were a certain Mr Mishack Kanjanga the 1st defendant herein and Diab Investments Limited, the 2nd defendants herein and their agents or servants. The plaintiff further suspects that there may be other persons who have invaded the leased land but not yet known to the plaintiff, and that although the plaintiff has received no notice of re-entry or withdrawal of the lease from the Ministry responsible for Land Matters the plaintiff is of the view that the invasion by the defendants may have been permitted or facilitated by the Ministry. The plaintiff therefore is concerned that its development plans will be frustrated and it will suffer loss if the defendants are allowed to remain on the land.

And in a supplementary affidavit sworn by Mr Khondiwa, on behalf of the plaintiff it is deponed that when he conducted a search at the Land Registry in Lilongwe, he was informed that a copy of entry in the land register for title number Bwaila 47/930 and its corresponding file were both missing. However the registry was able to furnish him with copies for titles Bwaila 47/1132, Bwaila 47/1133 and the corresponding entry showing the date of re-entry for application Number 453 of 2006 which shows that the Government re-entered the land on 26th May, 2006. The search further showed that Bwaila 47/1132, and Bwaila 47/1133 both belonged to Mahomed Diab and Mahomed Youssef of P.O. Box 781, Lilongwe as can be seen from exhibits CK5, CK6, CK7. The plaintiff further contended that a closer reading of exhibits CK5 and CK6 show that

Mr Mishack Kanjanga purportedly got the lease in respect of Title Number Bwaila 47/1132 on 1st May 2005 for a term of 99 years and sold it to Mr Mohamed Diab on 28th July, 2005 three months after obtaining the lease, but before developing the same. Further, the plaintiff contended that exhibits "CK3" and "CK7" show that a certain Mr Lexon Chiluli purportedly got the lease for Title number 47/1133 on 1st June, 2005 for 99 years and sold it to Mr Mohamed Youssef on 8th November, 2005 five months after obtaining the lease but before developing it. The plaintiff further states that it was informed by Mr Kwame Kafwimbi Ngwira of the Lands Registry, Blantyre that it is against Government policy to sell a piece of leased land from Government before developing it. The plaintiff therefore contended that the respective sales of land from Messrs Mishack Soldier Kanjanga and Lexon Chiluli to Messrs Mohamed Diab and Mohamed Youssef respectively were made against Government's public policy. Further, the plaintiff contended that exhibits CK4 and CK5 indicate that the Malawi Government purportedly re-entered Title Number Bwaila 47/930 on 26th May 2006 through re-entry Application Number 453/2006. The plaintiff therefore argues that from the forgoing it is clear that the purported transfers from Government to Mr Kanjanga and later to Mr Mohamed Diab, and from Government to Ms Chiluli and then to Mr Mohamed Youssef were made before Government re-entered Title Number Bwaila 47/930 and before any notice of re-entry was given to the plaintiff. In these circumstances therefore, the plaintiff contended that the said Messrs Mohamed Diab and Mohamed Youssef cannot be ***bona fide*** purchasers without notice. The plaintiff therefore prayed to this court that the order of ex-parte injunction made on 28th November, 2006 be extended until the determination of this matter or further order of the court.

The defendants vehemently opposed this application for the extention of an ex-parte order of an interlocutory injunction. In an affidavit in opposition sworn by Messrs Mohamed Diab and Mohamed Youssef, it is stated that they are the registered owners of Title Numbers Bwaila 47/1132 and 47/1133 respectively situate in the City of Lilongwe. It is further stated that the two through Diab Investments Limited, the 2nd defendants herein are developing the above stated properties, which are the subject of the ex-parte order of injunction herein. It is stated that by an indenture of lease dated 10th June 2005 one Mishack S Kanjanga sold to Mr Mohamed Diab a property known as Title Number Bwaila 47/1132 at a consideration of MK7,200,000.00, a copy of the transfer of lease is exhibited and marked as exhibit "MD1". The 2nd defendant also

exhibited a Title document in favour of the said Mr M S Kanjanga from the Malawi government, marked as exhibit "MD2" The 2nd defendant also exhibited Certificates of official search and receipt payment to Malawi Government marked as exhibit "MD4" and certificate of Lease marked exhibit "MD5". The defendants further state that by an indenture of lease dated 17th July, 2005 one Lexson Chiluli sold to Mr Mohamed Youssef a property known as Title number Bwaila 47/1133 at a consideration of MK1,100,000.00 and the defendants exhibited a copy of the transfer of Lease marked as exhibit "MD5". Further, the defendants also exhibited exhibit "MD6" which is a copy of the title document in favour of the said Mr Lexson Chiluli from the Malawi Government, and exhibit "MD7" which are certificate of official search and a receipt for payment to Malawi Government and "MD16" which is a certificate of Lease.

It is stated by the 2nd defendant that afterwards they had development plans done which they submitted to Lilongwe City Assembly, which were duly approved. The defendants exhibited exhibits "MD8" to "MD10" which are approved plans, development permission and application for development respectively. The 3rd and 4th defendants further state that as soon as they begun clearing the land they were surprised, when through the 2nd defendant, they were served with an order of ex-parte injunction dated 29th November, 2006 notwithstanding that the 3rd and 4th defendants had no prior notice of any adverse interest to theirs on the said property nor to that of Messrs Mishack S Kanjanga or Lexon Chiluli. As such, the defendants contended that they are informed by their lawyers that they are ***bona fide*** purchasers of a Legal estate without notice. The defendants further state that they were informed by the Commissioner for Lands that the plaintiff does not have any legal or equitable interest in Title Number Bwaila 47/930, the Minister of Lands having re-entered upon the same for failure by the plaintiff to develop the same within 2 years from the 1st May, 1999 and as a result of a Court Order which ordered the Malawi Government to return part of the said land to Mr Mishack Kanjanga, the 1st defendant herein as a result of which the said piece of land was subdivided into two plots namely Bwaila 47/1132 and Bwaila 47/1133 which were then subsequently leased to the 1st defendant Mr M S Kanjanga and Mr Lexon Chiluli respectively. The 2nd, 3rd and 4th defendants therefore contend that the plaintiff's remedy if any is lies with the Malawi Government and that the proper way to proceed is by way of judicial review and not an ordinary action like the one herein.

Further, the 3rd and 4th defendants contend that they were informed by the Commissioned for Lands that the plaintiff was aware both of the fact that the Minister of Lands had re-entered upon the said land and about the Court Order that Mr Mishack S Kanjanga had obtained and further of the fact that the property had been sub-divided and leased to Mr S Kanjanga and Lexon Chiluli above, which fact the defendants allege the plaintiff was aware of but chose not to mention in their affidavit in support. The 2nd defendant accordingly exhibited a certificate of an official search at the Lands Registry, dated 18th December, 2006, Search Number 4087 marked as exhibit "MD11" which showed that at the time that the proprietor of Title Number 47/930 was the Malawi Government. This, the 2nd defendant contends is evident of the fact that the Government had re-entered the said land, and was now its registered owner. The 2nd defendant therefore contends that had these facts been brought to the attention of the court when the plaintiff obtained its ex-parte order of injunction, the court would not have granted the injunction and that therefore the said order of ex-parte injunction was obtained by suppression of material facts by the plaintiff. The 2nd defendant further contends that in any case, that the plaintiff should be taken to have first searched at the Lands Registry before rushing to court.

The 2nd defendant further states that is has already spent huge sums of money i.e. MK8.300, 000.00 for the acquisition of the land, MK249,000.00 as Stamp Duty payable to Malawi Government for the transfer of the said property, MK2,500,000.00 for development plans, MK920,000.00 for planning permission, MK1,000,0000.00 in cleaning the land, and MK6,000,000.00 in importing materials for the development of the said project. Further, the 2nd defendant states that it was informed by Lilongwe City Assembly that the Assembly rejected the plaintiff's development plans because the searches at the Lands Registry revealed that the property in question belonged to the 3rd and 4th defendant as is evident from the Certificate of Official search herein. It is further contended by the 2nd defendant that the Minister of Lands re-entered upon said land sometime in 2004 and title deeds were issued in 2005 to Mr M S Kanjanga and Mr Lexon Chiluli and the plaintiff did nothing until he saw that that the 2nd defendant were making developments on the said land in 2006, two months after the 2nd defendants had begun effecting developments on the said piece of land. Further, the 2nd defendant contend that the Attorney General, the 5th defendant herein entered a consent judgment in respect of the land in question in favour of Mr Mishack Kanjanga, who transferred the title

number 47/1132 to Mr Mohamed Diab. The 3rd and 4th defendants therefore state that they only bought the properties after seeing Mr Kanjanga's and Mr Chiluli's title deeds and after conducting searches at the Lands Registry and the 3rd and 4th defendants therefore state that they were not aware until after they were served with the court injunction of any interests adverse to theirs in respect of the said property. The 3rd and 4th defendants further contend that the Minister re-entered upon the said land by sub-dividing the same and leasing the sub-divided plots to Mr Mishack S Kanjanga and Mr Chiluli. The 3rd and 4th defendants further exhibited a Statutory Declaration sworn by the Commissioner of Lands namely Mr Mr Majankono affirming the above marked as "MD12", as well as sub-division plans marked as "MD13" and "MD14" respectively. Further the 3rd and 4th defendants contend that in the event of the plaintiff succeeding with this action, the damages would adequately compensate the plaintiff. The 3rd and 4th defendants therefore further contend that the ex-parte order of injunction herein be lifted, or discharged, and that they be declared the owners of the said land, and that the plaintiff's remedy is in applying for judicial review against the Attorney General and further that the 3rd and 4th defendants are ***bona fide*** purchasers of the Legal Estate without notice. And the 3rd and 4th defendants accordingly pray that summary judgment be entered in their favour as per ***Order 14(A)*** of Rules of Supreme Court and that the injunction be discharged, and further that the action be struck-off.

ISSUES FOR DETERMINATION:

The main issues for determination in this matter are whether to continue the ex-parte order of injunction which was granted to the plaintiff on 28th November, 2006, as prayed for by the plaintiff and its legal practitioners or discharge the same as prayed for by the defendants and their legal practitioners. Secondly, the court also has to determine whether the 2nd , 3rd and 4th defendants are entitled to a summary judgment and thirdly whether the plaintiff's action herein should be struck off.

The law as regards interlocutory injunctions is in my view, very clear. 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. See also ***Order 29 rule 1 subrule 2*** of the Rules of Supreme Court. As

was stated in the case of ***Mangulama and Four Others vs Dematt*** Civil Cause Number 893 of 1999, Tambala J, as he then was, had this to say:-

> "Applications for an interlocutory injunction are not an occasion for demonstrating that the parties are clearly wrong or have no credible evidence…The usual purpose of an order of interim injunction is to preserve the ***status quo*** of the parties until their rights have been determined".

It is now well settled that the principles governing the grant or refusal of an interlocutory injunction are those that were enunciated by Lord Diplock in what has how become a landmark case on interlocutory injunctions, namely ***The American Cynamide Company v Ethicon Ltd*** [1975] AC 393; [1975]1A11ER 505, HL. The first principle is that the plaintiff must show that he has a good arguable claim to the right that he seeks to protect. Secondly the court must not attempt to decide the claim on affidavits, it is enough if the plaintiff shows that there is a serious question to be tried. Thirdly, if the plaintiff satisfies these tests, the grant or refusal of an injunction is for the exercise of the court's discretion on a balance of convenience. The court must consider whether damages would be a sufficient remedy; if so an injunction ought not be granted. In the ***American Cynamide Case*** (Supra) the court held that there was no rule of law that the court was precluded from considering whether on a balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeeded in establishing a ***prima facie*** case or probability that he would be successful at the trial of the action i.e. that there was a serious question to be tried. In the case of ***Amina Daudi t/a Amis enterprises v Sucoma*** Civil Cause Number 3191 of 2003, Mwaungulu, J enumerated the following principles, which I equally hold is good law, namely:

i. "A court will not grant an injunction unless there is a matter to go for trial
ii. Once there is a matter that should go for trial, the court has to consider whether damages are an appropriate remedy".

The learned judge on page 4 of his judgment had this to say:-

> "First, a court will not grant an injunction unless there is a matter to go for trial. This obviously filters cases not deserving the equitable relief that by its nature prevents exercise of rights before a court finally determined the matter…
> Secondly, once there is a matter that should go for trial, the court has to consider whether damages are an adequate remedy. This consideration requires answers to two sequel questions. First, from the perspective of the defendant, even if damages are an adequate remedy, the court will refuse the injunction if the plaintiff can not pay them…Secondly, from the perspective of the plaintiff, if damages are an adequate remedy and the defendant can not pay them, the court will refuse an injunction. The court may therefore allow the injunction, where damages are an adequate remedy and the defendant can pay them."

It must therefore be appreciated that damages will be an inadequate remedy where the plaintiff's or defendant's losses area difficult to compute. In ***ICL (Malawi) v Lilongwe Water Board*** Civil Cause Number 64 of 1998 unreported, wherein Chimasula-Phiri, reasoned thus:-

> "Further, if the defendants were found liable would pecuniary compensation be difficult to asses and/or would the defendant be unable to pay such damages? I see no such evidence in the affidavits in opposition as would logically lead to such inference. Therefore, on reflection it has become apparent that the injunction was founded on a decision which was wrong in law. It should not have been granted in the first place because damages would be adequate compensation to the plaintiff if the defendant becomes liable and damages would not be difficult to assess."

The question therefore, has the plaintiff demonstrated a right that it seeks to claim, or has the plaintiff shown that it has an arguable case here? The answer, in my view, should be in the negative The plaintiff was on 1st May, 1999 granted a lease for 99 years by the Minister responsible for Land Matters and the said land comprising of 3.00 hectares known as Title number 47/930 in the City of Lilongwe. The said Lease Agreement was exhibited as exhibit "KO2", dated 10th August 1999 from the Minister of the Government of Malawi responsible for Land Matters to the Lexus Developments Limited for a term of 99 years effective 1st May, 1999. It was an express term of the said lease in clause (b) that the plaintiff was under an obligation to develop the said piece of land by erecting thereon a suitable structure worth not less than MK2, 000,000.00 within a period of 2 years. The said clause (b) provided as follows:-

b) "At the lessee's own cost within the period of two years from the first day of May 1999 to erect, cover in and complete for immediate occupation buildings together with boundary fence and all proper and suitable outbuilding ***EXPENDING*** upon the works in labour and materials a total sum of not less than MK2,000,000.00 (Two Million Kwacha) such sums to be reckoned according to the lowest market prices for such works at the date such works shall be executed **AND** to produce vouchers to evidence such expenditure if the Minister shall require."

It would appear that after the signing of the lease agreement, two events occurred. The first one is that the plaintiff defaulted to develop the land within the period of 2 years as is stipulated under clause (b) of the Lease Agreement. The second event was that in 2002 as is deponed in paragraph 5 of the Statutory Declaration as to Re-entry under section 51 of the Registered Land Act Cap 58:01 sworn by Mr Francis Siveve Majankono dated 25th May 2006 is to the effect that in 2002 or thereabouts the Ministry of Malawi Government Responsible for Land matters was served with a High Court Restitution Order, which ordered the said Ministry of Lands to restitute 1.084 hectares of land being part of Title Number Bwaila 47/390 to Mr Mishack Soldier Kanjanga of Private Bag 266, Lilongwe who was a victim of Forfeiture Order under the infamous Forfeiture Act.

Now considering that the plaintiff herein was in breach of the Lease covenant to develop the land within 2 years, the Ministry of Lands decided to bring about a new development plan to the area

namely Title Number 47/390 and that the area was re-surveyed and demarcated. At this juncture it is important to have recourse to the provisions of the Registered Land Act which provides as follows:-

S49)1) "Subject to section 52, and to any provision to the contrary in the lease the lessor shall have the right to forfeit the lease, if the lessee

a) commits any breach of, or omits to perform, any agreement or condition on his part expressed or implied in the lease;

…

(2) The right of forfeiture may be

a) Exercised, where neither the lessee nor any person claiming through or under him is in occupation of the land, by entering upon and remaining in possession of the land."

And section 51 of the Registered Land Act provides as follows:-

S 51 "Notwithstanding anything to the contrary contained in the lease no lessor shall be entitled to exercise the right of forfeiture for the breach of any agreement or condition in the lease whether expressed or implied, until the lessor has served on the lessee a written notice –

a) specifying the particular breach complied of

b) if the breach is capable of remedy requiring the lessee to remedy the breach within such reasonable period as specified in the notice; and

c) in any case, other than non-payment of rent requiring the lessee to make compensation in money."

Clearly therefore, as can be seen from the evidence the plaintiff was in default of the express term of the lease that required them to develop the said land within a period of 2 years. The lease in respect of Title No Bwaila 47/930 as is evident from exhibit "KO2" was granted to the plaintiff for a term of 99 years effective 1st May, 1999. This meant that by the middle of year 2001 the plaintiff was supposed to have erected cover-in and buildings for immediate occupation together with boundary fence and all proper and suitable outbuilding totaling not less than MK2 million. However as is evident from exhibit "MD12", which is a copy of a Statutory Declaration the plaintiff failed to develop the land within the within stipulated development period. Hence, the action of the Minister, by re-entering upon the said piece of land as he is mandated under the law. It is unbelievable therefore that the plaintiff was unaware that the Minister had re-entered on Title number Bwaila 47/930. I dismiss the plaintiff's assertion on this point for the reasons that follow. Hence the Malawi Government appears as the Registered Owner of Title Number 47/930 as is evident from exhibit "MD11". I therefore find that the 3rd and 4th defendants, when they bought the land namely title number 47/1132 and 47/1133 from Kanjanga and Chiluli respectively got good title as they were ***bona fide*** purchasers without notice. This is so because both Mr Kanjanga and Mr Chiluli only transferred their respective leases namely 47/1132 and 47/1133 to Messrs Mahomed Diab and Manomed Youssef on 10th June, 2005 and 10th September 2005 respectively. As a maater of fact Mr Kanjanga's Lease Agreement from Government exhibit "MD2" is dated 11th May 2005, while Mr Chiluli's lease exhibit "MD6" is dated 29th June, 2005. This then sharply contradicts, what is deponed to in paragraph 13 of Mr Khondiwa's affidavit that Malawi Government only re-entered Title Number 47/930 on 26th May 2006. This is so because, it is not possible that government leased the two plots namely 47/1132 and 47/1133 to Mr Kanjanga and Mr Chiluli before it re-entered the same. I therefore find as a fact that government re-entered Title number

47/930 in 2004.

The law is that any claim to a piece of land can not lie against a ***bona fide*** purchaser for a piece of land without notice of any interest of any other person in the said land. See the dictum of

Lord Wilberforce in the case of ***Midland Bank Trust Company Limited vs Green*** [1981] AC513 where it was stated that the purchase of the Legal Estate must be in good faith and it must be of a Legal Estate as opposed to an equitable title. See also ***Cave vs Cave*** (1880) 15 Ch. D 639 and ***London and S W Railway Company vs Gomm*** (1882)20 Ch. D 562.

Further, as we have seen there was a High Court Restitution Order which ordered the Ministry of Lands to restitute 1.084 hectares of land being part of Title Number 47/930 to Mr Mishack Soldier Kanjanga, who was a victim of Forfeiture Order. Thus upon re-entry in 2004 the Minister subdivided Title Number 47/930 into two plots of land, namely 47/1132 and 47/1133 which were now leased or given to Mr M S Kanjanga and Mr Lexon Chiluli respectively with new lease documents from the lessor, namely the Government herein. According to the affidavit in opposition, Mr Kanjanga was assigned plot 47/1132 pursuant to a Court Order, and plot number 47/1133 was sold to Mr Chiluli and both of these gentlemen, I find, got good title at law. In turn Mr M S Kanjanga sold plot number 47/1132 to Mr Mahamed Diab, and Mr Lexon Chiluli sold plot number 47/1133 to Mr Mohamed Youssef. Therefore I do find that both Mr Mohamed Diab and Mr Mohamed Youssef were ***bona fide*** purchasers without notice, because the certificates of official search which are exhibits "MD4" and "MD7" dated 18th December 2006 for plot numbers 47/1132 and 47/1133 showed that the lessor at the time of the purchase of these properties was the Malawi Government. This clearly means that the two purchasers got good title and I do so find.

In these circumstances therefore, I am afraid that the question, as to whether the plaintiff has a good arguable claim or indeed whether there is a serious question to be tried can never be answered in the affirmative. Furthermore, it would appear, as is deponed in the 3rd and 4th defendant's affidavit that the plaintiff was already aware of the fact that the Minister responsible for land matters had re-entered the land due to the failure by the plaintiff to develop the land within the stipulated period of 2 years. In the case of ***Mangulama v Gazamiala***14 MLR 230, it was held indeed that government was entitled to re-enter land on breach of the terms of the lease. In dismissing the plaintiff's claim the court opined, as Tambala, J as he then observed.

> "The plaintiff had persistently failed to pay rent to the Government and there were arrears of rental. This entitled Government to effect a re-entry upon the plot in terms of section 14 of the Land Act as read with regulation 2 of the Land Act regulations."

The plaintiff herein was therefore in my view aware that the Minister had re-entered the said plot number 47/930 due to the failure by the plaintiff to develop the land within 2 years. Further there was a Court Order which ordered the Malawi Government to return part of plot 47/930 to Mr M S Kanjanga hence subdivision of Title number Bwaila 47/930 into 47/1132 and 47/1133. Clearly, therefore, the plaintiff as a consequence had no legal title to the said plot 47/930 at the time that these plots were being given to Mr M S Kanjanga and Mr Chiluli. As such good title passed to Mr Mohamed Diab and Mr Mohammed Youseff. Consequently, I therefore hold that the plaintiff has no good arguable cause neither is there any serious question to be tried.

As regards the vacation or discharge of an ex-parte order of injunction, the law is that the court has power on an application by the defendant by motion or summons to discharge an injunction which the plaintiff has obtained i.e. if it subsequently becomes apparent that the injunction was founded on a principle which was wrong in law. In ***Regent Oil Company v J T Leavesley (Linchifield) Limited*** [1966] 1WLR 1210 stamp J as he then was said:-

> "[I]f the plaintiff company were today applying for an interlocutory relief, I should be constrained reluctantly to refuse it, - reluctantly because this court is reluctant on an interlocutory application not to hold a party bound to the very words of his covenant, and I would have to hold that there ought not be an injunction from today until the trial. Taking the view I do, that the plaintiff company has no built – in right to the continuance of the injunction it obtained, after it has become apparent that it was founded on a decision wrong in law, I ought in my view to discharge the injunction."

Moreover the court has jurisdiction to discharge an injunction if it transpires later on after material the injunction was obtained that the same was obtained by suppression of facts or if sufficiently congent grounds are shown for the discharge. See ***London City Agency*** (JCD) Lee [1970]Ch. 597. It is very clear from the affidavit in support by the plaintiff at paragraphs 10, 11, and 12 that the plaintiff struggled to make the requisite payments to the Ministry of Lands. According to paragraph 1.9 of the 3rd and 4th defendants' affidavit, the plaintiffs' development plans were rejected by the Lilongwe City Assembly because the City Assembly informed the plaintiff that the land in question belonged to somebody else. Had this fact been made known to the court which granted the ex-parte injunction, the order I am sure, would not have been made.

Secondly, it is clear to this court that when the plaintiff was applying for the ex-parte order of injunction, it did not make a full and frank disclosure or indeed that some material fact were not disclosed. To begin with, the Minister of Lands re-entered upon Title No. Bwaila 47.930 in 2004, and as is sworn by Mr Majankhono in his Statutory Declaration exhibit "MD12", the Minister responsible for land matters upon realizing that the plaintiff had not complied with the conditions of the lease that was granted to the plaintiff in 1999, the Minister re-entered the land and the Ministry of Lands decided to bring about new development plan in the area, as a consequence of which the area was re-surveyed and demarcated, and as a result of the demarcation, a number of plots were created and allocated to more serious developers. The plaintiff in its affidavit never mentioned the fact that for 2 years after the lease was granted to it in May 1999, it failed to effect any development on Title number Bwaila 47/930, as a result of which the Minister re-entered the Title Number Bwaila 47/930 which was subsequently subdivided into Title Numbers Bwaila 47/1132 and 47/1133. Surely, these facts in my most considered view were material facts, which if the court had been aware of, would not have granted the plaintiff the ex-parte order of injunction. It is my finding therefore that the plaintiff is guilty here of suppression of material facts

The law is that where there is suppression of material facts by the plaintiff the court has power to discharge the injunction on the defendant's prayer for a discharge. In ***R V Kensington Income Tax Commissioners, ex-parte Princes Edmond de Polignac*** [1017]KB 486 Warnington L J made an illuminating statement on the point at on page 506.

> "It is perfectly well settled that a person who makes an ex-parte application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he can not obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him."

There must therefore be a full and frank disclosure of all material facts otherwise as was held in ***Phiri v Indefund*** Civil Cause Number 366 of 1996, the Order of Injunction may be set aside without regard to merits. In ***Schmitten v Faulkers*** (1893) W.N. 64 Chitty, J stated that the ex-parte applicant must proceed 'with the highest good faith'. In the case of ***Beese v Woodhouse*** [1907] 1WlR 531 similar sentiments were made as per the dictum of Davies L J which I find necessary, for purposes of my judgment, in which the learned judge said:-

> "[T]he party making an ex-parte application for an injunction should '***show utmost good'*** faith and that the doctrine of ***uberrimae fidei*** in effect applies to such cases." *(emphasis supplied by me)*

The plaintiff herein did not disclose material facts, namely that the Minister of Lands had re-entered Title Number Bwaila 47/930, that the same was re demarcated and subdivided into Bwaila 47/1132 and 47/1133 which were allocated to the 1st defendant Mr Mishack S Kanjanga and Mr Lexon Chiluli respectively. Further, the plaintiff never disclosed in its affidavit is

support of the ex-parte application, that since Title Number Bwaila 47/930 was leased to them by Malawi Government that the plaintiff failed to develop the same contrary to Clause (b) of the Lease Agreement which required the plaintiff to develop the said piece of land within 2 years. This actually explains why in 2004, government re-entered the said property. Consequently, in view of the foregoing and the findings made, it is my considered view that the ex-parte order of injunction ought not to have been granted in the first place and I accordingly, do order that the ex-parte Order of Injunction which the plaintiff obtained on 28th November 2006 against the defendants be and is hereby discharged. The plaintiff in my view had to show, which has not been shown, that irreparable damage or immediate need to prevent such damage for the ex-parte order of injunction to be shown. In any case, I am of the considered view, that damages would be adequate here as the plaintiff did not erect any structure or commence any developments on the land in question and further that damages would not be difficult to asses.

Having found that the plaintiffs have no arguable case against the 2nd, 3rd and 4th defendants and further having discharged the ex-parte order of injunction herein, it is my considered opinion, that the question for disposal of a case on a point of law under Order 14A of the Rules of Supreme court automatically falls off, and there is no need to make a decision on the same. Since this court has found that the 3rd and 4th defendants were ***bona fide*** purchasers without notice, it would appear to me and this I do find that if at all the plaintiff can sustain any action at all, then the same can be taken up against the Malawi government, which re-entered Title number Bwaila 47/930 subdivied the same to title numbers 47/1132 and 47/1133 issued leases to Messrs Mishack Kanjanga and Lexon Chiluli who subsequently sold title numbers 47/1132 and 47/1133 to Messrs Mohomed Diab and Mohomed Youssef respectively. The question as to whether the plaintiff will have to take an ordinary action or indeed by means of judicial review against the Attorney General, is in my most humble opinion, outside the scope of this ruling.

In these circumstances and by reason of the foregoing, I give judgment to the 2nd, 3rd and 4th defendants. Consequently the plaintiff's summons to continue the ex-parte order of injunction which was granted on 28th

November, 2006 is hereby dismissed with costs.

Pronounced in Chambers at the Principal Registry this 27th day, 2007.

Joselph S Manyungwa

JUDGE