



JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO 23 OF 2016



**BETWEEN:**

**LALA LIMITED ..... PLAINTIFF**

**-VS-**

**DIVYAKANT KANUBHAI AMIN ..... 1<sup>ST</sup> DEFENDANT**  
**DEVENANAD MANUBHAI AMIN ..... 2<sup>ND</sup> DEFENDANT**  
**RAJNIKANT CHATRABHUJ PATEL ..... 3<sup>RD</sup> DEFENDANT**  
**VINODCHANDRA MANUBHAI AMIN ..... 4<sup>TH</sup> DEFENDANT**  
**KIRITKUMAR MANUBHAI AMIN ..... 5<sup>TH</sup> DEFENDANT**  
**SMITA SEEMA AMIN ..... 6<sup>TH</sup> DEFENDANT**  
**THE ESTATE OF ATULCHANDRA CHATRABHUJ PATEL ..... 7<sup>TH</sup> DEFENDANT**  
**TRUSTEES OF GRITANJALI CHATRABHUJ PATEL ..... 8<sup>TH</sup> DEFENDANT**  
**TRUSTEES OF THE ATUL TRUST ..... 9<sup>TH</sup> DEFENDANT**  
**ORIETALTRUST ..... 10<sup>TH</sup> DEFENDANT**  
**GLOBAL INTERNATIONAL INVESTMENT INC ..... 11<sup>TH</sup> DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Gondwe, of Counsel, for the Plaintiff  
Mr. Mbeta, of Counsel, for the Respondent  
Ms. Annie Mpasu, Court Clerk

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**ORDER**

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*Kenyatta Nyirenda, J.*

This is the Plaintiff’s Summons for an Order that the Order granted by the Court on 27<sup>th</sup> July 2016 discharging the interlocutory injunction that was obtained by the Plaintiff and striking out the action of the Plaintiff be stayed pending an application to set aside the Order [hereinafter referred to as the “Plaintiff’s Summons”]. The Plaintiff’s Summons states that it is brought under Order 47 of the Rules of the Supreme Court (RSC) and the Court’s inherent jurisdiction.



The background to the Defendant's Summons is very brief. On 6<sup>th</sup> June 2016, the Plaintiff commenced an action against the Defendants for specific performance of a Share Purchase Agreement dated 8<sup>th</sup> October, 2015 for the purchase of shares in Universal Industries Limited and Universal Farming and Milling Limited [hereinafter referred to as the "2<sup>nd</sup> Share Purchase Agreement"], damages in addition to specific performance, damages for breach of contract, costs of the action and further or other relief. Virtually contemporaneously with the commencement of the action, the Plaintiff applied for and obtained an ex parte order of interlocutory injunction restraining the Defendants by themselves or their agents from breaching the 2<sup>nd</sup> Share Purchase Agreement [hereinafter referred to as the "injunction"].

The Defendants filed an application for (a) the discharge of the injunction on the ground that the Plaintiff had suppressed material facts when obtaining the injunction and (b) the striking out of the Plaintiff's action for being scandalous, frivolous, vexatious and an abuse of Court process on the ground that there is no subsisting Share Purchase Agreement between the Plaintiff and the Defendants.

The Plaintiff's Summons was filed with the Court on 28<sup>th</sup> July 2016. It is supported by an Affidavit, sworn by Lusungu Vulula Gondwe, a legal practitioner in the firm of Messrs Ritz & Company, wherein he attributes the Plaintiff's absence from Court on 27<sup>th</sup> July 2016 to some inadvertence:

4. *The matter was coming for an interparte hearing on the 27<sup>th</sup> day of July 2016.*
5. *Due to some inadvertence, I failed to appear for the hearing at 0900 hours and I was under genuine conviction that the matter would be coming for a hearing at 1400 hours as has invariably been the case in all the hearings associated with the matter.*
6. *Counsel for the Defendants took advantage of this absence to move the court to enter a Default Order dismissing the Plaintiff's action and also discharging the interlocutory injunction that was obtained by the Plaintiff in the matter"*

The Defendants are opposed to the Defendant's Summons and there is an affidavit in opposition sworn by Frank Mbeta, a legal practitioner in the firm of Messrs Mbeta & Company, wherein he depones as follows, in part:

3. *I have read the affidavit of Counsel **LUSUNGU VULULA GONDWE** in Support of the Application for stay pending application to set aside order and do hereby reply thereto as follows:*
4. *I refer to paragraphs 4 and 5 of the said affidavit and state that the hearing date of 27<sup>th</sup> July 2016 was actually agreed upon by Counsel for both parties in the*

presence of **MIKE CHILEWE Jnr** who was at that time in the witness box undergoing cross-examination on the contents of his affidavits in this matter.

5. Thus the Court merely endorsed the date when it turned out to be convenient to all the parties concerned.
6. The Court even emphasized that in view of what had transpired that far, the subsequent hearing has to be given a full day so that the parties could finish with their respective witness.
7. I verily believe that the failure to attend the Court on Wednesday, 27<sup>th</sup> July 2016 was not inadvertent on the part of Plaintiff's Counsel.
8. Furthermore, the Court directly addressed **MIKE CHILEWE Jnr** while in the witness box and advised him that he will proceed with cross-examination at 9:00 o'clock in the morning of Wednesday, 27<sup>th</sup> July 2016.
9. However, as already stated in the Supplementary Affidavit, **MIKE CHILEWE Jnr**, without proper justification or informing the Court of any excuse, just decided not to come to Court.
10. I verily believe that there was no basis for any inadvertent failure to attend the Court nor forgetting a conviction that the matter was coming at 14:00 hours.
11. I refer to the paragraphs 6 and 7 of the said Affidavit and state that the Defendants did not take any advantage of the Plaintiff's unjustifiable failure to attend the Court at all. The Court actually determined the Defendants' applications based on merits hence the direct reference to the evidence of **MIKE CHILEWE Jnr** including the admission that the 2<sup>nd</sup> Sale Purchase Agreement was not valid at all as it was never signed by both parties.
12. I verily believe that the Order to be stayed or set aside was fairly granted regard being had to the very admission of the invalid 2<sup>nd</sup> Sale Purchase Agreement. Thus the matter was not determined on technicalities but the totality of the evidence before the Court.
13. In any event, I verily believe that both the stay and setting aside will merely delay the matter when the evidence before the Court clearly prove that the Plaintiff's claim and interim relief cannot be sustained at all.
14. Furthermore, the order granted by the Court was duly perfected and the same being granted on the Defendant's applications, in the absence of good reasons just as in the Plaintiff's application herein, I verily believe that the Plaintiff cannot be granted an order for stay or rehearing of the matter."

The Defendants also filed a supplementary affidavit in opposition, sworn by Mr. Diminga Chiotha, a law internee at Messrs Mbeta and Company, and the material part thereof reads as follows:

- “3. *As part of my internship, I do attend Court sessions together with Counsel Frank Farouk Mbeta.*
4. *Since Counsel Mbeta became seized with the conduct of this matter on behalf of the Defendants, I have always attended Court proceedings alongside him.*
5. *Coincidentally, I stay in the compound together with the Plaintiff's Managing Director, Mr. Mike Chilewe Jnr.*
6. *On Tuesday 26<sup>th</sup> July 2016, I met Mike Chilewe Jnr at Mt Pleasant Total Filling Station whilst I was in the company of my sister-in-law, Tina Kendricks.*
7. *The said Mike Chilewe Jnr informed us that some thieves had broken into his warehouse and went away with bags of maize.*
8. *He then proceeded that he did not know that I work for Messrs Mbeta and Company until he saw my name on one of the documents which I had accepted service on behalf of Messrs Mbeta and Company.*
9. *The said Mike Chilewe Jnr went on to say that this matter was coming for further hearing the following day, Wednesday 27<sup>th</sup> July 2016 but he was not going to make it to the Court for that hearing as he would be busy sorting out the theft of maize issue.*
10. *I was therefore not surprised that Mike Chilewe Jnr did not attend Court on Wednesday 27<sup>th</sup> July 2016 as he had clearly indicated that he will not attend the Court on that day.*
11. *In the circumstances, therefore, Mike Chilewe Jnr's failure to attend the Court was premeditated and not inadvertent at all.”*

I have considered this matter and I am not persuaded by Counsel Gondwe's suggestion that the Plaintiff's absence from Court on 27<sup>th</sup> July 2016 was due to inadvertence. The hearing date and time were endorsed by the Court after the parties had agreed on the same. I, therefore, do not understand how Counsel Gondwe could have failed to diarise the agreed time. In any case, if indeed Counsel Gondwe had misdiarised the hearing time, no plausible explanation has been advanced as why (a) the Plaintiff also failed to attend Court on the set hearing time and (b) Counsel Gondwe did not show up at the Court at the time he alleges he had endorsed in his diary, that is, 2 o'clock in the afternoon of 27<sup>th</sup> July 2016. It is my finding that it was out of choice that the Plaintiff and his legal practitioner did not attend court on 27<sup>th</sup> July 2016.

Furthermore, and perhaps more importantly, the Plaintiff's Summons does not appear to be properly grounded. As already mentioned, the Plaintiff's Summons is brought Order 47 of the RSC, which is concerned with writs of fieri facias. The Order confers power on the court to stay execution by writ of fieri facias either

absolutely or for such period and subject to such conditions as the court thinks fit. In terms of Practice Note 47/1/1, the grounds upon which the court can exercise this power are either that there are special circumstances which render it inexpedient to enforce the judgement or order for payment of money or that the applicant is unable from any cause to pay the money. It is plain that the Order granted by the Court on 27<sup>th</sup> July 2016 does not pertain to payment of money by the Plaintiff. In the premises, I fail to appreciate the relevance of Order 47 of RSC to the present case. In any case, even if the Order is apposite, I am not satisfied that the Plaintiff has managed to adduce evidence of “special circumstances” which render it inexpedient to enforce the Order granted by the Court on 27<sup>th</sup> July 2016.

All in all, the Plaintiff’s Summons is dismissed with costs for lack of merit.

Pronounced in Chambers this 5<sup>th</sup> September 2016 at Blantyre in the Republic of Malawi.



**Kenyatta Nyirenda**  
**JUDGE**