IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 580 OF 1986

BETWEEN:

THE ADMINISTRATORS OF THE ESTATE OF
THE LATE JOHN DUNSTAN MSONTHI ..... PLAINTIFF

- and -

TIKUMBE LIMITED ..... 1ST DEFENDANT

- and -

J.C. KANSAWA ..... 2ND DEFENDANT

CORAM: MAKUTA, C.J.

Chirwa, Counsel for the Plaintiff
Mhango, Counsel for the Defendant
Namvenya/Mkumbira/Kadyakale, Official Interpreters
Manda, Court Reporter

JUDGMENT

The plaintiffs are the Administrators of the Estate of late John Dunstan Msonthi. They are seeking an injunction to restrain the defendants, their servants or agents or otherwise from closing an access road to the plaintiffs' house on Plot No. BC 384 at Sunnyside in the City of Blantyre. Further the plaintiffs are seeking an injunction to restrain the defendants from trespassing on the said plot or any part thereof without the plaintiffs' consent. The first defendants are a limited trading Company and the second defendant is the Managing Director of the company.

At the commencement of the trial the first defendants took up a preliminary point which was also taken up during the hearing of interim injunction namely that proper parties were not before the Court. The point was made under the provisions of Order 33 rule 3 which, inter alia, empowers the Court to order any question or issue raised in the pleadings to be tried before or after the trial. It was stated that the land over which the alleged right of way passed is owned by the second defendant and that such works as may have been done by the first defendant and complained of by the plaintiffs was done for and on behalf of the second defendant. The plaintiffs, however, maintained that the first defendant is the proper party since it was they who carried out the construction.

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The plaintiffs objected to the raising of the preliminary point during this hearing on the ground that the matter had already been adjudicated upon during the hearing of the interim injunction and if the defendants were not satisfied they should have appealed. I reserved my ruling as I took the view that at the interim injunction full facts were not before the Court. As the case progressed it became clear to the Court that the dispute was between the plaintiffs and the second defendant. When an application to add the second defendant as a party was made I acceded to it because I felt that justice of the case could only be done by the addition of the second defendant.

It is not disputed that the land over which the alleged right of way passed belongs to the second defendant; the Title Deeds are in his name. All relevant correspondence is in his name. True, he is the Managing Director of the first defendants but that is a separate legal entity. It is clear in these circumstances that the construction work was carried out in his personal capacity and not as Managing Director of Tikumbe Limited. The first defendants were brought in just to help procure materials but that, in my view, cannot be a ground for bringing an action against them. It is my view, therefore, that the bringing of the action against the first defendant was misconceived.

The plaintiffs have a house on the plot which is being rented by Messrs Proprietary Manufacturing Company Ltd. since April, 1985, and the access road was leading to this house. It would appear that the access road was in existence at the time the deceased acquired his plot on 21st July, 1972, and the road passed over a parcel of land separating Plot BC 702 and Plot BC 703. The second defendant, Mr. J.C. Kansawa, subsequently acquired both plots. In addition he also owns Plot No. BC 701. The plaintiffs have contended that over the years they have enjoyed the right of way on the access road and the building of a fence, and thus effectively closing the road, has infringed or deprived them that right of way.

The defendants, on the other hand, have contended that if there was any right of way at all, it was extinguished at the time the access road was closed. When Mr. Kansawa acquired the plots he applied to amalgamate them for development. The application was approved on condition that an alternative access road to Plot BC 384 be provided before closure. The alternative access road must be to Council standard. After construction the roadworks were inspected and were found to conform to Council standard. This was conveyed to the defendants by letter, exhibit D19, dated 16th October, 1986.

Mr. Chirwa, on behalf of the plaintiffs, has argued at length that the City Council had no statutory authority to approved the amalgamation of the plots and closure of the access road.

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I now proceed to examine the statutory provisions. Section 75 of the Local Government (Urban Areas) Act, (Cap. 22:01) provides:

> "Subject to and in accordance with any Act specifically providing for any matter, a Local Authority may, in addition to any powers for which specific provision is made by this or any other Act, exercise all or any powers contained in the First Schedule to this Act."

Then there are two provisos and the relevant one for our purposes reads:

> "Provide further that the Minister may, by order published in the Gazette, supplement, revoke, vary or amend the First Schedule to this Act."

Sub-regulation 22 of the First Schedule deals with planning and states:

> "Subject to any other Act to prohibit and control the development and use of land and buildings in the interest of proper and orderly development of the area."

It will be observed that the City Council under s.75 of the Local Government (Urban Areas) Act has powers to prohibit and control the development and use of land and buildings for purposes of orderly development of an area. Under the General Interpretation Act (Cap. 1:01) 'power' includes any privilege, authority or discretion. The section may be read together with any other Act specifically providing for any matter. When read together with s.7(1)(a) of the Town and Country Planning Act (Cap. 23:01), it will be noted that an order declaring a Planning Area in respect of an area lying wholly or partly within an Urban Area may be published and that, if the Minister so directs, empowers the Town Planning Committee to exercise and perform exclusively the powers provided in the First Schedule of the Local Government (Urban Areas) Act which may be vested in the Urban Area Council. Section 7(1) of the Town Planning provides as follows:

> "When an order declaring a Planning Area in respect of an area lying wholly or partly within an Urban Area has been published under Section 3 -
>
> (a) the powers to undertake any of the matters described in the First Schedule which are or may be vested in the Urban Area by virtue of the Local Government

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(Urban Areas) Act shall, if the Minister so directs, be transferred to and become vested in the Planning Committee in respect of the Urban Area contained in the Planning Area."

Such an order was published under Government Notice 251 of 1971 declaring the City of Blantyre a Planning Area. Part 1 of the First Schedule to the Town and Country Planning Act provides for the reservation of land for roads, the construction of new roads, improvement of existing roads, establishment of public right of way. It also provides for the closing or diversion of existing roads and public and private rights of way and tracks.

In the light of these provisions it is my view that the City Council has the powers to amalgamate plots or authorise the closure of roads. It is indeed surprising to hear the submission by Mr. Chirwa that the City Council has no powers whatsoever to do what it did.

It is not disputed that the defendant applied for amalgamation of the plots and closure of the access road. Mr. Steven L. Chavura, DW1, Deputy City Engineer from the City of Blantyre informed the Court that his Department was involved in the approval of development plans in question. In dealing with the application the City Council liaised with both the Lands Department and the Town Planning Committee. He stressed that it is important that the Town Planning Committee should let the City Council know of any developments on plots. According to exhibit C1 the application was approved by the Town Planning Committee meeting held at the Civic Centre on 6th May, 1986. When the alternative access road to Plot BC 384 was constructed it was inspected and found to conform to the Council standard. Another witness involved in the development control within the City of Blantyre was Mrs. Lucy Chipeta working for the Town Planning Department. She is stationed in Zomba but at the time the application in question was being considered she was stationed in Blantyre. She informed the Court that the application was approved on condition that an alternative access road be constructed. According to her the approval for the alternative access road was obtained from the Lands Department whose responsibility it was since the access road was public land.

Mr. Chirwa has submitted that the meeting which approved the application was not, in effect, held because no Minutes as required by section 8 of the Town and Country Planning Act were sent to the Minister. This, according to him, was proof that there were no Minutes and that was why they were not produced in Court. When asked whether he had evidence on that assertion he replied that it was not for him to prove it. His duty was merely to challenge and leave it to the defendant to prove it. I found that argument a bit amusing because if he asserts he must prove. In any case if the plaintiffs intended to base their case on it they should have given notice to produce. That, in my view, would have

obliged the defendants to produce the Minutes. Otherwise the defendants would not know that the Minutes would be required. In the circumstances I find no evidence to support the inference that the meeting which approved the application was not held. To the contrary the evidence of Mr. Chavura and Mrs. Chipeta clearly shows that the meeting was in fact held at the Civic Centre.

So far as the "right of way" is concerned Mr. Chirwa submitted that the "right of way" enjoyed by the plaintiffs arose by implication of law. To support his argument Mr. Chirwa relied on section 6(1) of the Conveyancing and Law of Property Act, 1881 which, he submitted, applies to Malawi and reads as follows:

> "A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part of parcel of or appartment to the land or any part thereof."

According to him even if the right of way is not specifically reserved by the conveyance this section confers, as it were, that right of way with the land. He further submitted that a look at the conveyance of Plot No. 384 reveals that when it was being conveyed to the Late Mr. Msonthi it was done together with the right of way enjoyed by the previous occupant. It was, therefore, his submission that the plaintiffs as Administrators of the estate have a right of way which was conveyed to them by implication of law when the document was prepared for the deceased. The right of way, according to Mr. Chirwa, did not arise by way of necessity. It was also submitted, in effect, that since the freehold title still remains with the Malawi Government and it is the Malawi Government which leased the respective plots to the deceased and to Mr. Kansawa, the Government cannot derogate from the grant of the right of way to the plaintiffs. Again, he submits that at the time Plots 702 and 703 were leased to the second defendant, the Late Mr. Msonthi had already acquired the right of way.

I have examined exhibit P3, i.e. the Indenture of Conveyance of Plot BC 384 and I have not seen any reserve of right of way. The Minister agreed to convey the scheduled land, i.e. Plot BC 384, free from incumbrances. But he excepted and reserved "all rights of way easements and profits a prendre now enjoyed by the Adjoining Properties over the

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Scheduled Lands ....." My understanding of this is that there was no right of way excepted or reserved over the adjoining properties by the Scheduled Lands under this Indenture of Conveyance.

Rights of way by implication of law are either rights of way reasonably necessary for comfortable occupation of the dominant tenant, which only arise by virtue of an implied grant or words implied in the grant or words implied by statute: Wheeldon v. Burrows (1879) 12 Ch. D.31; see also Aldridge v. Wright (1929) 2 K.B. 117. Since the grant itself or the Indenture of Conveyance of Plot BC 384 in the instant case did not give the right of way over the adjoining properties, the right of way by implication of law did not arise.

It, seems therefore, the right of way enjoyed by plaintiffs is a way of necessity which the law implies in favour of a grantee of land over the land of the grantor, where there is no other way by which the grantee can get to the land so granted him. If there is any other means of access to the land so granted, no matter how inconvenient, no way of necessity arises for the mere inconvenience of an alternative way will not of itself give rise to a way of necessity : London Corporation v. Riggs (1880) 13 Ch. D. 798. See also Volume 12 of Halsbury's Laws of England, Third Edition at pages 573 and 574.

If my finding that the plaintiffs have no right of way over the adjoining properties is correct, it follows that after the City of Blantyre, in conjunction with the Town Planning Committee had granted permission to amalgamate Plots 701, 702 and 703 and had given permission to close the access road after constructing an alternative access road, the defendants cannot be said to have interferred with a right of way.

Permission to amalgamate the plots and close the access road was, in my view, given in exercise of statutory rights. Where the continuance of an easement is inconsistent with the carrying out of works under statutory powers the result is an extinguishment of the easement by implication. In Yarmouth Corporation v. Simmonds (1878) 10 Ch. D. 518, a pier was constructed by the plaintiffs under order of Board of Trade in pursuance of powers conferred upon them by the General Pier and Harbour Act 1861. The plans showed that the pier when constructed would be physically inconsistent with the existence of an alleged public right of access to the sea-shore. Provisional order contained no express words extinguishing the right of way. It was held that if the alleged right of way had ever existed, it was extinguished by necessary implication of the construction. The principle laid down in that case applies, in my view, in the instant case since the City of Blantyre was acting under the Local Government (Urban Areas) Act and also under the Town and Country Planning Act.

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I now turn to trespass. The plaintiffs have pleaded that the defendants have been trespassing on plaintiffs' plot purporting to construct an alternative access road thereon to the plaintiffs' house without the plaintiffs' consent. In support of this Mr. Chirwa argued, in effect, that if the alternative access road had been constructed where the plaintiffs wanted it constructed, that would have constituted authority or licence. To put it in his own words: "They had been permitted to enter at point A; they cannot say that they were permitted to enter at point B." Mr. Msonthi, PW3, told the Court that during discussion with Mr. Mthawanji they, that is the plaintiffs, were prepared to trade-off part of the plot BC 384 for an alternative access road acceptable to them. It would appear Mr. Mthawanji is an Architect and he represented the defendants during the discussion.

In order to succeed in an action for trespass the plaintiff must prove:

a) That he was in actual possession at the time of trespass : Thompson v. Ward (1953) 2 Q.B. 153; he must have effective possession. It is immaterial whether his possession is rightful or wrongful.

b) Direct interference with the land, though there is no need to prove damage since trespass in actionable per see : Gregory v. Piper (1829) 9 B and C 591.

It should be mentioned, however, that although, in general, the only person who can sue for trespass is the person in possession, actual or constructive, at the time the trespass was committed, yet where the trespass has caused a permanent injury to the land, a person entitled to reversion may sue for injury to his interest and he may do so at once without waiting until his future estate falls into possession : Jones v. Llarnwst (1911) 1 Ch. 393.

In the instant case the plaintiffs were not in actual possession. It was Messrs Manufacturing Proprietary Company Ltd. who were in possession as lessee. The plaintiffs cannot, therefore, sue. Moreover there is no injury to their reversionary interest which would entitle them to sue at once. In fact Mr. Msonthi testified that the injury suffered was the inconvenience of going in a round-about way. I have already found above that the right of way enjoyed by the plaintiffs is a way of necessity and however inconvenient that may be it will suffice to give access to the land. Further there is no evidence that the value of the property has depreciated. As a matter of fact there is evidence that there has been rental increase the past two years.

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So far as direct interference is concerned, I am of view that if there is authority or licence that is sufficient justification. There is evidence that there was trade-off in that the plaintiffs were to forgo some metres of land in return for construction of an alternative access road. The present problem seems to arise from the fact that the access road has not been constructed where the plaintiffs wanted it. That in itself cannot suffice especially when it is borne in mind that the defendant satisfied the condition laid down by the City of Blantyre that the alternative access road must comply with Council standard.

In Armstrong v. Sheppard and Short Ltd. (1959) 2 Q.B. 384, the plaintiff had a small strip of land at the rear of his premises on which the defendants had entered and constructed a sewer for the discharge of sewage and effluent. The plaintiff claimed damages for trespass and an injunction to restrain the discharge of effluent through the sewer. He swore that he had never had any conversation with the defendants about the matter. The Judge found as a fact that the plaintiff had orally informed the defendant that he had no objection to the construction of the sewer and dismissed the action. The plaintiff appealed and the Court of Appeal held that if A gives authority to B for the doing of an act on his land, and the act is done and completed, then whatever the description of the authority, it is generally too late for A to complain and, accordingly, the plaintiff could not complain of the sewer construction on his land. This case has a lot in common with the present case and the principle enunciated in it, in my view, applies here.

On principles as regards grant of injunction, Mr. Chirwa cited several cases, namely Aslatt v. Corporation of Southampton (1881) 16 Ch. D. 143; New Brunswick Railway Co. v. British andFrench Trust Corporation Ltd. (1939) A.C. 1; King v. Brown (1913) Ch. 316 and Third Edition of Halsbury's Laws of England Volume 21 at page 839. The principles apply if legal rights are infringed or are likely to be infringed which does not seem to be the case here. Moreover Mr. Chirwa stressed on the quoting of obiter dicta and not on the ratio decidendi. It is trite law that obiter dictum is not essential to judge's decision, it is mere expression of opinion.

On the reasons given above I dismiss this action with costs.

PRONOUNCED in open Court this 21st day of March, 1988, at Blantyre.

F.L. Makuta
CHIEF JUSTICE