IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 975 OF 1992

BETWEEN:

J. L. MTHAWANJI (MALE).....1ST PLAINTIFF
- and -
R. MTHAWANJI (FEMALE).....2ND PLAINTIFF

(EXECUTORS OF THE LAST WILL OF R. S. MTHAWANJI (DECEASED))

- and -

J. CHING'AMBA (FEMALE).....1ST DEFENDANT
- and -
MALAWI HOTELS LIMITED.....2ND DEFENDANT
- and -
CHILEMBA (MALE).....3RD DEFENDANT

CORAM: MWAUNGULU, REGISTRAR

For the Plaintiffs, Nkhono
For the Defendants, Chagwamnjira

R U L I N G

Yesterday, the 7th of September, 1992, I heard an application by J. L. Mthawanji and R. Mthawanji suing as Executors and Executrix respectively of the Estate of Ralph Stephen Mthawanji. The application is opposed by Miss J. Ching'amba, first defendant, Malawi Hotels Limited, the second defendant, and Mr. Chilemba, the third defendant. The application was made under Order 113 of the Rules of the Supreme Court. After listening to argument and examining affidavits in support of the application, the application is refused.

The Executors and Executrix are appointed by the Will of Ralph Stephen Mthawanji of the 4th of April, 1992. Mr. Nkhono, appearing for the Executors, concedes that Probate has not been granted. He is in the process of obtaining it from this Court.

The Will, exhibited in the affidavit in support of the application, states in paragraph 1:

> "I APPOINT my wife, RUTH SYLVIA MTHAWANJI of P.O. Box 2022, Blantyre aforesaid and my brother JOSIA LESLIE MTHAWANJI of P.O. Box 1551, Lilongwe in the said Republic of Malawi (hereinafter called "my Trustees") to be Executors and Trustees of this my Will..."

Touching the property, the subject of contention in this action, paragraph 2 of the Will states:

> "I OWN two premises on Chileka Road, Chatha Village, T.A. Machinjili, Blantyre aforesaid and I gave devise and bequeath the premises presently occupied by JEAN SILOS CHING'AMBA of P.O. Box 30755, Chichiri, Blantyre 3 aforesaid to her and the other to my mother VIRGINIA MONICA MTHAWANJI."

Jean Silos Ching'amba occupies one of the premises. The other premises mentioned in the Will has not been given to Virgina Monica Mthawanji, the deceased's mother. Instead, Miss Ching'amba let the house to Malawi Hotels Limited, the second defendant who, in turn, housed the third defendant, an employee. This Summons is intended to obtain possession of this premises to enable the Executors carry out the purposes of the Testator.

The application is vehemently opposed. It is contended, on behalf of the first defendant, that the Executors have no right to sue before grant of Probate. Against this, the plaintiffs argue that the powers of Executors derive from the Will and not grant of Probate. Consequently, Executors may intermeddle with the estate. Further, it is argued, for the first defendant, that she has acquired some title to the premises because she bought the land, built a hedge round it and supervised the erection of the actual building.

On the last ground, although Counsel for the 1st and 2nd plaintiffs invited me to cast doubt on the evidence in the affidavits, in my opinion, assuming the first defendant bought the land, she has some interest in the land. She would, therefore, be on the premises in her own right. Consequently, this would not be a case where a summary order in the manner of Order 113 would be appropriate. Moreover, the Testator clearly states in the Will that the premises is occupied by the 1st defendant. It can be properly assumed that the first defendant was on the premises with the consent and licence of the Testator. The Testator is a

predecessor in title, in the loose understanding of the word, to the Executors of the Will. My own understanding of Order 113 is that the procedure would not be invoked in favour of an applicant if the occupiers of the premises are on the premises by the consent of the applicant's predecessors in title.

More importantly, however, is that Probate has not been granted to the Executors. Mr. Nkhono has argued that Executors can intermeddle or meddle with the estate even before Probate is granted. In my opinion, while Courts have recognised this right for Executors, Courts, as a matter of practice and principle, have refused relief before grant of Probate. The starting point is **Meyappa Chetty -vs- Supra Mania Chetty (1916) 1 AC 603.** This was a decision of the Judicial Committee of the Privy Council from an appeal from Singapore. **Lord Parker**, however, relied on **Thompson -vs- Reynolds 3 C & P 123** and **Woolley -vs- Clark 5 B & Ald. 744.** The principle to guide the Courts is found at page 608:

> "Assuming, but without deciding, that this is to be deemed to be a suit which the Testator would, if he were living, have a right to institute, their Lordships have come to the conclusion that this contention cannot be upheld. It is quite clear that an Executor derives his title and authority from the Will of his Testator and not from any grant of Probate. The personal property of the Testator, including all rights of action, vests in him upon the Testator's death, and the consequence is that he can institute an action in the character of Executor before he proves the Will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on Probate, but because the production of Probate is the only way in which, by the rules of the Court, he is allowed to prove his title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled: see Comyn's Digest, "Administration," B.9 and 10; **Thompson v. Reynolds (1); Woolley v. Clark (2)"**

The judgment of the Judicial Committee of the Privy Council was accepted by the English Court of Appeal in **Ingall v. Moran (1944) 1 All ER, 97.** At page 102, **Lord Justice Goddard** said:

> "There is no doubt that, where a deceased person leaves a Will and therein names an Executor, the latter can institute actions before obtaining Probate,

> though the action may be stayed until the Probate is granted: **Tarn v. Commercial Banking Co.** 4. The reason for this is, no doubt, that the Executor's title is derived from the Will, which operates from the death of the Testator, and all he has to do is to prove the Will, that is, to prove that the Will which names him as Executor is the last Will of the deceased. He has a title to sue but the Court requires him to perfect his title and will not allow the action to proceed till this has been done. The action will be stayed, but not dismissed. An administrator is in a different position."

In Re **Crowhurst v. Park** (1974) 1 All ER 991, 999, Justice Goulding said:

> "Counsel have suggested that the foregoing jurisprudence is inapplicable where, as here, the defendant is willing to admit the Executor's title to the Testator's personal estate and does not require the production of Probate. In my judgment that is not a correct view. I think the court insists on the procedural requirement of its own motion for the protection of all who may have interests in the Testator's personal estate or claims against his Executor: see in that connection the historical footnotes at the end of the report of **Thompson v. Reynolds.**

What I understand from these decisions is that the power to intermeddle or meddle with the estate of the Testator before Probate is granted by the Court is distinct from seeking relief from the Court. In the latter case, Courts will refuse to grant relief till the Executor's title to land is perfected. This is achieved by grant of Probate. This is confirmed by our sections 37 and 49(2) of the Wills and Inheritance Act.

In so far as the applicants in this case want relief from this Court before grant of Probate, this Court will not entertain the action. The wiser thing is to stay the proceedings till Probate is granted. As I have said, however, the 1st defendant, if she paid for the plot, would be entitled to some interest in the estate. She would be there in her own right. Conversely, she is on the premises by the consent of the executors' predecessor in title. This would not be the case where Order 113 would be invoked. In the former case there is an issue to be tried. Since there is no grant of Probate, it is inane to give directions under Order 28, Rules 4 and 8. In the latter case, I could

dismiss the Summons. I think the right course is to stay the proceedings to enable grant of Probate. If Probate is granted, the applicants might have to consider whether to proceed on the Summons. The defendants may have to enter caveats to the application for grant in view of the situation raised by their affidavits.

MADE in Chambers this 8th day of September, 1992, at Blantyre.

D. F. Mwaungulu
REGISTRAR OF THE HIGH COURT