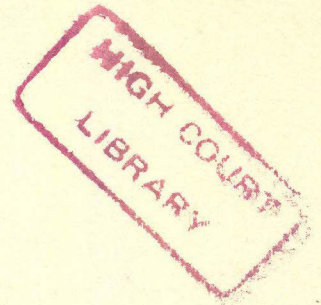


IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1072 OF 1992



BETWEEN:

AUTOCRAFT LIMITED..... PLAINTIFF

- and -

CITY OF BLANTYRE..... DEFENDANT

CORAM: MTEGHA J.

Msiska, of Counsel, for the Plaintiff

Nyirenda, of Counsel, for the Defendant

Kaundama, Official Interpreter

R U L I N G

In this Originating Summons the plaintiff is praying for the following reliefs, namely:

- "(a) A DECLARATION that the Plaintiff is legally entitled to carry on its business on Plot Number ESE, Limbe, City of Blantyre, until such time that it has formally been allocated another plot to move its business to namely plot Number M1 Mapanga also within the City of Blantyre by the Department of Lands.
- (b) THAT the Plaintiff be given extension of time to move its business to the said plot M1 Mapanga without closure of its business presently being run Plot ESE, Churchill Road, Limbe, within the City of Blantyre in the interim.
- (c) THAT the said extension of time also be given in order for the Plaintiff to exhaust its rights of appeal procedures under the Town and Country Planning Act against the notice to close down and seal its business on the said plot ESE Limbe."

The application is opposed by the defendant. By its affidavit deposed to by Mr T C Nyirenda, Counsel for the defendant, it has been deposed that:

- (a) The Order for declaration cannot be had because the plaintiff has no legal right to flout the law by carrying on business in an area not zoned for that business;



- (b) The plaintiff has not lodged any appeal under the Town and Country Planning Act;
- (c) The plaintiff does not dispute that it is in breach of statute; and
- (d) The plaintiff has no right to assert against the defendant since Plot E8E, Limbe does not belong to the plaintiff and, therefore, the plaintiff has no interest in the plot.

The brief facts which have led to this application appear to be these:

The plaintiff in this case, Autocraft, is a company engaged in panel-beating and car-breaking business. Over the years, it carried on business on premises belonging to Majestic Cinema. These premises were in Limbe, situated along Grevillia Avenue. These premises were being rented from the proprietors of Majestic Cinema. Subsequently, these premises were sold to a third party and it became necessary for the plaintiff to vacate the premises. Alternative premises were, therefore, required.

As luck had it, the plaintiff's Managing Director, Mr Hamid Alimahomed, had another plot. This plot, No. E8E, is also situated in Limbe, along Churchill Road. The plaintiff then moved its business to this plot. However, this latter plot is in what is zoned as a residential area, and not a commercial area. This business could, therefore, not lawfully be carried on on that plot.

It would appear that as soon as the plaintiff was made aware that it would be required to vacate the plot along Grevillia Avenue, the Managing Director submitted plans to build and move the plaintiff's business. In fact, he built the premises, it would appear, without the defendant's authority. Discussions then ensued between the plaintiff and the defendant. However, on 29th August 1990, the defendant wrote to the Trustees of Hajra Property Development Limited in these terms:

"29th August, 1990

The Trustee
Hajra Property Development Limited
P.O. Box 5916
LIMBE

Dear Sir

DISPLAY OF SECONDHAND MOTOR VEHICLES
FOR SALE ON PLOT NO. E9E - LIMBE

Your above application was submitted to the planning Committee on 23rd August, 1990 and was approved subject to the following conditions:-

1. Only good secondhand vehicles be displayed and not scraps.
2. This should be a temporary use waiting for development of the plot.

You may wish to submit plans for the proposed development for the Committee's decision.

Yours faithfully

FOR: TOWN CLERK/CHIEF EXECUTIVE"

At this stage, it is not easy to tell how this letter came into this matter. In the first place, the matter is relating to Plot E9E and not Plot E8E. Secondly, it appears the property belongs to a different entity altogether.

Anyway, as I have pointed out earlier, discussions ensued between the parties and at the end of the day, the defendant wrote a letter to Mr Alimahomed on 6th February 1992. This letter stated:

"RE: CLOSURE OF BUSINESS AND STOP NOTICE ON PLOT
E8E - CHURCHILL ROAD, LIMBE

With reference to the above subject, and further to my letter of the 31st ultimo, please be informed that the Regional Administrator (S), OPC, has written to us on the above issue and in accordance therewith I set out hereinbelow conditions which you must comply with before opening your premises.

- (1) The premises be opened from the 10th February, 1992 for a period of 6 months, ie to 10th August, 1992 during which you will be looking for alternative premises to build on and move into at the expiry of the period hereby given;
- (2) The warehouse, workshop, offices and fence recently constructed without the Town Planning approval are demolished on or soon after the 10th August, 1992.
- (3) The operations should be limited to breaking of vehicles, storage of spares and matters ancillary thereto. No sales shall be allowed on the premises.
- (4) During the period referred to in (1) above, the premises to be maintained in presentable condition which should not distract from the general aesthetics of the surrounding areas.

- (5) That Mr Hamid shall henceforth recognise the existence of the Town and Country Planning Committee and shall abide by its requirements as laid down in the Town and Country Planning Act of the Laws of Malawi.
- (6) That should Mr Hamid feel aggrieved by these conditions, he should follow the procedure as laid down by the Town and Country Planning Act of the Laws of Malawi which procedure was already made known to him.

As a signification of your agreement to the terms set out hereinabove, please sign the counterpart hereof and send same to me before 5.00 p m on Friday, the 7th instant in order to enable you open your premises on Monday, the 10th instant.

Please note that no extension of the period granted herein will be permissible. Should you fail for any reason whatsoever to procure a place to which you are required to move by the 10th August, 1992, no further indulgence shall be granted to you.

Further, any breach of the above conditions shall be a subject of legal proceedings in Court for breach of agreement whereupon you will be required to remedy the breach by immediate ceasure of all operations.

Yours faithfully

D.R.D. Alufandika
TOWN CLERK AND CHIEF EXECUTIVE"

The plaintiff did not vacate the premises by 10th August 1992. Another letter was written by the defendant on 24th August 1992. It stated:

"Dear Sir

RE: CLOSURE OF BUSINESS AND STOP NOTICE ON PLOT
NO. EGE CHURCHILL ROAD, LIMBE

With reference to the agreement between yourself and the Town Clerk and Chief Executive of the City of Blantyre, of 6 February 1992, which you signed on 12 February 1992, you agreed to vacate the above named premises by 10 August 1992.

As this letter is being issued on 25 August, we insist you vacate the premises before 28 August, as your property will be sealed on 28 August."

The plaintiff has not vacated the premises.

I will return to this point later. However, during the period, Mr Alimahomed was looking for another plot. Plot M1, Mapanga was allocated to him by the Controller of Lands and Valuation, but, as can be seen from the letter allocating a plot to him, there were some things which had to be done before he could be allowed to build, let alone, move the business. One letter dated 3rd April 1993 stated:

"Dear Sir

**APPLICATION FOR LEASE OF LAND AT MAPANGA FOR
INDUSTRIAL PURPOSES**

Further to the letter of 9th September 1991 from the Regional Controller of Lands and Valuation (South) I have pleasure in informing you that Mapanga area is being rezoned for industrial purposes. That being the case it is hereby confirmed that you have been allocated initially 3 hectares for your car breaking and ancillary business.

As soon as the detailed layout of the area is completed you will be advised to commence development after your building plans have been approved by the Blantyre Planning Committee. In this respect it would be in your interest to have such plans ready soon after the detailed layout is completed.

Yours faithfully

B.S. Chawani

ACTING CONTROLLER OF LANDS AND VALUATION"

This letter was immediately followed by another letter from the Regional Physical Planning Officer. It stated:

"Autocraft
P.O. Box 5916
Limbe.

Dear Sir,

**REZONING OF PART OF PLOT NO. MP1 FROM LOW/MEDIUM
DENSITY RESIDENTIAL TO INDUSTRIAL USE**

Your letter dated 8th March, 1993 refers.

I would like to advise that the application for rezoning of part of plot No. MP1 from low/medium density residential to high industrial use received ministerial approval late last year.

Following ministerial approval, this office prepared a detailed layout plan for the area which was tabled for Town Planning Committee's consideration on 20th October, 1992. The committee was of the opinion that some of the plots were too large and advised, therefore, that the plan be revised.

I am pleased to inform you that revisions have been finalised and the plan will be tabled again at the next Town Planning Committee meeting which is scheduled for 22nd April, 1993. After Town Planning Committee's approval, a copy of the plan will be sent to the Regional Controller of Lands and Valuation and it is his office which will allocate plots to individual developers.

Lastly, I would like you to note that, among other things, ministerial approval acknowledges the fact that topographically, the area in question is not quite suitable for industrial development. This is why it was initially zoned for residential development. Nevertheless, the ministerial approval stipulated that only high quality development will be permitted in this area. This is due to the fact that the site is along a major and very busy road.

Yours faithfully

L.P.H. Longwe
for: REGIONAL PHYSICAL PLANNING OFFICER."

It is, therefore, clear that as of now, no specific date is known as to when this plot is available.

It would appear that when the plaintiff realised that the business will be sealed and that it will be forced to vacate Plot E8E, an injunction was obtained from the Court restraining the defendant from doing so. Efforts by the defendant to vacate the injunction were not successful. As of now, the injunction still stands.

What comes out clearly from these facts is this: Autocraft Limited is clearly a separate entity. It is not the owner of Plot E8E in Limbe. That plot belongs to a Mr Hamid Alimahomed. It is not quite clear whether that plot, M1, Mapanga also belongs to Hamid Alimahomed, or to the plaintiff. It is also quite clear that Plot E8E, Limbe was developed without City Council authority. The plaintiff has produced Exh. PAM2 to show that it had paid K755.00 as plan fee. But this exhibit, per se, does not mean that it relates to Plot E8E. In fact, it may very well relate to Plot E9E, belonging to Hajra Property Development Limited, according to the heading. Finally, what is also clear is that Hamid Alimahomed is Managing Director of the plaintiff's business.

It will be noted that when the plaintiff was served with a notice to close down and seal its business at Plot E8E, Limbe, it lodged an appeal against the notice under the Town and Country Planning Act.

I will now turn to the prayers.

The first prayer in the Originating Summons is a declaration that the plaintiff is legally entitled to carry on its business at Plot E8E, Limbe until such time that it has been allocated Plot M1, Mapanga to move its business to.

The power to make a declaration by the Court is a discretionary one. It must be exercised with great care and judiciously, regard being had to the circumstances of the case.

The Court will not make a declaration when the relief claimed is unlawful. It has been argued by Mr Msiska that the plaintiff was allowed to build on Plot E8E in order to move the business there. Indeed, Mr Alimahomed was allowed by the defendant in its letter of 6th February 1992. It can be argued that this permission was not given to the plaintiff, but to Mr Alimahomed. If this was the position, then the plaintiff has no locus standi. The plaintiff has no interest in the plot. The dispute is between the defendant and Mr Alimahomed.

It is also quite clear that by carrying on business on the plot, if the plaintiff has a locus standi, the plaintiff was doing so illegally. The permission which was granted by the defendant on 6th February 1992 was for a period of six months only, and there were conditions attached to the permission. But the plaintiff has not complied with them. A declaratory judgment or order is an equitable remedy and he who seeks it must come with clean hands. I cannot, therefore, grant this relief where there is such clear illegality.

I will now turn to the second prayer, that the plaintiff be given time to move its business to Plot M1, Mapanga. It will be seen from the facts which I have outlined that the plot is still under review by the authorities. It is not known when the problems which have arisen will be sorted out. In these premises, it would not be possible for the Court to give a realistic time extension. The extension clearly depends on when the plot is going to be ready. This prayer must, therefore, fail.

Finally, the Court is being asked to extend the time in order for the plaintiff to exhaust its rights of appeal procedure under the Town Planning Act against notice to close down and seal its business on Plot E8E.

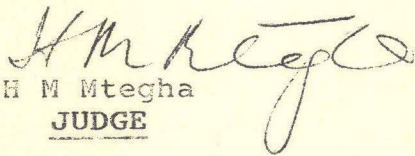
It will be noticed, from the facts of the case that notice of closure of business and stop notice was given on 6th February 1992. There is no notice of appeal to that notice. Therefore, there is no appeal, as Mr Nyirenda rightly pointed out. The only notice of appeal appearing on the file was that dated 11th November 1991. This notice, however, relates to Hajra Property Development Limited and not to the plaintiff. At that time, Plot M1, Mapanga was not yet allocated to the plaintiff. According to section 67(2) of the Town and Country Planning Act:

"Where a person wishes to appeal against any notice or decision referred to in subsection (1) he shall submit a notice of appeal within thirty days of the receipt of the notice or decision to be appealed against, to the Board."

The plaintiff's rights have, therefore, been exhausted.

This Summons is, therefore, dismissed, with costs. This means therefore, that the Notice served on the plaintiff by the defendant stands.

MADE in Chambers this 25th day of May 1993, at Blantyre.


H M Mtegha
JUDGE