

**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL CAUSE NO. 3456 OF 1999**

**BETWEEN : -**

SATEHZAN LIMITED ..... PLAINTIFF

- and -

MOBIL OIL (PVT) LIMITED ..... DEFENDANT

**CORAM - CHIMASULA PHIRI, J.**

K.W. Chibambo/P.C. Nkhono of counsel for defendant/applicant

M.F. Tsingano of counsel for plaintiff/respondent

Mrs M. Katunga - Court Clerk

**RULING**

The defendant applies to this court for an order to discharge an **ex-parte** interlocutory injunction obtained on 5th November 1999 but dated 8th November 1999. The plaintiff moved the court to order and direct that an injunction be granted requiring the defendant to vacate the filling station premises known as Plot No. 218 at Monkey Bay in Mangochi within 10 days of the service of the order. Secondly, that the defendant whether by its servant's or agents refrain from trespassing upon the said premises. The court so directed as prayed for by the plaintiff on the usual undertaking as to damages as well as granting opportunity to the defendant to have the **ex-parte** order set aside by bringing in an **inter-partes** application on 2 clear days notice.

This present summons seeks an order to discharge the **ex-parte** order on the grounds that the plaintiff suppressed material facts when it obtained **ex-parte** the interlocutory injunction and/or that in any event the plaintiff is not entitled to the right it seeks to protect by the said injunction. There is an affidavit of Mr Nkhono sworn on 19th November, 1999 to which there are exhibited a number of documents and another affidavit sworn on 17th November 1999. The plaintiff filed an affidavit in opposition contending that the plaintiff disclosed all the relevant material facts as far as its cause of action was concerned. Therefore the plaintiff denies that it suppressed material facts in its application for an **ex-parte** injunction order. The plaintiff went further to argue that the under-lease entered into between Malawi Railways Limited and the defendant expired on 30th September 1991 and that the document entitled **Letter of Intent** upon which the

defendant relies as an agreement for a 10 year lease was but only indeed a letter of intent and no more. Furthermore, that if the letter of intent be taken to be a lease agreement, the same was subject to Government approval and no such approval having been obtained, the lease agreement for 10 years never came into existence at all. The plaintiff has also contended that the defendant has not expended K2,019,600.00 for developments on the premises and that if at all any such expenditure has been incurred, the defendant is taking into account its equipment such as fuel pumps and under-ground tanks which the defendant can easily remove and use again elsewhere.

Finally, the plaintiff has contended that it is the beneficial owner of the premises and that this has been acknowledged by the defendant as demonstrated by the defendant's payment of rent directly to Malawi Lake Services Limited and also negotiating issues pertaining to the said property directly with Malawi Lake Services Limited. Furthermore that Malawi Lake Services Limited as Beneficial owner and Malawi Railways Limited as a legal owner exercised their proprietary rights by choosing the plaintiff as their prospective lessee and ministerial consent is being awaited. The plaintiff prays that the application be dismissed and that the interlocutory injunction herein should be allowed to remain in place until after determination of the issues in the substantive action.

The facts upon which the ex-parte order was made are contained in the affidavit of Zani Sacranie, General Manager of the plaintiff company. It is deponed therein that sometime unknown to the deponent, the defendant entered into a lease agreement with Malawi Railways Limited whereby the premises in dispute were leased to the defendant. Thereafter Malawi Railways Limited was restructured and a Limited Company called Malawi Lake Services Limited was incorporated. Under the reconstruction programme Malawi Railways Limited held the said premises in trust for Malawi Lake Services Limited and will in due course assign the same to Malawi Lake Services Limited. It has been contended in the affidavit that the lease between the defendant and Malawi Railways Limited expired some time unknown to the deponent but that the defendant has continued occupying the premises. Furthermore that following the expiration of the lease aforementioned, the plaintiff approached Malawi Railways Limited and Malawi Lake Services Limited for a lease of the same premises. The response was favourable and plaintiff was offered a 15 year lease commencing from 1st October, 1999. The Agreement is exhibited.

When the defendant got wind of the negotiations between the plaintiff and Malawi Lake Services Limited, the defendant requested for a renewal of the lease entered into between itself and Malawi Railways Limited. The plaintiff exhibited a letter from Malawi Lake Services Limited turning down the defendant's offer. Following this situation, the relationship between the plaintiff and the defendant has soured and the defendant has refused to recognise the plaintiff as new lessee of the premises. The plaintiff wishes the defendant vacated the premises and that the plaintiff sub-leases the same to Caltex Oil (Malawi) Limited, another oil company to continue with similar business of the defendant.

Practice note 29/1/17 of Order 29 Rule 1 of the Rules of the Supreme Court sets out a number of circumstances under which a court can discharge or dissolve or waive an ex-parte injunction order. This court has on previous occasions dealt with this subject of discharging interlocutory injunction in several cases including - **Jimmy Koreia vs Designated Schools Board** Civil Cause No. 1908 of 1995 (unreported); **Press Agribusiness Limited vs Farmers World Limited** - Civil Cause No. 284 of 1997 (unreported); **ICL (Malawi) Limited vs Lilongwe Water Board** - Misc Civil Case No 64 of 1998 (unreported); **Thusitha Perera vs Asoka Dhanapala** - Civil Cause No. 1597 of 1998 (unreported) and **Brian Mungomo (MCP) and Goodwin Mvula (AFORD) vs The Electoral Commission** - Misc. Civil Application No. 23 of 1999 (unreported). In all these cases it is clear that if a material fact has been suppressed the court can discharge or dissolve the **ex-parte** order either on an **anex-parte** application or where the court directs that there be an **inter-partes** application, on the hearing of such an application. The approach of the court to an application of this nature has always been a consideration of the original application in the light of the new facts and determine whether the new facts would lead the court to decide differently. If the decision would be different, the suppressed information is material. If the decision would not change even in the light of the new facts, then the suppressed facts are not material. In considering the totality of the facts if the **ex-parte** order is to be upheld it must be shown that the plaintiff has a good arguable claim to which it seeks to protect and that there is a serious question to be tried. The remedy is granted in the discretion of the court. It is an equitable remedy and where damages would be sufficient remedy, the order would normally be denied. The purpose of having such a remedy is to ensure that a **status quo** is maintained until the rights of the parties are determined through the trial. The case of **American Cynamid** (1975) AC 396 is the bedrock of judicial intervention for interlocutory injunctions. Damages are said not to be sufficient if the wrong is irreparable or outside the scope of pecuniary compensation or if damages would be very difficult to assess. The court will always consider preservation of the **status quo** and abatement of the wrongful act or deed. It will be, generally, material to consider whether more harm will be done by granting or by refusing an injunction order. In particular it will usually be wiser to delay a new activity rather than to risk damaging one that is established. See - **Granada Group Limited vs Ford Motor Co. Limited** (1972) FSR 103.

In the present case the issue of whether or not the **Letter of Intent** is a mere letter of intent or an actual agreement is a triable issue and requires factual evidence to decide its status. This Letter of Intent provided for a 10 year Lease from the expiration of the initial lease agreement between the defendant and Malawi Railways Limited. In the affidavit of Sacranie the duration of the lease which is said to have expired was not disclosed either wilfully or intentionally or negligently or through lack of information on the part of the plaintiff. The court thinks that the plaintiff did so deliberately or intentionally because as a prospective lessee the plaintiff should have carried out a diligent inquiry with Malawi Lake Services Limited to ensure that there were no encumbrances on the title for these premises. If the court had been told about the letter of intent and that it was that document which governed the relationship between the defendant and Malawi Lake

Services Limited and Malawi Railways Limited, the court would not have granted the interlocutory injunction order. The situation would have been that the defendant is claiming to be a lessee under the agreement duly executed by the defendant and Malawi Railways Limited in 1988 while on the other hand the plaintiff is claiming to be lessee under a Lease Agreement between Malawi Lake Services Limited and Malawi Railways Limited on the one hand and Satehzan Car Hire Limited on the other. This contract was executed by Malawi Lake Service Limited and Satehzan Car Hire Limited. The Malawi Railways Limited which is said to be the Trustee for Malawi Lake Services Limited did not execute. Furthermore, no relationship has been established between the plaintiff and Satehzan Car Hire Limited i.e. are they one and same entity or is the plaintiff a beneficiary of Satehzan Car Hire Limited. I have no doubt that both the plaintiff and defendant contend that they entered into a long term lease for the premises where ministerial consent should have been sanctioned. Both do not as yet have such ministerial consent. The plaintiff contends it has applied for one while the defendant contends that Malawi Railways Limited and/or Malawi Lake Services Limited should not use lack of ministerial consent to vitiate the contract because that would be tantamount to reliance on self induced frustration of contract. I am of the view that the plaintiff is not an innocent purchaser for value without notice. Equity does not assist a volunteer. Furthermore, he who seeks equity must come with clean hands. The plaintiff deliberately chose not to inquire into the status of the defendant **visa vis** the premises in dispute. The law requires a search spanning 40 years back for one to be assured of a clean title. Even where the dealings between the defendant and Malawi Railways Limited were not registered, the plaintiff or Satehzan Car Hire Limited or Satehzan Filling Station Limited should have inquired from the defendant to say the least, because the plaintiff had knowledge that the defendant had a prior lease agreement with Malawi Railways Limited and was still in occupation even after there were allegations that the lease had since expired. The plaintiff cannot claim any better title than the defendant. The balance of convenience would favour that the defendant should still remain in occupation until the issue is determined by the court. On that score alone I would discharge the interlocutory injunction order.

The other point raised by the defendant is that the plaintiff does not have any right that would require protection by injunction order. The argument is that Malawi Railways Limited is still the registered owner and beneficiary of these premises according to search done at the Deeds Registry. The argument goes on that even following a restructuring programme of Malawi Railways Limited and the birth of Malawi Lake Services Limited there should have been a deed of assignment conveying the legal title. Therefore, at most what Malawi Lake Services Limited inherited was beneficial interest of an equitable nature. Therefore, following the non-execution of the Lease Agreement by Malawi Railways Limited, no legal title passed to Satehzan Car Hire Limited. As such Satehzan Car Hire Limited or the plaintiff have no legal right which should be protected by an injunction order. Under order 29 of the Rules of the Supreme Court there must be a legal right which an application for interlocutory injunction should seek to protect. On the face of it, the plaintiff does not have a legal right unless it had joined Malawi Railways Limited, Malawi Lake Services Limited and Satehzan Filling Station Limited as co-plaintiffs. There cannot be any dispute about the plaintiff's equitable right to the property

but that is not good enough to sustain the injunction order as it came after the defendant's existing right and is not of a superior nature.

Lastly, the plaintiff has contended that the defendant has put little development on the premises save for the defendant's equipment comprising fuel pumps and under-ground fuel tanks. Suffice to say that this argument is misplaced and misguided because when one talks of development in relation to a filling station one talks of these equipments. Therefore it is clear that the defendant has made substantial contribution towards the enhancement of the monetary value of the premises and even without legal title to the premises equity would come to its aid and restrain Malawi Railways Limited and or Malawi Lake Services Limited from evicting the defendant from these premises before the expiry or collection of the defendant's fruits of its investment. This is an area where equity would follow the law with dragging feet. The remedy of injunction being equitable, I would have exercised my discretion in favour of the defendant and discharged the injunction order on that ground too.

The issue of costs is discretionary, Costs normally follow the event. In the circumstances of this case I do not find any reason why the general rule should not apply. I order that the plaintiff will pay costs of and incidental to this application. However, the issue of the undertaking as to damages made by the plaintiff will still pend until the determination of the main action.

**MADE IN CHAMBERS** this 30th day of November, 1999 at Blantyre.

**CHIMASULA PHIRI**  
**JUDGE**