

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2004 OF 1995

BETWEEN:

A. DEMETRIOU ESTATE LIMITED.....PLAINTIFF
t/a NAMBANDE ESTATE

and

NOMBO ESTATE LIMITED.....DEFENDANT

CORAM: TWEA, J

M. Msisha of Counsel, for the Plaintiff

P. Nkhono of Counsel, for the Defendant

Kaundama, Recording Officer

RULING

This application is brought by the defendant that these proceedings should be set aside on the ground that counsel for the plaintiff company are acting without authority of the plaintiff company.

The plaintiff in this case is A. Demetriou Estate Limited, trading as Nambande Estate. This estate was owned by one William Nedrick Dapey, now deceased, and he was sole director, until, according to his own evidence, 1996 when he sold the Estate.

It is on record that during the growing seasons of 1993 - 1995, this estate and the farm equipment were let out to the defendant. At the end of the lease, the farm, sheds and equipment were in a state of waste and disrepair. The defendant did not make good the waste and disrepair. The sole director, the late William Dapey then commenced this action against the defendant in the name of the company. The plaintiff obtained judgment in default and the matter came up for assessment of damages. The defendant sought to have

the judgment set aside. Eventually by consent, the judgment was set aside and the defendant entered a defence.

The record shows that pleadings were not closed until 1997, and trial commenced on 27 March, 2000. Mr. Dapey gave evidence for the plaintiff in which he disclosed that he sold the estate in 1996 and that he was no longer a director. The plaintiff's case was closed. The case was for the defence. However, before proceeding the defence made the present application.

The defendant contended that since the farm was sold, then Mr. Dapey had no authority to prosecute this action in the name of the company, nor could he instruct counsel to prosecute on its behalf. Mr. Dapey told this court that the asking price for the farm and sundry was K1.5 million, but due to the state of waste and disrepair the buyers could not buy at that price. He therefore knocked off K0.5million and offered his furniture in the farm house, which was worth K85,000 in order to effect a sell at K1 million. Effectively, he lost K600,000.00 which did not pass on to the new owners on the sale of the farm

From the record it is clear that at the time the default judgment was set aside by consent, Mr. Dapey was the director of the plaintiff company, and therefore had authority to instruct counsel to proceed with the case. However, after the sale of the farm in 1996, counsel continued with preparation of the case until a bundle of pleadings was filed on 7th September, 1997. Then there was change of counsel to the one now in court. Clearly, present counsel was not instructed by the plaintiff's company, but Mr. Dapey, who, on his own evidence, was no longer a director then. When the action started, Mr. Dapey had instructed Messrs Lilly Wills and Company. They as agents, would, in the normal course of things, have the general authority to do everything that would reasonably be expected to be done by them in the cause: See ***Prestwich vs Poley*** (1865) 18 C.B. 806 also para. 3079 of Rules of the Supreme Court Part II 1995 ed. This general authority however, could not have survived, when Mr. Dapey decided to leave Messrs Lilley Wills and Company and gave a retainer to Messrs Nyirenda, Msisha and Company. Clearly, Messrs Nyirenda Msisha and Company did not get their retainer from the plaintiff company, because Mr. Dapey was not a director of the plaintiff company then. From counsels submissions, it is even doubtful whether the plaintiff company is aware of this action. Since Mr. Dapey was no longer a director of the plaintiff company, after he sold the farm, he had no authority to sustain this action in the name of the company. See ***Chikoko Trading Limited vs Farming and Trading Co. Ltd***, and others, Civil Cause 3178 of 2000 (unreported)

From the evidence of Mr. Dapey however, it is clear that since he was obliged to knock off the cost of the waste and disrepair from the asking price for the farm, the loss for the waste and disrepair not having been made good of, by the defendant, he was still entitled to recover the money as a loss accruing to himself and not the company as he had sold it at a reduced value. Clearly this position was not made known to the lawyers otherwise this would have been regularized. The position, as it now stands is that Mr. Dapey had authority to instruct lawyers to act for him which he did. However, he had no authority to instruct lawyers to act for the plaintiff company, which he did. The lawyers therefore have no authority to act for the plaintiff company. Mr. Dapey, be this as it may, has an interest to protect in the loss that the plaintiff company suffered, as this loss now fell on him. He could have sustained this action in his personal capacity.

It is on record that Mr. Dapey is now deceased. There is no record as to whether there are any executors or administrators appointed for his estate. So much having been done with the knowledge of the defendants which would amount to undue delay; on their part see ***Danish Mercantile Co. Ltd and Others vs Beaumont and Another***, (1951) 1 All E.R. 925, it would not be justiciable in the circumstances to dismiss the action. I therefore order that this action be stayed for 90 days from today, pending the lawyers enquiry into the matter of the deceased estate and capacity to continue with this action. I will not make any order as to costs at this point in time.

Pronounced in Open Court this 11 day of May 2001 at Blantyre.



E.B. Twea
JUDGE