IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CIVIL CAUSE NO. 3684 OF 2002

BETWEEN:

MICAHIL JAMA ALI,

t/a PUTLAND IMPORTING COMPANY.....PLAINTIFF

- and-

ALI DERE (male).....1st DEFENDANT

IBRAHIM BABAGIDA(male).....2nd DEFENDANT

HASSAN ISSA (male).....3rd DEFENDANT

MALAWI REVENUE AUTHORITY.....4th DEFENDANT

CORAM: CHIMASULA PHIRI J.

Gustave Kaliwo of Counsel for the Plaintiff
C. M. Mwala of Counsel for the Defendants
M. H. Fatch – Court Clerk.

O R D E R

The plaintiff obtained an ex-parte injunction order on 7th November 2002 restraining the first three defendants from infringing the plaintiff's registered Trade Mark under 342/2002 among other restrictions. This Order was to remain valid for 14 days. The plaintiff was ordered to file an inter-partes application within 14 days. On 2nd December 2002, the three defendants took out Summons to discharge the injunction order. The defendants' contention being that the plaintiff had not complied with the court order to take out inter-partes summons within 14 days. On 5th December 2002, the plaintiff took out an inter-partes summons for an interlocutory injunction praying for similar restraints as ordered in the interlocutory injunction order of 7th November 2002. After a few adjournments at the instance of the plaintiff the matter was scheduled for hearing on 17th December 2002. In the affidavit in support of the inter-partes application the plaintiff has stressed the fact that he has proprietary interest in the Trade Mark "MIRAA" while the defendants have no such interest. The plaintiff has alleged that it is his belief that the defendants wish to continue to carry out unlawful and illegal activities by importing exotic vegetables from Kenya in breach of all the Trade Mark laws and orders just as the defendants were doing before the interlocutory injunction order. The plaintiff admits that he did not set down an inter-partes application with 14 days as directed by the Court. The explanation given is that the 1st, 2nd and 3rd defendants were evading service of the interim injunction order and since it is a mandatory order it required personal service on the defendants and not their legal practitioner. Lastly, the plaintiff prayed for extension of the interlocutory injunction order until the trial of the action particularly that the inter-partes summons has now been taken out by the plaintiff. The defendants made a response in a supplementary affidavit stating that they have legal interest for challenging the plaintiff's Trade Mark 'MIRAA' and have already filed an opposition to the plaintiff's trade mark with the Registrar General. Furthermore, the defendants are denying that they evaded service of the injunction order. Lastly, the defendants are alleging that the plaintiff's failure to take out inter-partes summons within 14 days was deliberate and aimed at frustrating to have the matter legally resolved.

On 17th December 2002, Mr Mwala adopted his affidavits and made his submissions along those lines. Mr Chisale who appeared on behalf of the Mr Gustave Kaliwo adopted the affidavit of Mr Kaliwo. Mr Chisale argued that the interlocutory injunction order was properly granted and that the defendants should not be allowed to take advantage of technical lapse on the part of the plaintiff. He further submitted that the balance of convenience favours extension and retention of injunction order. Mr Chisale argued that if the injunction is discharged or dissolved the defendants will engage in illegal activities detrimental to the plaintiff's trade mark. Mr Chisale prayed that the interlocutory injunction order of 7th November be sustained until the trial of the matter.

The usual purpose of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action. In **Mobil Oil (Malawi) Limited v Leonard Mutsinze –** Civil cause No. 1510 of 1992, Chatsika J. stated that:-

"the principles upon which an application for an injunction will be considered are set out in Order 29/1/2 and 29/1/3 of the Rules of the Supreme Court and were succinctly elucidated in the case of **American Cynamid Company v Ethicon Limited (1975) AC 396.** Before an injunction can be granted, it must be established that the applicant has a good claim to the right he seeks to protect. The court does not decide the claim on the evidence contained in the affidavits. A good claim is said to have been established if the applicant shows that there is a serious point to be decided. When these principles have been established, the Court exercises its discretion on the balance of convenience. In deciding the question of the balance of convenience the Court will consider whether damages will be a sufficient remedy for the mischief which is complained of and even if it consideres that damages will be a sufficient remedy, it must further consider and decide whether the defendant or wrong doer shall be able to pay such damages."

In the present case the judge seized with the ex-parte application ordered that "this interlocutory injunction shall remain valid for fourteen (14) days from the date of this order"(my own underlining). This order was made on 7th November 2002. This means that the validity of the order lapsed on or about 21st November 2002 by efflux of time. By 22nd November 2002 there was no interlocutory injunction order in this matter. Therefore there was no need for the defendants to apply for discharge or dissolution of the interlocutory injunction order because none existed.

I will also proceed to consider the arguments on whether or not the interlocutory injunction order, if it existed, could be discharged or dissolved on the ground that the plaintiff failed to file an inter-partes application within 14 days of the court order. There is no dispute that on 7th November, 2002 the court ordered that "the plaintiff do file an inter-partes application within fourteen (14) days of the date of this order."(My own underlining). Therefore the plaintiff should have taken out his summons at the latest by 21st November 2002. The summons was taken out on 5th December, 2002 according to the court cashier's date stamp i.e. two weeks out of time. The defendants have argued that the plaintiff was prompted to take out the inter-partes summons because the defendants had taken out summons to discharge injunction order. I have already made a finding that the defendants made such an application under a mistaken belief that the injunction order was still in existence. I am belabouring this point because there is a very sad development in our legal practice whereby our legal practitioners are rushing to court to obtain interlocutory injunction orders and sleep over them. The situation becomes very bad where the validity of the order extends to the trial of the action. Case life span in Malawi extends over 4 years. This means that a party can rely on interlocutory injunction order for such unduly long period unless a further court order is made discharging or dissolving or varying it. Sadly, some legal practitioners are allowing their clients to use such orders with a view or the aim of frustrating their adversaries. This conduct needs to be discouraged. The argument of Mr Kaliwo that the defendants were evading personal service is in my view unacceptable. As an experienced lawyer, he should have come back to court for further orders including on mode of service. Mr

Kaliwo opted to continue chasing wild goose. He cannot turn around to blame the defendants because of his wrong choice of options. Further, the claim by the defendants that the plaintiff took out the inter-partes summons because of the defendants' summons of 2nd December 2002 may not be far-fetched. The proximity in dates between 2nd and 5th December 2002 needs to be explained by the plaintiff. Furthermore, in relation to this particular aspect, I am not sure that the plaintiff obtained a court order extending the period for filing an inter-partes application beyond the stipulated 14 days. An interlocutory injunction order is an equitable remedy and a party seeking the aid of such an order must come to court with clean hands and without undue delay. The plaintiff is guilty of trying to bring the inter-partes summons through the back-door i.e. on a lapsed order without extended validity order. In my view there is no valid pending inter-partes summons as claimed by the plaintiff.

The summons to discharge injunction order is erroneously brought to this court and is hereby dismissed. The defendants have not applied to this court to strike off the inter-partes summons for non-compliance of the order of 7th November 2002. Therefore, I make no order.

The issue of costs is in the discretion of the court. Both parties have failed on their respective wishes because of procedural irregularities. I order each party to pay its own costs.

MADE IN CHAMBERS this 10th day of January 2003 at Blantyre.

G. M. Chimasula Phiri

JUDGE