



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 1842 OF 2007**

BETWEEN:

CLARA ALLENA TANGA.....PLAINTIFF

- AND -

JAFALI KAWINGADEFENDANT

CORAM: THE HONOURABLE JUSTICE E. B. TWEA

Mr Kamwasi, of the Counsel for the plaintiff

Absent – Counsel for the defendant

Mrs Nkhoma – Official Interpreter

RULING

Twea, J

This is an inter – parte application for an injunction. In the defendants affidavit in opposition, there is a cross prayer for an injunction to be granted in his favour.

The undisputed facts of this matter are that the plaintiff and the defendant are neighbours. Both of them carry on business of importation and resale of

wares from South Africa. It is undisputed that the plaintiff, occasionally, would be away from home for protracted periods.

It is averred by the defendant that a 16 year old son of the plaintiff told him that the plaintiffs creditors wanted to confiscate the house in which the children lived for a debt that the plaintiff had failed to honour. At that time the plaintiff had been away from home for a protracted period. The defendant averred that he declined to help.

Later the boy persisted to the point of crying that they would lose the house. He told the court that the boy informed him that his mother has instructed him to sale the land in issue to him at the price of K150, 000.00. Out of good neighbourly intentions he agreed to the demands and requests of the boy. He ordered him to bring senior relations to witness the transaction.

It was averred that the boy produced his aunt and they all appeared before traditional chiefs who sanctioned the transfer of the land, from the plaintiff to the defendant. The defendants now claim that there was a valid land transaction through the son of the plaintiff.

The plaintiff averred that she was not aware of the debt in issue, nor did she sanction her son to sale the land on which she had an incomplete City approved building under construction. It was her evidence that since the misfeasance originated with her son she was willing to refund the defendants money with normal interest.

When the case was called, the plaintiff confirmed that the land in issue is under the Blantyre City Assembly, Traditional Housing Area jurisdiction.

The plaintiff was in the process of leasing it. The defendant did not dispute this, but indeed confirmed, that his subsequent search and enquiry revealed that the land was not leased land.

The plaintiff obtained an interim injunction to keep the defendant off the land to allow her to continue the construction of her house. The defendant wants to remain on the land because he has cultivated maize on it.

This matter is before me to decide whether or not the injunction in favour of the plaintiff should be extended and made permanent or not. Further, I have to determine whether an injunction should be granted in favour of the defendant. It is not my duty, at this point in time, to decide the rights of the parties.

The principles in the celebrated case of *American Cyanamid Vs Ethicon Ltd [1975] AC 396* are well known. First and foremost is that there must be a right to protect. The first question that comes to mind is “what right does the defendant have to protect?”

The only answer is “title to the land in issue.” To obtain such a right to title, the defendant will have to prove that the minor son of the plaintiff was an agent of the plaintiff. On the face of it, it is clear that a minor does not have the legal capacity to create a contract. Secondly, the defendant will have to prove that the other relatives of the plaintiff, whom the minor called to his aid on the demand and request of the defendant, were agents. This will depend, first and foremost on their ages. The other things that create an agency; express or implied will then come into play. Thirdly, the defendant

has to prove that the so called village headmen or Group Village headmen have jurisdiction over land which is controlled by the Blantyre City Assembly, albeit under the Traditional Housing Area jurisdiction? Do these local authorities have the capacity to effect a transfer of land which is under the jurisdiction of the Blantyre City Assembly?

I note that the defendant argued that the plaintiff should not be allowed to get the land because she may resale it. First this was not substantiated. Secondly, this does not diminish her right to the land. If it is hers she can do as she pleases. She is not bound by the acts of her son.

These are the serious, issues that the court will look at. So far they all militate against the defendant and are in favour of the plaintiff.

In any case, the defendant cultivation on the land would not be so substantial as to make it inequitable for him to be compensated with damages.

Further, I note that the facts show that although the defendant was pro – active to be a prudent buyer, he did not go far enough. The law is clear; “let the buyer be ware;” “caveat emptor.” This is the rule of law that a purchaser buys at his own risk. He should have protected himself by not transacting with minor, verifying the instructions from the plaintiff or acquiring an assignment from the so called creditors of the plaintiff. He never did. He has become wiser after the event.

Last but not least I wish to acknowledge the willingness and attempt to settle this matter out of court. This chance is being squandered at great expenses

to the party that will fail to succeed. If Counsel were more mindful of the unjustifiable expenses, this matter should have settled.

At the end of the day I find that the balance of justice is in favour of granting the permanent injunction in favour of the plaintiff and I so order. Further, I order the plaintiff to pay the amount in dispute: K150, 000.00 plus the interest she is prepared to pay, into court. This should arrest any unnecessary expenses for the parties.

Pronounced in Chambers this 23rd day of January, 2008 at Blantyre.

E. B. Twea
JUDGE