

**IN THE HIGH COURT OF MALAWI  
LILONGWE REGISTRY  
CIVIL CAUSE NO. 238 OF 2005**

**BETWEEN**

**KALINDE M.L. CHINDEVU ..... 1<sup>ST</sup> APPLICANT**

**LAPHIUS THOMAS ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MALAWI RURAL FINANCE COMPANY LIMITED ..... DEFENDANT**

**CORAM : CHOMBO, J.**

: Ottoba, Counsel for the Plaintiff  
: Makono, Counsel for the Defendant  
: Njirayafa, Court Interpreter  
: Mthunzi, Court Reporter

**JUDGMENT**

The plaintiffs, by a writ of summons, seek a declaration from the Court that:

1. the power of attorney dated 14 September 2000 purportedly executed by the second plaintiff is not valid.
2. the surety charge for K600,000 registered on 6 November 2001 as application number 924/2001 is null and void.
3. the first plaintiff is the owner of the premises known as title No. Bwaila 47/636 in the City of Lilongwe.

According to the evidence on record the property in question was purchased by the parents of the 2<sup>nd</sup> plaintiff but registered in his name - Laphius Thomas. Laphius, according to PW3 is their first born child and as a gesture of appreciation the parents bought this plot for him. At the time of purchase of the said plot in 1998, Laphius was about 6 or 7 years old and that he would be given the plot when he would grow up. The father of Laphius, Raphael, now deceased, signed for the lease agreement in the name of Laphius Thomas in 1998. The following year in November he had died and, there is a death certificate to that effect. After the death of Raphael Thomas, the breadwinner, the family found itself in dire financial circumstances. It was agreed by the family of the deceased, who were not in a position to help the deceased's wife and children that the plot bought by the deceased and his wife, PW3, in the name of Laphius be sold. Laphius, then still a minor and without legal capacity was informed about the intended sale and his uncle Konyani Thomas signed the sale agreement, again using the name Laphius Thomas as his late father had done. The plot was sold to the 1<sup>st</sup> plaintiff and he paid K121,135.75 as evidenced by the sale agreement of 9<sup>th</sup> March 2000.

The 1<sup>st</sup> plaintiff has so far spent over K2million in developing the said plot. He then decided to seek consent to transfer the lease title. When a search was conducted in the Land Registry it was found that the land was encumbered with a security charge dated 29<sup>th</sup> October 2001 and registered under the Registered Land Act on 6<sup>th</sup> November 2001 as application number 934 of 2001. The said security charge derived its authority from a power of attorney of 14 September 2000 giving power to one Ernest Adon Subili to use the said plot as security for a loan of

K600,000.00 from the defendant. Both documents were said to have been signed by Laphius Thomas as owner of the plot in question.

The second plaintiff has denied signing the power of attorney and the surety charge, nor does he and PW3 know the beneficiary of the loan, the said Ernest Adon Subili. Laphius denies going to the Chambers of Mamtora & Company to sign these or any documents in connection with the said property. In any event at the time these documents are purported to have been signed, Laphius was only 12 years old and his father had already died.

The defendants on the other part state that they were handed the documents in question as security for the said loan and they dispensed K600,000.00 on the strength of these documents. On the face of it there was nothing irregular about the documents and therefore the defendants must be allowed to exercise their right as contained in the surety of charge. It was the submission of DW1, the only witness of the defendants, that the father of the second plaintiff must have signed the power of attorney and surety charge before he died and, unknown to the second plaintiff, the property was already encumbered at the time of sale. Further, the defendants submit, that the said plot does not belong to the first plaintiff. Briefly put this is the evidence of the two parties.

The first issue to determine, in my view, is the issue of the ownership of the plot. Who is the rightful owner of this plot? PW3 explained to Court that together with her husband, and for the love of their first born son, decided to buy a plot and have it registered in his name. At the time of purchase the said Laphius was only a

child and they proposed to hand it to him later in life. Although this has not been spelt out but the circumstances can be construed that the plot was held in trust by the parents for Laphius. And, if the trust concept is extended further, the parents as trustees could exercise their discretion in good faith to deal with the said property to benefit the intended beneficiary. It was the evidence of PW3 that the said plot was sold to raise fees and upkeep for the second plaintiff and his siblings after the death of their father. There is no doubt that the said sale of property was in good faith, and it was agreed upon by the family of the late Raphael and PW3 that the plot be sold and that late Raphael's brother would sign on behalf of Laphius who was still a minor. The sale was evidenced by a sale agreement dated 9<sup>th</sup> March 2000.

The defendants apart from submitting that the plot does not belong to the first plaintiff has not adduced any other evidence that would be grounds for disentitling the first plaintiff of that plot. I would therefore not engage in an academic exercise as to who is the right person to sign particular documents, suffice to say that there was an agreement by the family of second plaintiff to sale the said plot and it was sold. It should be noted also that at the time of sale no encumbrance had been registered against this particular piece of property. Title therefore passed without any encumbrances. It can be argued therefore that the 2<sup>nd</sup> plaintiff, if indeed he or his late father signed the power of attorney and the surety charge after the sale of the said plot, they had no capacity to do so and their acts, if indeed it was either of them signing the documents in question, could not have any effect on the land that had earlier sold to the 1<sup>st</sup> plaintiff. According

to the dates of the document the sale agreement of 9 March 2000 has priority over the surety charge registered on 6<sup>th</sup> November 2001.

If therefore, as argued by the only defence witness, that the father of second plaintiff executed the power of attorney in 2000 and the surety charge in 2001 the same could not be tied to the land because as at that time the property had already been sold. However, there is an anomaly which the defendant has failed to explain, how could the man who died in 1999 rise from the grave to sign the documents in 2000 and 2001. The second plaintiff did not and could not have signed the documents. Somebody did sign them in the name of Laphius Thomas and that person, the only one holding the key to the jigsaw puzzle has not been brought to Court to testify; Ernest Adon Subili, benefactor of the loan of K600,000.00. Another person was present when the said Laphius Thomas signed on these very important documents, Reuben Mwanza who is registered as having witnessed the signing of the “Promisory Note” issued by the defendant to Ernest Adon Subili. Both Subili and Mwanza indicated that they reside in Lilongwe – Msundwe Trading Centre and Maliwa Village, Mawelo respectively. There is no evidence on record of a search for these two crucial witnesses, or, if anything has happened to them, of their circumstances that would prevent them from coming to Court to testify about the Laphius Thomas who executed these documents that are central to the determination of this matter.

The fact that the defendants have in their possession documents that, on the face of it, seem to be properly executed, does not in itself entitle them to exercise their right as contained in the surety charge. It would seem that at the time of

executing the documents no serious attention was paid to certain salient but important, details. It was necessary for the said Laphius Thomas to be properly identified before the execution officer at Mamtora and Company. The portion on “CERTIFICATION AS VERIFICATION OF INSTRUMENTS REGISTERED LAND ACT” requires that the identification of the person signing the document be specified. But this was not completed – making it difficult to conclude how Mamtora and Co. identified the said Laphius Thomas. This omission, coupled with the undisclosed identity of the almost “invisible” Laphius Thomas, the very tender age of Laphius Thomas and incapacity to sign documents of this nature at the time, and the impossibility of having Raphael Thomas – the deceased - sign on these documents, makes the Court come to the conclusion that the defendants’ claim of the outstanding sums of money cannot be enforced on the said property. There is clear evidence that the defendants were dealing with characters of a dubious nature. This must also act as a wake-up call for the defendants, especially the need for more strict proof of the identity of the characters that present themselves before them.

I must therefore find that the plot rightly belongs to the first plaintiff. The first plaintiff’s application for consent to transfer the title must therefore not be hindered by the encumbrance as registered by the surety charge which is not enforceable against this piece of property. The defendant must look for the said Ernest Adon Subili to recover their monies from him.

In making an order for costs I have taken into consideration the fact that it was apparent, from the disclosed facts of the case, that Laphius Thomas, the young

man who gave evidence in Court, nor his father who died in 1999 could have executed the power of attorney and the surety charge in 2000 and 2001 respectively. I therefore order and condemn the defendants with costs herein.

MADE in Court this 25<sup>th</sup> of April 2008.

E.J. Chombo

**J U D G E**