

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO.10 OF 1985
(Being Civil Cause No.487 of 1983)

BETWEEN:

UNANGO ESTATES LIMITED &
A.G. CHIGAMBA **APPELLANTS**

- and -

M.C. MICHAEL **RESPONDENT**

Before: The Honourable Mr. Justice Mtegha, J.A.
The Honourable Mr. Justice Kalaile, J.A.
Nakanga, Counsel for the appellant
Msiska, Counsel for the respondent
Manda, Court Reporter
Kadyakale, Law Clerk

JUDGMENT

Kalaile, J.

On September 15th, 1983, the appellants brought an action against the respondent for an injunction to restrain the latter or his servants or agents from entering or using a parcel of land in Machinga district known as Unango Estate Limited. The appellants further claimed damages for wrongful entry on the said parcel of land by the respondent and or his servants or agents. The respondent denied liability for the alleged wrongful entry and the resultant claim for damages. Upon obtaining an Order for Directions, the respondent took out a summons to dismiss the appellants' action on the ground that the appellants were not the proper parties and that their claim was frivolous and vexatious, and further that there was no probable cause of action. In the affidavit in support of the summons to dismiss the action, it was deposed that as the first appellant was under receivership, only the Receiver and Manager could bring an action in respect of Unango Estate Limited. On their part, the appellants filed an affidavit in opposition in which it was deposed that the receivership had been terminated.

In the meantime, another scenario was developing. Before the respondent's summons to dismiss the action was actually heard, the Receiver and Manager took out a summons to discontinue this action on the grounds that it was not in the interests of Unango Estate Limited, and further that since the estate was already under receivership, the appellants had no locus standi, and, could not maintain the action in the circumstances. The Registrar of the High Court ruled that since Unango Estate Limited was still under receivership, the appellants had no locus standi, and accordingly, could not maintain the action in their own names. The appellants appealed against the Registrar's Order and Jere, J. upheld the said Order.

On 18th October, 1985, Jere, J. upheld the Registrar's Order in the following passage from his ruling:

"Since the letter of 13th August, 1981, the second plaintiff has written to the defendant three letters, clearly indicating that he had not taken possession of the estate. The learned Registrar was of the view that the conditions set out in a letter dated 13th August, 1981, had not been complied with and discontinued the action accordingly. After perusing the letter I am also left in no doubt that the receivership had not come to an end. In these circumstances, therefore, since the defendant was both Receiver and Manager, he is deemed to have been in control of the entire business as well as possession. In these circumstances therefore, the appeal is dismissed."

The letter from the Receiver and Manager was framed as follows:

"The Receiver/Manager,
Unango Estate Limited,
Private Bag 52,
LILONGWE.
13th August, 1981

(Stamp
14/8/81)

The Director,
Unango Estate Limited,
P.O. Box 296,
BLANIYRE.

Dear Sir,

On instructions of the debenture holders I am resigning as Receiver of Unango Estate Limited once we have realised the income from the sale of the moveable assets of the company. It has been agreed by the debenture holders that the permanent improvements should not be dismantled and that you shall be allowed to resume occupancy of the estate and have full use of the land and fixed assets.

I have been requested by this letter to inform you of the conditions that the debenture holders will allow you to resume occupancy immediately. These are:-

- (1) That the Bank will continue to have the right of the property at any reasonable time.
- (2) That you will maintain the buildings and keep them insured at your expense.
- (3) That the proceeds of any commercial crops grown on the estate, despite being grown at your expense, belong to the Bank. However the Bank will not necessarily claim these proceeds if it can be demonstrated that they are required to maintain the property.
- (4) That payment of the unsecured creditors, who were restricted by the Receivership Order, are now and in the future the responsibility of the owner (yourself).
- (5) All costs of keeping the company in being will be borne by yourself.

It must be clearly understood that whilst Receivership has been lifted all rights of the Bank as debenture holders and mortgagee continue as long as the debts to the Bank remain outstanding.

Please sign below as certification that the above has been explained to you and you are agreeable.

Yours faithfully,

D.H. Sherman
RECEIVER/MANAGER

Stamp
6th April, 1984
Signature"

However, in construing that letter Jere, J. only quoted the five conditions listed in the letter and left out the introductory explanatory passages and also omitted the passages which appear in the letter after those conditions were stated. It is not surprising that the learned Judge came to the conclusions which he arrived at since the excluded parts of the letter unequivocally express the clear intention of the writer to terminate or to lift the receivership. We do not wish to belabour the point but it seems to us abundantly clear that this letter terminated the receivership and that the conditions stated therein were not conditions precedent to the termination. The five conditions presuppose that the second appellant is in actual possession of Unango Estate Limited. We shall have occasion to revert to this point later in the judgment.

The next point for determination is whether only the Receiver and Manager is the competent party to bring this action to the exclusion of the appellants if the estate was, at the material time, under receivership. This point

was exhaustively dealt with recently by the Supreme Court in M'dinde Estate Ltd vs. CBM Farm Services Ltd and another (M.S.C.A. Civil Appeal No. 6 of 1985) (unreported). In that case, as in the present one, the Receiver and Manager was not appointed by an order of the court but was so appointed by the debenture holders out of court. In delivering the court's decision, Unyolo, J. stipulated that:

"It will be noted from the foregoing clauses that the Receiver/Manager in the present case, unlike in the Multi-Holdings case and the Newhart case, was not given specific powers to institute legal proceedings. And as already pointed out case law authority holds that the powers of a Receiver/Manager appointed out of court must depend on the terms of his appointment. Section 98 of the Companies Act also provides that a Receiver so appointed must act in accordance with the instrument under which he was appointed otherwise he would have to apply to the court for directions if there were any matters arising in connection with the performance of his duties namely those duties he is authorised to do under the instrument, such as, in the present case, the collecting of the property or assets charged by the debentures, the selling of the same and carrying on or concurrence in the carrying on of the business of the company.

All in all, we find that the powers conferred on the Receiver/Manager in the present case do not divest the directors and shareholders of the appellant company of their inherent power to institute proceedings on behalf of the company. Further we do not think that by instituting the proceedings in this case, the said directors and shareholders were, on the available facts, in any way interfering with the Receiver/Manager from collecting the company's assets nor were the said assets and property thereby necessarily imperilled. Indeed, the action taken by the appellant would be for the benefit of the company and its creditors generally should the appellant succeed in the matter. However, we are not here making any comment as regards the merits or otherwise of the plaintiff's action.

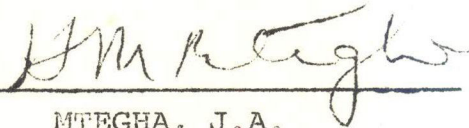
In short, we are satisfied and find that the appellant was entitled to institute the proceedings in this case notwithstanding the fact that the company was under receivership and a Receiver/Manager appointed. The ground of appeal on this aspect accordingly succeeds."

To our minds, the observations made by Unyolo, J. in the M'dinde case apply with equal force to the case under consideration. We so find even if we did not have the benefit of examining the actual text of the debentures themselves. This appeal succeeds in toto in that we find that the first and second appellants were proper parties to these proceedings and that they were entitled to prosecute their claims to trial. Upon examining their statement of claim which was filed in the court below, we are equally satisfied that by instituting these proceedings, the directors and shareholders of Unango Estate Limited did not in any way interfere with the Receiver and Manager from collecting the company's assets


and property and thereby imperilling those assets. We have arrived at this conclusion because the five conditions stated in the Receiver and Manager's letter dated 13th August, 1981 appear to us to be conditions which should be fulfilled whilst the second appellant is in possession of the land. It would, in our view, be impossible for the second appellant to fulfil those conditions if he was not in possession of the land and if the receivership was, at the same time, exercised in full. If the receivership remained fully operational, how could the second appellant be expected to maintain the buildings and insure them too? How could he be expected to grow commercial crops and pay off the unsecured creditors? And in so far as the first condition is concerned, how can the Bank give itself a right of inspection of the land if the second appellant was not in possession of the Estate? The Receiver and Manager cannot be allowed to approbate and reprobate. Compliance with the five conditions by the second appellant after the termination of the receivership cannot and should not imperil the company's assets. It is for these reasons that we allow this appeal. The respondent is condemned in costs.

DELIVERED at Blantyre on this 28th day of October, 1988.

(Signed)


MTEGHA, J.A.

(Signed)


KALAILE, J.A.