

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil cause number 3155 of 2003

Between

M. KATSONGA PHIRI Plaintiff

And

CANDLEX LIMITEDDefendant

CORAM: DF MWAUNGULU (JUDGE)

Plaintiff, absent

Ndau, legal practitioner, for the plaintiff

Beni, official court interpreter

Mwaungulu, J.

ORDER

The defendant, Candlex (Malawi) Limited applies to dissolve an injunction the plaintiff, Mr. Katsonga Phiri, obtained ex parte on 3rd December, 2003. The injunction compelled the defendant to allow the plaintiff and his tenant to use the passage through the defendant's premises to the plaintiff's warehouse. The plaintiff, it seems, relies on a right of way enjoyed over adjacent land. The defendant wants to dissolve the injunction because, the defendant alleges, the injunction was wrong in principle and the plaintiff suppressed facts. The plaintiff was absent during the hearing.

According to the plaintiff's supporting affidavit to the ex parte application, the premises border the defendant's. The plaintiff accesses his premises through the defendant's. The defendant closed the access. Consequently, the plaintiff and his tenant, Office World, cannot access through the defendant's premises. The defendant contends

the plaintiff excluded from the court the fact that the defendant's was private land. He contends the plaintiff should have informed the court other accesses to the warehouse and that the plaintiff's warehouse is not in the defendant's premises. In my judgment, the plaintiff disclosed material facts essential to the application. In *Maida v Maida* Civil Cause number 14 of 2003, unreported, this Court said:

“In my judgment, it would not have made any difference if this information, which the plaintiff discredits, was before the judge. The Supreme Court of Appeal in *Vitsitsi v Vitsitsi* MSCA Civ App. No. 4 of 2002, unreported, confirmed this Court's view that an injunction will be dissolved if the applicant suppresses information which, if before the court, would have materially affected the determination. The facts unavailable to the court on which to impugn an earlier injunction must be material to the determination.”

Although it was unnecessary to do so, the defendant's affidavit discloses the defendant's ownership of the land adjacent. Trial will determine whether, as the defendant alleges, the plaintiff could access his premises from other places. Trial will also determine whether that the plaintiff had other accesses disentitles him from an easement which, on the supporting and opposing affidavits, he has in the form of a right of way on the defendant's land. The defendant's contention that because its premises are private land entitles it to exclude for security reasons the plaintiff access is, in my judgment, part of the general question at the trial in determining the plaintiff's right of way. There was, therefore, in my judgment sufficient disclosure establishing an easement enforceable by an interlocutory injunction.

Consequently, the defendant cannot contend that there was no legal basis for the plaintiff's application. The common law recognises the rights of an owner of land, easements or profits a prendre, over adjacent land: *Robins v Barnes* (1615) Hob 131; *Metropolitan Rly Co v Fowler* [1892] 1 QB 165 at 171, per Lord Esher, MR; *affd.* (1893) AC 416; *Hewlins v Shippan* (1826) 5 B and C 221 at 229, 230 per Bayley, J.; *Mounsey v Ismay* (1865) 3 H and C 486 at 497, per Martin, B; *Reilly v Booth* (1890) 44 Ch D 12 at 26, CA; *peers v Lucy* (1694) 4 Mod Rep 362; and; *Baker v Brereman* (1635) Cro Car 418. *Taff Vale Rly Co v Cardiff Rly Co* (1917) 1 Ch 299 at 317, CA, per Scrutton, L.J. A right of way, whether by prescription or implication by law, is the oldest and typical easement known to the law *Ballard v Dyson* (1080) 1 Taunt 279; *Cannon v Villars* (1878) 8 Ch D 415. The right of way most certainly arises where both the dominant and servient tenements were in common ownership and the common owner disposes one: *Bayley v Great Western Railway Co* (1884) 26 Ch D 434 at 452 – 453; *Milner's Safe Co Ltd v Great Northern and City Railway Co Ltd* [1907] 1 Ch 208. There could be a right of way by necessity: *Wheeldon v Burrows* (1879) 12 Ch D 31 at 49; and *Aldridge v Wright* [1929] 2 KB 117.

On the whole, the plaintiff did not fail to disclose material facts to the court that initially granted the ex parte injunction. The affidavit established a right to adjacent land

a court can protect by an injunction. The injunction is, therefore, not discharged.

There is, as both I and counsel noted, a discrepancy between the order I indorsed on the file and the order finally signed and served on the defendant. My order was for the injunction to last four days. The order actually served on the defendant and initialed by me is for the injunction to last up to trial. This is not a slip that should be amended on mere suggestion or discovery of the error. The defendant can make an appropriate application to rectify the error.

Made in court this 29th Day of December, 2003.

DF Mwaungulu

JUDGE