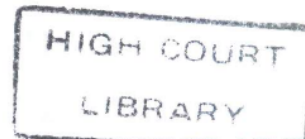


*Injunction - restraining sell of land - can be discharged if there was a serious suppression of the material facts*

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 1875 OF 2001**



**BETWEEN:**

ABDUL HAMID NATHVANI.....1ST PLAINTIFF

AND

SWAN INDUSTRIES.....2ND PLAINTIFF

AND

FIRST MERCHANT BANK.....DEFENDANT

**CORAM:** MKANDAWIRE, J  
Phoya of Counsel for the Plaintiff  
Msowoya of Counsel for the Defendant  
Balakasi, Official Interpreter

**RULING**

On 24<sup>th</sup> July, 2001 the plaintiff obtained an interlocutory injunction restraining the defendant from selling or advertising the sale of property known as Title No Limbe Central - 105. The order herein was obtained on an ex parte application. This is now a summons to discharge the said order on the basis that in obtaining the order, the plaintiff had suppressed material facts.

There was an affidavit in support of the ex-parte summons for an injunction. I can only refer to two paragraphs of that affidavit and

they are as follows:-

- 2.1 The defendant, through its agent is in the process of selling property on Title No Limbe Central - 105 which the plaintiffs had used to secure a financial facility which they had obtained from the defendant.
- 2.2 The plaintiffs have, on the other hand always insisted that the defendant is not entitled to sell the said property the plaintiffs having fully discharge their liability to the defendant well before the defendant decided to take steps to sell the said property.”

The affidavit is dated 23<sup>rd</sup> July 2001. The defendant's contention is that paragraph 2.2 is a serious suppression of fact because as at the date of the plaintiff's affidavit the debt was still outstanding. The plaintiff's affidavit does not state when the defendant decided to take steps to sell the property. However, it is very clear from the defendant's affidavit in support of the present application that the demand letter was made on 18<sup>th</sup> June, 2001. The date of the demand letter is very important. The third paragraph of this letter reads as follows:

“In the premises we demand that you do pay the K1,618.923.22 aforesaid plus K291,406.18 our collection

costs within 7 days from the date hereof failing which we shall have no choice but to proceed to sell Title No Limbe Central 105 in order to recover the said amount and our costs. Should there be a balance outstanding after sale of the said Title, we shall proceed to Institute Court proceedings to recover such balance.”

It is clear that the outstanding debt and the collection costs were not paid within the stipulated period. In this regard let me refer to the defendant's letter dated 1<sup>st</sup> August, 2001. It is clear from this letter that after the Letter of Demand dated 18<sup>th</sup> June, 2001 the plaintiffs made three payments totaling K1,100,000.00. Attached to this letter is a bank statement for the 2<sup>nd</sup> plaintiff. This bank statement shows that as at 1<sup>st</sup> August, 2001 there was a balance of K619,040.70 still unpaid. The plaintiff knew this state of affairs very well. The plaintiffs knew that some of the post dated cheques deposited with the defendant had been dishonoured. These are matters well within the plaintiff's knowledge. And yet on 23<sup>rd</sup> July 2001 the plaintiff was saying in the affidavit that the debt had been fully discharged. This was not just suppressing a very material fact but that the plaintiff was telling deliberate lies to the court. The plaintiff had deliberately misled the court into making an order which should not have been made.

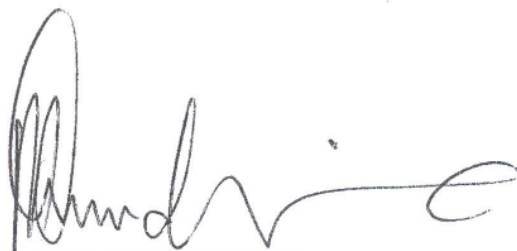
In an ex-parte summons for an interlocutory injunction a party is under a duty to make full and frank disclosure of all material facts - Orders 29/1/17 and 29/1/23 of the Supreme Court practice. In the present case the plaintiff suppressed a very material and crucial fact. In the case of **Rex v Kensington Income Tax Commissioner** Princess Edmond De Polignac, Warrington L J had this to say:

“It is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do-is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.”

It follows that the order made herein cannot stand. The collection costs were not the subject of an interlocutory injunction, but under the charge they are fully payable. The order on 24<sup>th</sup> July 2001 is discharged forthwith with costs. If the defendant suffered any damages the same shall be assessed by the Registrar if they cannot be

agreed.

Made in Chambers this 22<sup>nd</sup> day of August 2001 at Blantyre.



M P MKANDAWIRE

**JUDGE**

