

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
BEING MISC. CIVIL CAUSE NO. 66 OF 2007

BETWEEN

FATIMA BWANALI APPLICANT

-VS-

LILONGWE CITY ASSEMBLY & OTHERS RESPONDENT

CORAM HON. JUSTICE KAMANGA

Kalasa for applicant
Ottober for respondent
Chulu, Court Interpreter

RULING

On 9th July 2007 the court granted an order by way of injunction restraining the respondent from continuing allowing vendors to occupy the applicant's property on plot No. 23/SQ/01 and that all structures put up by the vendors thereon be pulled down. The application had been made ex-parte upon applicant's counsel indication that the issue was extremely urgent. In granting the order, the court indicated that the same would subsist for a period of fourteen days subject to inter-party application.

On 21st August 2007 the applicant moved the court by way of inter-party summons on application for an injunction under

Order 29 of the Rules of the Supreme Court seeking that the respondent be restrained from continuing allowing vendors to occupy the applicant's property that is aforementioned. There is an affidavit in support of the application that is sworn by the applicant's counsel. The respondent opposes the prayer and seeks that the application be dismissed with costs.

This is the basis for the applicant's prayer as sworn by her counsel. The applicant is the present holder of Lilongwe City Assembly Plot No. 23/SQ/1 in Area 23 which the applicant initially acquired as a squatter but was later regularized as holder who was requested to pay ground rent and development charges. A memo for regularization of the title was produced marked as "KRKI". The contents of this document read as follows:

LILONGWE CITY ASSEMBLY MEMO

FROM : DIRECTOR OF PLANNING AND DEVELOPMENT
TO : DIRECTOR OF FINANCE (Attention: Cashier)
DATE : 06/11/06.

PAYMENT OF DEVELOPMENT CHARGES/GROUND RENT/REGULARIZATION FEES/LEASE FEES FOR A PLOT NUMBER 23/SQ/1 IN AREA 23 IN TRADITIONAL HOUSING AREA IN THE CITY OF LILONGWE.

Please receive payment of Development charges/Plot Regularization fees/Lease Processing fees for the above plot as detailed below:

NAME OF APPLICANT : MISS FATIMA BWANALI
PLOT NO. : 23/SQ/1
ADDRESS : P/BAG 1, LILONGWE.
AMOUNT : K400.00 R/N 133377 06/11/06

Then there is “KRK2” dated 5th May 1998. It is a letter from the respondents to the applicants titled ADOPTION SQUATTER SETTLEMENTS IN AREA 23. The contents of this document read as follows:

We would like to inform you that this office is in the process of regularizing the land which you illegally acquired and developed.

However, before this is done, you are requested to pay regularization fee in the sum of K2,500.00 as detailed below.

[A breakdown is provided].

Please take note that failure to pay these fees within a period of 30 days will result into Lilongwe City Council auctioning your property in order to recover expenses incurred as specified above.

A copy of the applicants’ receipt as evidence of payment is attached.

It is the applicant’s counsel’s submission that from the outset the applicant had been enjoying reasonable possession of the plot up and until when the Respondent caused vendors to relocate from the roadside to the applicant’s plot. That the applicant went to complain to the Respondent that vendors had encroached upon her property and due to absence of toilet facilities the vendors were making her enjoyment of her property uncomfortable as she

was literally subjected to awful smells and most of the time she has to remove garbage which is all over the place. Further, the vendors have removed the boundary beacons which the Respondent had put in place as a sign of demarcation of the applicant's plot. Upon receipt of the applicant's complaint the respondents undertook to inspect the applicant's plot with a view to removing the vendors who had encroached into the plot and built hawkers thereon but ever since the report was issued, no action was taken by the respondent. A copy of the Respondent's inspection report dated 26th February 2007 was produced.

The report read as follows:

LILONGWE CITY ASSEMBLY

THA SECTION

INSPECTION REPORT

Plot Number	-	23/SQ/1	Date: 26/02/07
Plot Owner	-	Miss Fatima Bwanali	
Name of Officer	-	H. Mambala	
In the company of	-	---- Charles Funuwayo	
Reason for Inspection	-	Illegal vending on squatter plot No. 23/SQ/1	

Beacons numbers and

Distance between beacons- Boundary beacons removed

Findings - Vendors have encroached into
The plot by building hawkers,

some are selling food stuffs, others are displaying their merchandize.

- Access road is blocked

Recommendation - Lets carry out a joint inspection as soon as possible.

- Signed.

Estate Officer's remarks - [None].

It was submitted on applicant's behalf that the respondent's action in collecting daily revenue from the vendors compromises their position and makes it difficult for them to remove the vendors and demolish the structures which the vendors have put on the plot. As no action has been taken by the respondents since the inspection report was issued. The vendors cannot by themselves move out of the applicant's plot except by the order of the court.

This is the respondent's position vis-à-vis the application as sworn by Hastings Mumba, the Estate Manager. The respondent is the owner of Traditional Housing Area Plots within the city of Lilongwe including the trespassed land being referred to as 23/SQ/1 which is the subject matter of the application. The respondents have never allocated this land to the applicant. The applicant illegally occupied and developed the land without the respondent's permission and grant of development permission.

The respondent upon noticing the squatters and development on the land advised all concerned persons including the applicant to apply for regularization of the plots and the illegal developments thereon for the respondent's consideration. The applicant applied for regularization of the land which she acquired and developed without the respondent's consent and claims to have paid fees for the land. After inspection of the land, it was observed that the land is for a tree belt and a public footpath leading to the western part road of Area 23. And by action of development of a house and a toilet, the applicant has blocked the tree belt and public footpath. To date the respondents have not approved the application for regularization on the land and the illegal development thereon because the applicant encroached on the tree belt and has blocked a public Foot path such that no permanent development can be permitted on the land.

The respondent also observed that the applicant has delayed in bringing this application for an interlocutory injunction. The respondent also observed that there are no triable issues and there is no cause of action and that damages can be an adequate remedy in this matter.

Order 29 of the Rules of the Supreme Court deals with the procedures for the exercise of powers to make interlocutory orders. Interlocutory Orders are generally speaking orders that

are intended to provide a remedy as parties await determination of the substantive application. Interlocutory Orders by their nature are not meant to provide a final relief to the applicant. In most cases, they are only meant to provide a temporary relief in the form of preserving the status quo until the issue which is the subject of the context is resolved.

Injunctions generally are orders of the court restraining the commission or continuance of some wrongful act and the general rule is that an application for grant of injunction by a plaintiff must be made after the issue of writ or originating summons (029/IA/19 (1999 ed) except for cases of emergency and in such scenarios it must be shown that there are strong grounds to justify the application being made ex-prate.

In the matter at hand, the application had originally been made ex-prate to wit my brother Justice Nyirenda granted an order that would subsist for a period of 14 days from the 9th of July 2007. From the date that the order was granted up to date 21st August 2007, the court record does not bear any substantive action from the application. That in itself is an oversight on applicants counsel's part [If it is to be so termed] that constraints this court from dealing with this application. The applicant can not seek to get a remedy that will ultimately be permanent in nature and that will also operate as a final determination under the guise of seeking an interlocutory relief see *Lilongwe City*

Vendors Association vs Lilongwe City Assembly (Civil Cause No. 618 of 2006).

Then there is the issue of preserving the status quo pending determination of the rights of parties in relation to the subject matter of the dispute, as being the primary basis for granting interlocutory injunctions. Again a reading of the relief sought moves one to believe that the relief sought is mandatory though interlocutory. The applicant is seeking that the respondent be restrained from continuing allowing vendors to occupy the applicant's property and that all structures put up by the vendors thereon be pulled down. The practice of the courts in granting interlocutory mandatory injunction has been that the discretion to so order be exercised with great caution. And much as situations may arise where courts may be inclined to so order, there may also be other instances where a grant of an order of this nature may have the consequence of creating a risk of greater injustice if it is granted rather than withheld at the interlocutory stage. The affidavits in support of application by both parties indicate that there are triable issues from both parties. i.e. The applicant avers that she has a right to property and the respondent claims that the applicant has no claim of right to the property in issue. The basis for holding either positions by either party are equally persuasive. The balance of convenience thereby persuades this court to make a finding that observes that the granting of the order sought is unnecessary.

Now coupled with the observation that as at today there is no substantive action. I will not bother to dwell on the other grounds that both counsels have submitted in support of their applications. Suffice to observe that there is no cause to grant the prayer.

Application is dismissed with costs to the respondent.

MADE in Chambers this 24th day of August, 2004.

I. Kamanga

J U D G E