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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO.379 OF 1989

BETWEEN:

MOLLY SOMANJE (FEMALE) PLAINTIFF
(Suing on her behalf and on behalf
of and as representing all the
children and beneficiaries of the
estate of Sydney Benson Somanje
(Deceased)).

AND

ELIZABETH SOMANJE (FEMALE) 1ST DEFENDANT

ANDREW CHILAMWA (MALE) 2ND DEFENDANT

ROBERT ATHERSTONE STUMBLES (MALE) 3RD DEFENDANT
t/a SACRANIE, GOW AND COMPANY

CORAM: MTEGHA, J.

Jussab, Counsel for the Applicant
Kaliwo, Counsel for the Respondent
Kadyakale, Law Clerk



R U L I N G

This is an application by the defendant for an order that I should vacate the injunction which I granted ex parte herein on 30th May, 1989.

Perhaps it would be proper if I briefly state the history of the matter. On 24th April, 1989, the defendants in this matter were granted Letters of Administration by the High Court to administer the estate of late Sydney Benson Somanje (deceased) who died on 9th August, 1987 in accordance with the terms of his Will a copy of which was attached to the Letters of Administration. In his Will, dated 30th August, 1980, the deceased, apart from giving small pecuniary legacies to a number of people, mostly his children from the first wife, ranging from K25.00 to K125.00, he bequeathed the bulk of his estate comprising farms, real property, cattle and machinery to the first defendant and her two children. This did not augur well with the other children, and Molly Somanje, suing on her own behalf and on behalf of and representing all the children and beneficiaries of the estate of Sydney Benson Somanje (deceased) issued a writ to have, in the first place, the Letters of Administration granted to the defendants to be revoked and secondly, a grant of an injunction to restrain both the defendants from intermeddling with or wasting any of the assets of the estate. The writ was issued on 25th May, 1989. On 29th May 1989, an Ex parte

summons was issued against the first and second defendants for an interlocutory injunction to restrain the two defendants by themselves or their agents from administering the estate, from disposing transferring or dealing in any way with a number of properties which were listed. These properties included four dwelling houses in Blantyre, Lilongwe and Thyolo, a farm in Thyolo, two plots at Chirimba, Blantyre, and Mangochi, two maize mills, six vehicles. There were two affidavits deposed in support of the application, sworn by the plaintiff and one Foster Grant Sekeyani, a cousin to the deceased.

In her affidavit the plaintiff deposed that she and others are beneficiaries of the estate of the deceased and that her mother, Florence Somanje, had nine children with the deceased one of which is the plaintiff who were entitled to his estate. She deposed to the effect that in 1970 the deceased started cohabiting with the first defendant, nee Chilamwa, and out of that illicit relationship two issues, Patricia and Bartlett were born. In the circumstances, therefore, the first defendant was not lawfully married to the deceased, and therefore she and the second defendant are not next of kin to be granted Letters of Administration, and that they obtained the Letters of Administration by concealment of material facts or by misrepresentation or fraud. She further deposed that since the grant of Letters of Administration the Administrators have proceeded to call in the assets and to her knowledge, they have removed a Jaguar motor vehicle from the Office of the Administrator General to unknown place; have received K24,166.73 and that the first defendant has openly indicated that she and her children were wholly entitled to the estate to the exclusion of others and that it is her fear and that of other beneficiaries that unless restrained by an injunction the administrators will exhaust the real and personal estate of the deceased for the benefit of the first defendant only. The affidavit of Sekeyani is to the effect that the plaintiff's mother is the lawful wife of the deceased and not the first defendant.

I heard this application on the 30th May, 1989 and I granted the ex-parte interlocutory injunction. It is that injunction that the defendants would now like me to vacate.

The cardinal principle is that the purpose of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in an action. The most important point is that the plaintiff must establish that he has an arguable claim to the right which he intends to preserve by an interlocutory injunction; but it is not the duty of the court to try to decide the claim on affidavits, but it is incumbent upon the plaintiff to show that there is a serious question to be tried - see the observations of Lord Diplock in American Cyanamid Co. v. Ethicon Ltd. (1975) AC 396. As far as an ex parte application is concerned, it must be shown that there are strong grounds to justify its being made ex parte, and all the facts must be laid before the court and nothing suppressed. This application requires the court

that the rule of "uberrima fides" on the part of the applicant be strictly applied - ~~Lord Cosens-Hardy~~ MR in Rex v. Kensington Income Tax Commissioners (1917) 1KB 486.

The affidavit sworn by Mr. Jussab in support of this application discloses that the marriage between the plaintiff's mother and the deceased was legally dissolved on 28th October, 1974 by the Blantyre Traditional Court under the Court's Certificate No.31004, in which it was ordered that the deceased should pay K500.00 and a house at Ndirande to the plaintiff's mother, together with all household effects at Kwenengwe Farm, which the plaintiff's mother accepted. It was his deposition that in November, 1974, the first defendant married the deceased as evidenced by an affidavit sworn by Aida Walasi, and thereafter Patricia and Bartlett were born and they resided at Kwenengwe Farm. The first defendant and the deceased renovated the house at the farm and carried out jointly the farming operations at the farm as evidenced by a letter from National Bank dated 4th March, 1986. Mr. Jussab deposed that all the dwelling houses which are in Blantyre and Lilongwe were acquired by the deceased after 1974 and that the property at Mangochi was acquired jointly by the first defendant and the deceased; that the maize mills at Chimwankhunda and Ndirande were hers as can be evidenced by the rentals she paid to Malawi Housing Corporation and Messrs Agason Motors. The affidavit also discloses that the Toyota Crown Station Wagon BE 3788, Morris Marina BE 6414 belong to the first defendant absolutely as evidenced by the blue books, and the Toyota Dyna Pick-up was registered in the name of "Pat Bat", therefore it would be unfair to deprive her of her motor vehicles. Further the affidavit discloses that the greatest beneficiaries of the deceased's estate are the first defendant and her children and therefore she is entitled first to the letters of administration, and that failure to include other beneficiaries was due to abusive language by the other beneficiaries. The plaintiff's allegation that the defendants would administer the estate to the exclusion of other beneficiaries is not founded since the plaintiff and others are legatees of the Will.

I have set out all these relevant facts in extensio so as to see clearly the issues that are involved in this matter.

It was Mr. Jussab's submission that the application ex parte could not have been entertained because the plaintiff's affidavit did not state the time when the plaintiff was threatened with the injury, and that if notice of the injunction would be mischievous if served on the defendants, and that it was so urgent that if the injunction was not granted the mischief would have been committed. It was his submission that in the present case the plaintiff ought to have deposed in her affidavit that if notice was served the defendants would have administered the estate for the benefit of themselves to the exclusion of other beneficiaries. Further, Mr. Jussab submitted, the administration of estate as the one at hand requires a lot to be done, and there was no way that the real and personal estate would have been exhausted in a matter of days and therefore there are no strong grounds to

warrant an ex parte application for the injunction as there was no threat of imminent injury, and therefore the application did not conform to O.29/1/13.

I think it should be pointed out that the plaintiff's action against the defendants is to revoke the letters of administration and for an injunction to restrain the defendants to call in and distribute the estate. There is evidence that a sum of K24,000.00 was received from the Administrator General and handed over to the defendants' lawyers; there is evidence that some motor vehicles were obtained by the defendants from the premises of the Administrator General. This in my considered opinion is a threat, which is actual, that the defendants were tampering with the estate in their capacity as administratrix and administrator of the deceased estate. The injunction was therefore sought to prevent this mischief and to leave the matters as they are until determination of the case. I would not therefore accept Mr. Jussab's submission that there was no threat to the estate. The case of Petre (Lord) v. Eastern Counties Railway (1843) 3 Ry & Can. Cases 367 which was cited to me by Mr. Jussab is a case which sets out the general principle that an ex parte injunction ought never to be granted, unless there is some real mischief, either likely to arise or requiring immediately to be remedied. I would not, however, hesitate to reiterate the words of Lord Langdale M.R. in Magdalen College, Oxford v. Ward (1839) 1 Coop. Temp. Cott. 265 when he said that "when an application is made to me for such an injunction I am always disposed to accede to the application where little mischief can arise by the granting of the injunction ex parte and on the other hand irreparable injury may ensue where the injunction is refused".

It was Mr. Jussab's submission that in the present case there were some material facts which were not disclosed to the court. For example, the plaintiff's affidavit says that the late S.B. Somanje never married the first defendant and that her mother's marriage was never dissolved yet this is not true as evidenced by marriage and divorce certificates, and therefore the plaintiff's case was not fully and fairly stated before the court, and this fact per se entitles the court to vacate the injunction. He cited the case of Rex v. Kensington Income Tax Commissioners, Princess Edmond De Polignac (1917) 1 KB 486. The ratio decidendi of this case is that if an ex parte injunction has been granted upon an affidavit which was not candid and did not fairly state the facts, but stated them in such a way as to mislead and deceive the court, there is power inherent in the court, in order to protect itself and prevent an abuse of process, to discharge the injunction, and even to refuse to proceed further with the examination of the merits.

Was this the position in the present case? Mr. Kaliwo has submitted that the plaintiff did not suppress any facts. The instructions he has are that the plaintiff is going to contest the validity of both the divorce and marriage certificates, to the effect that they were procured by fraud.

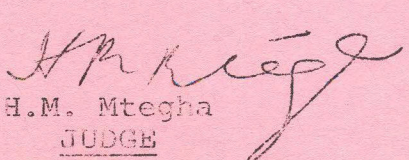
It has also been submitted by Mr. Jussab that the first defendant is the sole owner of a maize mill at Ndirande, Toyota motor vehicle BE 3788 and Morris Marina vehicle BE 6414. There is evidence to support this, e.g. receipts of payments to Agason Motors for the maize mill and registration books for the vehicles. The first defendant has, Mr. Jussab submits, absolute ownership of these. Prima facie this appears to be correct. But Mr. Kaliwo says that even these items will be contested by the plaintiff.

It has been generally submitted by Mr. Kaliwo that there are serious issues to be tried in this case. Even if it is accepted that the first defendant is the wife of the deceased, the second defendant, who is a brother to the first defendant, was not entitled to the letters of administration because he was not a beneficiary in any way.

Now, as I have pointed out earlier, the function of this Court at this juncture is not to decide on the merits of the case. When one is faced with an application for an injunction like this one, one has to ask, as Lord Diplock pointed out in the American Cyanamid Case (Supra): has the plaintiff shown that there is a serious question to be tried? In my considered opinion there are triable issues here. The marriage of the first defendant to the deceased is contested; the legality of the second defendant to be granted letters of administration is disputed; ownership of the property is disputed. These few, among others, are issues which ought to be determined by Court.

Having so decided, I come to the next question, and that is to decide the balance of convenience, and in so doing I have to consider first "whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendants' continuing to do what he sought to be enjoined between the time of the application and the time of the trial" - per Lord Diplock in the American Cyanamid Case. It is clear to me that the balance of convenience lies heavily in favour of my refusing to vacate the order. If I do not do so, the defendants can proceed to call in the assets of the estate, deal with them at their discretion and at the end of the day, other beneficiaries may have no recourse to any property. While as if the injunction remains as it is until the determination of the case neither party will suffer. Accordingly, I decline to vacate the order that I made on 30th May, 1989. The costs for this application to be costs in the cause.

MADE in Chambers this 9th day of August, 1989 at Blantyre.


H.M. Mtegha
JUDGE