IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil cause number 14 of 2003

Between

AIDA MAIDA Plaintiff

And

ALI MAIDA 1st Defendant

And

SALIM BAGUS 2nd Defendant

CORAM D F MWAUNGULU (JUDGE)

Matemba, Senior Legal Aid Advocate, for the plaintiff

Mambulasa, Legal Practitioner, for the defendant

Katunga, the official court interpreter

Mwaungulu, J

ORDER

The defendants, Mr. Ali Maida and Mr. Salim Bagus, apply to this Court to dissolve an injunction this Court granted the plaintiff, Mrs Aida Maida. The injunction restrained the first defendant from howsoever tampering with the estate of Swaleyi Maida, now deceased. The injunction further restrained the first defendant from selling a

portion of the estate, comprising real estate, to the second defendant. The defendants want the interlocutory injunction dissolved chiefly because, they contend, the injunction, obtained ex parte, should not have been granted at all in principle. Secondly, the defendants contend the defendant's failure or omission to disclose material facts undermines the ex parte injunction. The plaintiff contends, correctly in my judgement, that the ex parte injunction was competent on the principles applicable to interlocutory injunctions and requirement for disclosure.

The plaintiff and the first defendant, the deceased's wife and brother, respectively, are beneficiaries under the deceased' estate. The deceased died intestate; he left no will. The deceased's estate includes realty part of which the first defendant, under an agreement of 22nd January 2003, sold to the second defendant. At the time of the sale, there was no administrator to the estate. There was no such administrator at the hearing of this application. It seems, however, the first defendant, after the plaintiff obtained the interlocutory injunction, approached the Administrator General for advice. The Administrator General called for all beneficiaries. The plaintiff refused to attend because of the interlocutory injunction. The Administrator General has not applied for letters of administration. On information he received, he advised the first defendant that he, the administrator general, would approve the tentative arrangements giving a portion of the estate to the plaintiff. The plaintiff, obviously, is unhappy with the arrangement. She insists the first defendant do nothing until letters of administration and the estate is distributed and that, until that is done, the defendant should neither act on nor sell the estate.

She is right. An application to dissolve an ex parte injunction, in practice, is an opportunity to test whether the court should have granted the ex parte interlocutory injunction in the first place. This is because, on an application to dissolve an injunction, the court, besides the question of suppression of material facts, can dissolve an interlocutory injunction unsound in law. Consequently, a court will dissolve an interlocutory injunction where one should not have been granted in the first place. Before considering that question, it is useful to resolve the question of failure to disclose material facts.

Courts make an interlocutory relief, like one here, before rights, disputed by the parties, are determined. Such relief, occurring as it does before the parties' rights are known, has potential for injustice. A successful party at the trial will grieve that the court failed to stop the other party from persisting in conduct that should have been prevented in limine. Conversely, if successful, the party prevented will feel delayed and betrayed that the court stopped her doing that which was perfectly within her rights. A court is required to do justice in the matter. It cannot do nothing. Doing nothing may result in injustice. The court has to do the best for the sake of justice. That best, however, depends on having the best and most of the information on which to base the judgement. There is potential for injustice, therefore, where parties, whenever a court has to make such determination, deliberately or inadvertently suppress facts material to such exercise. A

court will, therefore, interfere where it ordered the interlocutory relief without information, which, if before it, would have materially influenced the outcome.

The information the defendants contend the plaintiff never proffered to the judge who granted the interlocutory injunction ex parte was, as Mr. Matemba correctly contends, not one that would affect the judge's determination. The plaintiff's contention, I assume I understand it correctly, is that neither her nor the first defendant, both beneficiaries to the estate with many others, of course, have authority, without letters of administration, to affect the estate in the manner the first defendant is doing, disposing part of the estate where the plaintiff also lives. To that contention, the answers cannot, as the defendants contend, be that the first defendant is entitled to the estate or that the plaintiff, which is denied, agreed to the arrangements she now questions. In my judgement, 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. The facts the defendants raise are not consequential to the determination. The question then remains whether in law the judge should have given the interlocutory relief.

In law and principle the plaintiff is, on the facts in this matter, entitled to the interlocutory relief sought. For reasons earlier expressed, namely to do justice between the parties, courts do not order interlocutory injunctions as a matter of course. There have been many judicial developments and comments on the principles Lord Diplock in the House of Lords laid in the often quoted case of American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396; [1975] 1 All E.R. 504; [1975] 2 WLR 316. One cannot attempt to summarise all comments and developments except as pertain to this case. Where there is between the parties a substantial issue for a court and damages are not an adequate remedy for losses to either party, to preserve the status quo and on a balance of justice, on the circumstances of the case, a court will, on the applicant's undertaking to pay damages, grant an interlocutory injunction. This approach enables the court to do justice between the parties before the court finally determines their rights.

The applicant must first satisfy the court that there is a matter for a court to try. There will be such matter as long as the issue is not frivolous or vexatious. It is unnecessary that there should be a prima facie case. In this matter it is known to all that there are many beneficiaries apart from the plaintiff and the first defendant. Potentially all of them can apply for letters of administration jointly or singly on the demonstration of their interest. None of them has. The plaintiff rejects the arrangements the first defendant mentions as never have been made with her consent and in fact occurred because of this suit. There is the very question whether they were adequate to confer authority on the defendant to administer the estate let alone dispose of the property. There is, therefore, a matter to be tried. The next question is whether damages are an adequate remedy.

This second aspect considers what will be the outcome of the suit and essentially whether the defendant will be compensated from the plaintiff's undertaking to pay damages. Consequently, even where damages are an adequate remedy, the court will refuse the injunction if the plaintiff cannot compensate the defendant for the losses should the defendant be proved right at the end of the trial. Conversely, the court will grant an injunction where damages are an adequate remedy if the defendant cannot compensate the plaintiff if the plaintiff is proved right at the end of the trial. The defendant, who prays for dissolution of the injunction, has not shown that he would be able to compensate the plaintiff if the plaintiff is right. On the law appropriate, the plaintiff's share is likely to be substantial. She would be able to compensate the first defendant for his small share in the estate. Moreover, it does not follow that where damages are an adequate remedy and the parties can pay them that the injunction will be refused. An injunction may be granted even where damages are an adequate remedy and the parties can pay them where damages are not what is in the reasonable contemplation of the parties from the subject matter of the case. For example, a party in possession can be compensated in money by an affluent trespasser. The court will nevertheless grant the injunction because stopping the trespass itself will be what the parties intend to stop or further. This principle is more incident in a case like the present where the beneficiaries would want to reside on the properties that the defendant is inclined to sell. I would hold that even if damages are an adequate remedy here and the parties can pay them, they are not in the contemplation of the parties.

I must therefore consider whether the balance of justice is in granting or refusing the injunctions. One should start from that until the administrator acts, one cannot know the size of the whole estate and the beneficiaries (including creditors who can also apply for letters of administration) or their numbers. Without this, even if the size of the estate is known, it is difficult to know what share belongs to each beneficiary and therefore to the first defendant, who is but one of the many uncertain number of beneficiaries. At the least, when the size of the estate is known the plaintiff's share can be ascertained depending, of course, on consanguinity or affinity and the appropriate customary law or other law. Depending on the appropriate law she and her children and dependants would be entitled to the first share of 2/5, ½ or the first portion. If she comes from the Southern Region other than Nsanje, she would be entitled to the matrimonial home. The first defendant's share remains so uncertain. The balance of justice is therefore in favour of granting the injunction to maintain the status quo. On this conclusion, it is unnecessary to consider other aspects the law on this matter requires in deciding whether or not to grant an injunction.

Made in Chambers this 29th Day of October 2003.

D. F. Mwaungulu

JUDGE