

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
MISCELLANEOUS CIVIL CASE NUMBER 83 OF 2007**

BETWEEN
**REGISTERED TRUSTEES OF NKHOMA SYNOD OF
THE CHURCH OF CENTRAL AFRICA PRESBYTERIAN-----
APPLICANT**

AND
**KASUNGU TOWN ASSEMBLY-----
RESPONDENT**

CORAM: HON.SINGINI, J
Mr. Kalasa, of counsel for the Applicant
Mr. Chilenga, of counsel for the Respondent
Mr. Kaferanthu, Court Official

RULING

In this matter the applicant is seeking an order of injunction to stop Kasungu Town Assembly from constructing any structures on a piece of land within the area of the Assembly, identified as Plot Number 51 as in the *ex parte* summons issued on 14th August 2007 and as Plot KU 128 as in other supporting documents. The matter has now been commenced by an *interparte* application following an earlier direction by Her Honour Justice Kamanga, J, when the matter came before her as an *ex parte* application. The applicant claims to have a lease over the land. The land is open space or undeveloped, and the Assembly wants to construct on it some public amenities such as public toilets and a car park for public transport. The Assembly opposes the application asserting that the land is public land under its control and has not been leased to the applicant or to any other person.

The same plot is also being claimed by a third party, one Miss Kafoteka. To oppose her actions on the land, the applicant in the present matter commenced a civil suit against Miss Kafoteka way back in 2003, asserting its claim to the land and seeking to stop her own claim. That separate suit is registered in this Registry as Civil Cause Number 95 of 2003. The proceedings in that suit are still on-going.

When the present matter came for hearing before me last Thursday, on 17th January, counsel for the applicant made a preliminary application to have this matter consolidated with the applicant's case against Miss Kafoteka under Civil Cause Number 95 of 2003. He submitted that as the two suits involve competing claims over the same piece of land, it would better serve the interests of justice if the two cases were consolidated so that the issue of who between the three parties has the claim of right to the land be determined in one set of proceedings.

Counsel for the respondent opposes the application for consolidation on three grounds, first, that there are no proceedings that have been commenced by way of an originating process by the applicant against the respondent since filing the *interpartes* application for the order of injunction in September, 2007. He argues that an application for an order of injunction is not the mode of commencing the suit for claiming the right to the land in question and that therefore there are no proceedings as between the applicant and the respondent to be consolidated with any other proceedings, including the proceedings under Civil Case Number 95 of 2003. Secondly, he submits that as the respondent, Kasungu Town Assembly, is not a party to the proceedings under Civil Case Number 95 of 2003, consolidation as sought by the applicant would be to drag the respondent into a case in which it is not a party. Thirdly, he submits that under Order 4 of the Rules of the Supreme Court, consolidation of suits is procedurally permissible where the parties are the same, the issues are the same and the reliefs sought are similar.

Further, counsel for the respondent also prays that the application for an order of injunction be dismissed in default of an originating summons for a claim against the respondent since filing the application for the order of injunction in September, 2007.

In his response counsel for the applicant countered that there was clearly a common interest that would require or justify consolidation since there are three competing claims, all in the two cases registered in this Registry, over the same piece of land with one of the three parties being a common party to both suits. He also counters that dismissing the application for the order of injunction would mean that the applicant has no claim of right to the land in question and would thus also prejudice the applicant's claim against Miss Kafoteka in Civil Case Number 95 of 2003. He

suggested that it would even have been proper that the respondent in this matter were to be joined as a party in the other matter.

I adjourned the hearing for my ruling on the preliminary application for consolidation and on the respondent's application to dismiss the order of injunction.

On the issue of consolidation, I would like to restate the provisions of Order 4, rule 9, in particular paragraph (1), that-

“(1) Where two or more causes or matters are pending in the same Division and it appears to the Court-

- (a) that some common question of law or fact arises in both or all of them, or
- (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or
- (c) that for some other reason it is desirable to make an order under this paragraph

the Court may order those causes or matters to be consolidated on such terms as

it thinks just or may order them to be tried at the same time or one immediately

after another or may order any of them to be stayed until after the determination

of any other of them”.

Considering that wording of the Order, I hold that consolidation is permissible in a variety of circumstances and in particular upon the single factor of there being a common question of law or fact arising in the causes or matters to be consolidated as is the case in the present matter where there is the common issue of claims by three parties to the same piece of land in both matters. I am further guided by the decision in *Harwood v. British Statesman Publishing Co. Ltd.* [1929] W.N. 38 that “actions may be consolidated where the plaintiffs are the same and the defendants are the same, or where the plaintiffs or defendants or all are different” (per Sankey L.J., p.59). I would therefore dispel the submission by counsel for the respondent that consolidation was permissible only where, as he put it, “the parties are the same”.

On the other hand, I am also guided by the statement, which I uphold as a proper statement of law and practice, and to be just, appearing in Order 4/9/1, that “no order for consolidation will be made without hearing all parties affected, and therefore it will only be made on the hearing of applications in all actions”: *Daws v. Daily Sketchy* [1960] 1 W.L.R. 126; [1960] 1 All E.R. 397, C.A. I am therefore inhibited to make an order of consolidation not having heard the other party, Miss Kafoteka, in the matter under Civil Case Number 95 of 2003.

I have asked myself whether the matter before me can proceed separately in parallel to the matter under Civil Case Number 95 of 2003. I have come to the conclusion that the issue in the case before me can be determined on its own facts and the decision of this Court cannot alter the facts as to which party between the applicant (Nkhoma Synod of CCAP) and the respondent (Kasungu Town Assembly) has the valid claim to the land in question. It will be a decision on the facts that should not depend on the facts in the other case.

I therefore decline to grant the order for consolidation as applied by counsel for the applicant.

As I have mention in this ruling, counsel for the respondent prayed that the application before me for the order of injunction be dismissed as the applicant has not, since filing the application for the injunction, taken out originating summons against the respondent to make the claim over the land in question, showing that the applicant has no right of claim, or is unable to show any right of claim, to the land. During the last hearing, counsel for the applicant did not present the application for the order of injunction but instead began by seeking leave to apply for consolidation, which I granted and proceeded to hear him on that application. I did not hear him on the application for the order of injunction against the respondent and that was with my leave having allowed him to proceed with the application for consolidation. I therefore decline to consider dismissing the application for the order of injunction before I have heard the applicant or the applicant has had the opportunity to be heard on it.

In summary, therefore, I rule against the application by counsel for the applicant for consolidation. I also rule against the application by counsel for the respondent to dismiss the application for an order of injunction at this stage before I have heard the application.

MADE in chambers at the Lilongwe District Registry this 22nd day of January, 2008.

E. M. SINGINI, SC
JUDGE