



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 1638 OF 2006**

BETWEEN:

TAIBU MAHOMEDPLAINTIFF

- AND -

BEN KAMBULIRE.....DEFENDANT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA

Mr Naphambo/Mr Magela, of Counsel for the plaintiff

Mr Mpaka, of Counsel for the defendant

Mr Thewete – Official Interpreter

R U L I N G

Manyungwa, J

This is the plaintiff's inter – parties application for an Order of interlocutory injunction restraining the defendant from interfering with the plaintiff's residential premises. The application is made under Order 29 of the ***Rules of the Supreme Court***. There are two affidavits in support of the application, one sworn by the plaintiff namely Taibu Mahomed whilst the second one is sworn by Mary Nkapita, the plaintiff's aunt. The defendant, Mr Ben Kambulire the defendant herein opposes the application and has sworn and filed an affidavit in opposition. The second affidavit in opposition is sworn by Symon Jameson Ndaombwa, a qualified surveyor. Before I go into the affidavits, I must state that the court has delayed in writing this ruling because Counsel had indicated that they would file written submissions with the court within 14 days but todate such

submissions have not been filed for over a year and the court shall therefore have to do without recourse to the same.

In his affidavit in support of the plaintiff the plaintiff deponed that he is the owner of residential premises known as plot number 159/66/3 which the defendant has destroyed, and that the plaintiff inherited the said residential premises from his late father who died in 1991. The plaintiff further deponed that since inheriting the residential premises from his late father he has enjoyed a peaceful and an undisturbed occupation of the premises to date. The plaintiff further stated that on 16th April, 2006 the defendant's servants on instructions from the defendant demolished a brick fence and 2 houses belonging to the plaintiff within the residential premises without licence or permission, and that the defendant was threatening to continue demolishing structures erected on the plot claiming that he was a new buyer entitled to utilization and development of the premises, and that therefore unless the defendant is restrained by a court order from entering and interfering with the premises, the defendant shall continue doing so. The plaintiff further stated that the defendant and his servants were now threatening to demolish a Maize Mill, the only structure left on the residential premises belonging to the plaintiff and had given an ultimatum to the plaintiff to abandon the premises or face destruction of the maize mill.

In the second affidavit in support, Mary Nkapita of Kalonga Village, T/A Mponda, Mangochi District deponed that she is the plaintiff's aunt and current guardian since the plaintiff's both parents passed away. The deponent deponed that the property in dispute belonged to the plaintiff's father and was bequeathed to the plaintiff and his siblings upon the plaintiff's father's death, and that the whole plot was under the *de facto* control of an older brother called Abu Yusuf as the plaintiff was at the material time only two years old when his father passed away. It is further deponed by Mary Nkapita that from the on – set the said Abu Yusuf and Mr William Tayub had attempted to grab the property from the plaintiff and his siblings as is evidenced by exhibits GN1, GN2 and GN3. The said exhibit GN1, which a letter from the Acting Chief Legal Aid Advocate, dated 24th January, 1992, addressed to Mangochi Magistrate Court and copied to the District Commissioner, Mangochi was in the following terms:

FROM: THE ACTING CHIEF LEGAL AID ADVOCATE
P.O. BOX 569, BLANTYRE.

TO : THE MAGISTRATE, P.O. BOX 131,
MANGOCHI.

Cc : The District Commissioner, P.O. BOX 138,
Mangochi.

: Mrs Ella Yusuf Mahomed, Nkungulu Traditional
Court, P/A Mkungulu, Mangochi.

: The Administrator General, P.O. Box 100,
Blantyre.

CIVIL CAUSE NO. 65 OF 1992

DECEASED: ESTATE OF YUSUF MAHOMED

Kindly please serve the enclosed originating notice on Abu Yusuf Mahomed and William Tayub, well known personalities at Mangochi Boma.

I also enclose copies of the said notice for the attention of the District Commissioner, Mangochi and the Administrator General so that they are made aware that this matter is coming for hearing on 6th February, 1992 at the High Court, Blantyre.

Mrs Ella Yusuf Mahomed is also informed of the same date of hearing.

Signed
J B V Nyimba
Acting Chief Legal Aid Advocate.

Exhibit "GN2" is a letter dated 13th January, 1991 from The Acting Chief Legal Aid Advocate addressed to the district Commissioner, Mangochi and was in the following terms:

FROM: THE ACTING CHIEF LEGAL AID ADVOCATE

P.O. BOX 569, BLANTYRE.

TO : THE DISTRICT COMMISSIONER,
P.O. BOX 138, MANGOCHI.

Cc : Mrs Ella Yusuf Mahomed, Nkungulu Traditional
Court, P/A Nkungulu, Mangochi.

: The Administrator General, P.O. Box 100,
Blantyre.

Re: YUSUF MAHOMED (DECEASED ESTATE)

Thank you for your letter Ref. No 1/13/Vol XIX/170 dated 6th January, 1992 and a copy of the purported will thereto.

I am calling the enclosure a purported will because the document does not amount to a will in law. It lacks the signatures of the two witnesses as required by Section 5(1) of the Wills and Inheritance Act Cap 10:02 of the Laws of Malawi. Thus the deceased died interstate.

In the circumstances, I wish to advise you to take inventory of all the property that the deceased left and ensure that nobody interferes with the same until a court decides otherwise. However, according to Section 16(3) of the Wills and Inheritance Act, the widow is entitled to the household belongings used by the widow of the deceased during his lifetime. In this respect, William Tayub and Abu Yusuf should be kindly advised to comply with what the law of the land says. Other remaining property will be the subject of the court proceedings very soon. I will get in touch with you as I process this matter in court in due course.

Signed
J B V Nyimba

And finally exhibit "GN3" which was a letter from The Acting Chief Legal Aid Advocate addressed to The District Commissioner for Mangochi was in the following terms:-

FROM: THE ACTING CHIEF LEGAL AID ADVOCATE
P.O. BOX 569, BLANTYRE.

TO : THE DISTRICT COMMISSIONER,
P.O. BOX 138

Cc : Mrs Ella Yusuf Mahomed, Traditional Court,
P/A Nkungula, Mangochi.

Re: YUSUF MAHOMED (DECEASED ESTATES)

I am acting for and on behalf of Mrs Ella Yusuf and her children whom she had with the late Yusuf Mahomed.

The late Yusuf Mahomed married Ella Yusuf Mahomed on 19th April, 1984 at Mangochi District Council under customary law. There are the following children of the marriage still living.

1. Miriam Yusuf Mahomed born on 09/01/85
2. Tayibu Yusuf Mahomed born on 19/01/89
3. Alima Yusuf Mahomed born on 16/09/91

The late husband passed away on 28th August 1991 and left a will which he wrote in 1978 before he was married to my client. There are now disagreements which have erupted. William Tayub and Abu Yusuf want to deprive my client of households and property which my client acquired whilst in the marriage with the deceased. I wish to kindly ask you if you may advise William Tayub and Abu Yusuf to stop harassing my client until the matter is settled in court.

Furthermore, I would request you to send me a copy of the will of the deceased which you are keeping. The copy of the will shall enable me to file summons in the High Court where the will shall be contested according to Section 14 of the Wills and Inheritance Act, Cap 10:02 of the Laws of Malawi.

Signed
J B V Nyimba
ACTING CHIEF LEGAL AID ADVOCATE

The deponent further stated that the said property was then distributed in a court case in which it was decided that the plaintiff and all his siblings including Abu Yusuf, would stay on the land and enjoy profits from a maize mill which the plaintiff's father had installed on the land. The deponent further states that when Abu Yusuf passed away, William Tayub took control of the property and without alerting the plaintiff, mortgaged the property to NBS Bank, and that upon the said William Tayub failing to service the loan, the bank then sold the land to the defendant. After completing the said sale, the defendant then entered the said land without notice and demolished dwelling houses, a brick wall fence, toilet and a bathroom and that this was done without giving the plaintiff any warning. The defendant now threatens to demolish the maize mill. The plaintiff therefore prayed to this court that the defendant, his agents or anyone connected to him be restrained from entering the premises and demolishing the maize mill until proper title has been established in a court of law.

The defendant opposes the plaintiff's application, and in his affidavit in opposition, the defendant Mr Ben Kambulire, of Mangochi stated that he purchased a piece of land known as 159 – 66/3 Mangochi from NBS Bank in or around March, 2006 as is evident from exhibit "BK1" which is a copy of an offer letter for the sale of the property from NBS Bank to the defendant. The said letter went as follows:

NBS Bank
NBS House
P.O. Box 32251,
BLANTYRE 3
21ST March, 2006

Mr B Kambulire
P.O. Box 390
Mangochi

Dear Mr Kambulire

**OFFER OF PROPERTY ON PLOT NUMBER 159/66/3
MANGOCHI**

We refer to your bid for the purchase of the above property at MK500, 000.00 [FIVE HUNDRED THOUSAND KWACH]

We are pleased to let you know that your bid was successful at MK500, 000.00. Please note that this offer is subject to the terms and conditions which are enclosed herein.

Kindly sign and return one copy to us (together with your letter of acceptance) Deposit of at least 50% is also required to be paid within 10 days from the date of this offer.

In case you pay the full purchase price now, the bank undertakes to handover the property immediately while perfecting the legal documentation. Please take note that if we do not receive your acceptance of this offer within the given period, we shall consider the offer cancelled.

Looking forward to hearing from you soon.

Yours faithfully

Signed
R Kanyandula (Miss)
RECOVERIES MANAGER

The deponent further states that the Bank executed its power of sale over the property and sold the same to the defendant when Mr W J Tayub defaulted in the payment of the loan referred to above. At the time the property was sold to the defendant, the plaintiff had constructed a maize mill on the plot and that this was done on the understanding that the plot belonged to the said Mr W. J. Tayub and the plaintiff being a relative to the said Mr W. J. Tayub occupied the plot on that basis. The defendant further stated that the deed plan on the property which is deed plan No. 1110/97 clearly shows that there is only one plot on the piece of land and that that plot is the one sold to the defendant by the bank herein as is evident from exhibit "BK2" being Deed Plan No. 1110/97 situated at Mangochi Boma dated November, 1997. The defendant further depones that the said Deed Plan for the piece of land

clearly shows that the plaintiff's maize mill is situated within the boundaries of the plot that the defendant bought from the bank, and that as a lawful owner of the property in question the defendant is mandated to conduct development work on the said plot. And that on that basis therefore the defendant began a building project on the plot. The defendant further states that the plaintiff is now refusing to move out of the plot saying she is entitled to remain on the said plot as her relative, Mr W. J. Tayub the chargor herein, failed to build a house for her anywhere and that the plaintiff had applied for an order of injunction to restrain the defendant from entering the premises on the basis that the plot belonged to her. The defendant further contends that the plaintiff's interest in the land if at all, ceased when the property was sold to the defendant, and that it was therefore wrongful for the applicant and unfair for the plaintiff to claim ownership of the property and restrain the defendant from entering the premises. And that in view of the foregoing the applicant's application for an order of injunction restraining the defendant from entering the plot is misconceived and an abuse of the process of the court.

The second affidavit in opposition was sworn by Mr Symon Jameson Ndaombwa, who deponed that he is a qualified surveyor who has at all material times conducted surveys on the plot in dispute herein and that he is in fact the one who conducted a survey on the said plot when the same was being sold by NBS Bank to the defendant in this matter. The deponent stated that he visited the plot again on 23rd May, 2006 to locate beacons marking the boundaries of the said plot number 159 – 66/3 to determine whether or not the defendant herein is really encroaching as alleged by the plaintiff and that he confirmed that the boundaries of the said plot are the same as do appear on the deed plan as is evident from exhibit "SJN1". The deponent further states that going by the said Deed Plan and the actual positions of the beacons marking the boundaries of the said plot it is clear that the plaintiff's maize mill is within the said plot number 159/66/3. The defendant therefore prayed that the plaintiff's applications be dismissed with costs.

ISSUES FOR DETERMINATION

The main issues for the determination of this court in this matter is whether the plaintiff's application should be granted or whether the application should be dismissed as prayed for by the defendant.

THE LAW

The usual purpose of an interlocutory injunction is to preserve the *Status quo* until the rights of the parties have been determined in the main action.¹ As was stated by Tambala, J as he then was, in the case of *Mangulama and Four Others V Dematt*² that:

“Applications for an interlocutory injunction are not an occasion for demonstrating that the parties are clearly wrong or have no credible evidence...The usual purpose of an order of injunction is to preserve the *status quo* of the parties until their rights have been determined.”

It is now settled that the principles governing the grant or refusal of an interlocutory injunction are trite knowledge and are those enunciated by Lord Diplock in the celebrated case on interlocutory injunctions namely *The American Cynamide Company V Ethicon Limited*³. The first principle is that the plaintiff must show that he or she has a good arguable claim to the right that he seeks to protect. Secondly, the court must not, at the interlocutory stage, attempt to decide the disputed issues of facts on the affidavits before it; it is enough if the plaintiff shows that there is a serious question to be tried. Thirdly, if the plaintiff satisfies these tests, the grant or refusal of an injunction is for the exercise of the court’s discretion on a balance of convenience. In deciding where the balance of convenience lies the court must consider whether damages are a sufficient remedy; if so an injunction ought not be granted.

In the case of *Candlex Limited V Phiri*⁴ it was stated as follows:-

“It is accepted that the procedure relating to the grant or refusal of an interlocutory injunction and the tests to be applied are generally those laid down Lord Diplock in *American Cynamide Company V Ethicon Limited* [supra]. It is important to recognise these principles as guidelines which are not cast in stone although variations from them are limited. Put simply, the guide lines require that initially the applicant must show there is a serious question to be tried. If the answer is yes, then the grant or refusal of an injunction will be at the discretion of the court. In exercising its discretion the court must consider whether

¹ See also Order 29 r 1 of the Rules of Supreme court, 1999

² *Mangulama and Four Others V Dematt* Civil Cause No. 893 of 1999

³ *The American Cynamide Company V Ethicon Limited* [1975] AC 393

⁴ *Candlex Limited V Phiri* Civil Cause No. 713 of 2000 (unreported)

damages would be an adequate remedy for a party injured by the court's grant or refusal to grant an injunction. If damages are not an adequate remedy or the losing party would not be able to pay them, then the court must consider where the balance of convenience lies.”

And in *Ian Kanyuka suing on his own behalf and on behalf of all National Executive members of the national Democratic Alliance (NDA) V Chiumia and Others*¹ Tembo J, as he then was, said:

“Order 20 of the Rules of the Supreme Court makes provision for general principles respecting the grant or refusal of an application for interlocutory injunction. The usual purpose of an interlocutory injunction is to preserve the *Status quo* until the rights of the parties have been determined in an action. The order is negative in form, thus, to restrain the defendant from doing some act. The principles to be applied in application for interlocutory injunctions have been authoritatively explained by Lord Diplock in *American Cyanamid company V Ethicon Limited* [supra]. The plaintiff must establish that he has a good arguable claim to the right he seeks to protect. The court must not attempt to decide the claim on affidavits; it is enough if the plaintiff shows that there is a serious question to be tried. If the plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on a balance of convenience. Thus, the court ought to consider whether damages would be a sufficient remedy. If so an injunction ought not be granted. Damages may not be sufficient remedy if the wrong – doer is unlikely to be able to pay them. Besides, damages may not be sufficient remedy if the wrong in question is irreparable or outside the scope of pecuniary compensation or if damages would be difficult to assess. It will be in general material for the court to consider whether more harm will be done by granting or by refusing an injunction. In particular it will usually be wiser to delay a new activity rather than risk damaging one that is established.”

Further, in the case of *Mobil Oil (Malawi) Ltd V Leornard Mutsinze*²- Chatsika J, as he then was stated as follows:-

¹ *Ian Kanyuka suing on his own behalf and on behalf of all National Executive Members of National Democratic Alliance (NDA) V Chiumia* Civil Cause No. 58 of 2003

² *Mobil Oil (Malawi)Ltd V Leornard Mutsinze* Civil /cause No. 1510 of 1992

“The principles upon which an application for an injunction will be considered are set out in Order 29/1/2 and 29/1/3 of the rules of the Supreme Court and were succinctly elucidated in the case of *American Cyanamide Company V Ethicon Limited* [1975] AC 396. Before an injunction can be granted, it must be established that the applicant has a good claim to the right he seeks to protect. The court does not decide the claim on the evidence contained in the affidavits. A good claim is said to have been established if the applicant shows that there is a serious question or point to be decided. When these principles have been established, the court exercises its discretion on the balance of convenience. In deciding the question of balance of convenience, the court will consider whether damages will be a sufficient remedy, it must further consider and decide whether the defendant or wrong – doer shall be able to pay such damaged.”

In the instant case the question has the plaintiff established a good arguable claim to the right that he seeks to protect must therefore be answered in the affirmative. This is because the plaintiff deponed that he inherited the land in dispute from his late father who passed away in 1991, and that he has ever since enjoyed a peaceful and undisturbed occupation of the premises until the 16th April, 2005 when the defendants servant on instructions from the defendant demolished a brick fence and 2 houses within the residential premises without licence or permission. Further as has been demonstrated by Mary Nkapita, the land in dispute initially belonged to the plaintiff’s father and was bequeathed to the plaintiff and his siblings upon his father’s death. However since the plaintiff was young, only 2 years old at the time, the whole plot was under the *de – facto* control of an older brother called Abu Yusuf and that the said Abu Yusuf and Mr William Tayub had tried to grab the property from the plaintiff and his other siblings. Subsequently it was then ruled by a court of law that the plaintiff and all his siblings including the said Abu Yusuf would stay on the land and enjoy the profits from the maize mill which had been installed on the land by the plaintiff’s father. It was only after Abu Yusuf died that the said William Tayub took control of the property, and without informing the plaintiff mortgaged the property to NBS Bank, and when he defaulted on the mortgage, the NBS Bank subsequently sold the land to the defendant, Mr Ben Kambulire. In my considered view, what happened here was not only regrettable but also

fraudulent, as Mr William Tayub never owned the land, such that he could not have entered into dealings with the bank without involving plaintiff.

Further, I have also considered whether damages would be sufficient, and I have come to the conclusion that they probably may not be sufficient as it is not only the maize mill that is in issue, but that this is a place where the plaintiff stays. Moreover, it is my considered opinion that if the injunction is refused, the damage done to the plaintiff will be irreparable and clearly therefore more harm will be done by refusing to grant the injunction sought.

CONCLUSION

In these circumstances and by reason of the foregoing, it is my finding that the balance of convenience tilts in favour of the plaintiff and I therefore grant the plaintiff an order of injunction restraining the defendant from entering and interfering with the residential property of the plaintiff until the issue of title or ownership of the land in dispute is settled.

As regards costs, these normally follow the event, and consequently I order that costs of these proceedings be borne by the defendant.

Pronounced in Chambers at Principal Registry this 9th April, 2008.

Joseph S Manyungwa
JUDGE