IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 215 OF 2016

BETWEEN:

THE REGISTERED TRUSTEES OF THE KINGDOM

OF GLORY INTERNATIONAL AND THREE OTHERS PLAINTIFFS

AND

HOMEMAKERS LIMITED 1st DEFENDANT

PASTOR CAROL CHAPOMBA 2nd DEFENDANT

Coram: JUSTICE M.A. TEMBO,

L. Gondwe, Counsel for the Plaintiffs
Chinangwa, Counsel for the 1st Defendant
Banda, Counsel for the 2nd defendant
Chanonga, Official Court Interpreter

ORDER

This is this Court's order on the plaintiffs' application for continuation of an order of injunction that the plaintiffs obtained ex parte in this matter.

The plaintiffs blatantly stated as a fact, that which he knew was clearly not true, namely, that in civil cause number 24 of 2013 the 2nd defendant sued the 1st defendant only and not the plaintiffs too in a legal action that implicates the rights

to the land that are being fought over by the plaintiffs and the 2nd defendant in this present matter thereby precluding the plaintiffs from the effect of the court decision in the civil number 24 of 2013. This deliberate misstatement was part of the plaintiffs' central argument at the ex parte stage. The full story is as follows.

The subject matter of the dispute herein is land which the 1st defendant sold to both the 2nd defendant and the plaintiffs. The 1st defendant sold the land in dispute to the 2nd defendant in 2007 earlier than to the plaintiffs to whom it was also sold in 2014. Mr Dick Chagwamnjira, a lawyer who was described by counsel for the plaintiffs during oral argument as a versatile investor, is actually a Managing Director of the 1st defendant who negotiated the sale of the land in dispute to the 2nd defendant on behalf of the 1st defendant. He also negotiated the sale of the same land to the 1st and 2nd plaintiff at least.

The subject matter of this case has been subject of several legal actions resting with the Land cause number 24 of 2013 in which the 1st defendant in the present matter was actually the plaintiff who sued the 2nd defendant.

The High Court, in Land cause number 24 of 2013 made its decision in favour of the 2nd defendant as against the 1st defendant ordering the 1st defendant to transfer the land in issue herein as determined by a survey that was meant to delineate the land actually sold by the 1st defendant to the 2nd defendant. The High Court made several determinations in Land cause number 24 of 2013. The High Court determined that when the sale was being done the extent of the land was not ascertained physically. Further that this lead to litigation in several matters that spanned nine years. The High Court also found that the sale was on paper but the land as sold was not ascertained on the ground leading to the lengthy litigation which eventually led to a consent order that a survey was to be done to ascertain the extent of the land sold. The High Court also found as follows with respect to the conduct of the 1st defendant in civil cause number 2092 of 2007

> I have shown above that the defendant had a better title to the land sold by the plaintiff and was entitled to protect it. The plaintiff did not have any better title than the defendant because he sold it out save for identifying the extent of the land. All that is remaining is formal transfer of the same to the defendant. The defendant did not cause the uncertainty on the land. She rightly assumed that the land on paper is what is on the ground. There was no bad faith on her side as she

> was protecting her rights in the land which were threatened. In my view the status quo would have to be to prevent the plaintiff from leasing out portions of any land around until a definitive survey is done. In any case there was already an injunction against the plaintiff in the earlier judgment cited above. It was improper for the plaintiff to continue to lease out some land on the disputed land in the face of a clear injunction. This could be interpreted that they are coming to court too seeking equitable relief but with unclean hands.

In the present matter the plaintiffs claim that they have an equitable interest in the land in dispute because they bought the land just like the 2nd defendant and particularly because the plaintiffs were shut out by the 2nd defendant when the 2nd defendant only sued the 1st defendant in Land cause number 24 of 2013 in which the High Court found for the 2nd defendant and ordered that the land belongs to the 2nd defendant as against the 1st defendant. It is on that basis that an ex parte order of injunction was granted. The fact of the matter however is that the plaintiffs really twisted the facts on obtaining the ex parte order. The main contention of the plaintiffs that they were shut out by the 2nd defendant from the 2013 litigation that determined the rights to land herein is not supported by the facts as gathered from the affidavit evidence on record before this Court. This contention is simply not true.

During oral argument this Court asked counsel for the plaintiff specifically about this contention and he could not explain the basis for the plaintiffs' contention that the 2nd defendant sued the 1st defendant in Land cause number 24 of 2013. In Land cause number 24 of 2013 what in fact happened was that the 2nd defendant, who was initially a landlord of the plaintiffs and who eventually sold the land to the plaintiffs, sued the 2nd defendant. Counsel Lusungu Gondwe for the plaintiffs however could only insist that in any event his clients were never heard in Land cause number 24 of 2013 and therefore should be allowed to litigate on their equitable interest in the land as against the 2nd defendant because the plaintiffs are bonafide purchasers of the land without any notice that the same was already purchased by the 2nd defendant. The plaintiffs further stated that the 2nd defendant acquiesced in their usage of the land in issue and should be estopped from enforcing the decision of the High Court in Land cause number 24 of 2013 as against the plaintiffs.

The truth of the matter was therefore misrepresented and twisted by the plaintiffs in so far as the role of the parties in the legal action of 2013 is concerned.

This Court is aware of the applicable law on interim injunctions as submitted by both the plaintiffs and the defendant. The court will grant an interim injunction where the applicant discloses a good arguable claim to the right he seeks to protect. The court will not try to determine the issues on affidavit evidence but it will be enough if the plaintiff shows that there is a serious question to be tried. If the plaintiff has shown that he has a good arguable claim and that there is a serious question for trial then the court will consider whether the balance of convenience favours the granting of the interim order of injunction. See *Kanyuka v Chiumia* civil cause number 58 of 2003 (High Court) (unreported); *Tembo v Chakuamba* MSCA Civil Appeal Number 30 of 2001 both citing the famous *American Cynamid Co. v Ethicon Ltd* [1975] 2 WLR 316. The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality. Beyond that, it does not matter if the claimant's chance of winning is 90 per cent or 20 per cent. See *Mothercare Ltd v Robson Books Ltd* [1979] FSR 466 per Megarry V-C at p. 474; *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 per Megaw LJ at p. 373.

The first question this Court has to resolve is whether the plaintiffs have disclosed a good arguable claim to the right they seek to protect. The submission of the plaintiffs is essentially that they were never heard in the matter in land cause number 24 of 2013 because the 2nd defendant did not sue them and that the plaintiffs must be allowed to vindicate their rights in the land in dispute. Further that the plaintiffs are bonafide purchasers of the land herein without notice of the 2nd defendant's interest therein. Further that the 2nd defendant acquiesced in the plaintiffs construction activities on the land and cannot now be allowed to enforce her rights as per the earlier decision of the High Court in land cause number 24 of 2013 without the plaintiffs being heard.

The 2nd defendant however contends that the plaintiffs are not bonafide purchasers of the land herein in view of the many legal battles between the defendants in this matter and the order of injunction restraining the 1st defendant from selling the land herein way before the plaintiffs came on the scene. The 2nd defendant also contends that in 2012 she served an originating summons in land cause number 242 of 2012

in which the 1st and 2nd plaintiff and others were respondents. The originating summons is marked as exhibit HC 3. The 2nd defendant contends that the plaintiffs must be deemed to have known about these legal actions or at least should have inquired about the same.

The 2nd defendant also contended that the plaintiffs were served with the order of injunction restraining the sale of the land herein. This injunction was obtained in civil cause number 2047 of 2007. The plaintiffs, or atleast some of them, conceded being served with an order of injunction in that regard dated 16th September 2014.

The 2nd defendant therefore rejects the plaintiffs' contention that she acquiesced in the construction activities carried on by the plaintiffs on the disputed land.

What is striking to this Court is that the plaintiffs did not think it prudent to join the case despite being served with an injunction by the 2nd defendant retraining the 1st defendant from selling the land herein. This injunction was served on some of the plaintiffs in September 2014 a couple of months after they bought the disputed land herein in July 2014. The plaintiffs let the 1st defendant fight the action which it commenced against the 2nd defendant over the disputed land herein. Yet they knew the determination of that case would have repercussions for them.

This Court also finds that the claim of acquiescence is not well founded. The plaintiffs had been on the land a tenants of the 1st defendant initially. Later it is when sale negotiations took place. The dispute between the defendants went on all the while. The 2nd defendant served an order of injunction on some of the plaintiffs a couple of months after they had bought the land herein that is on the 1st and 2nd plaintiff church organizations. How would one say the 2nd defendant acquiesced in the land usage by these plaintiffs in such circumstances?

In such circumstances one finds it hard to see that the plaintiffs were never aware of the litigation. The claim by the plaintiffs cannot be sustained. The plaintiffs knew of the legal disputes and took their interest in the land subject to the legal disputes between the defendants. They have no good arguable claim. The plaintiffs are caught by *lis pendens*.

The plaintiffs having failed to establish a good arguable claim to the right the y seek to protect cannot be allowed an injunction.

This Court then next has to consider the question whether damages would be an adequate remedy to either party if the injunction is not granted. As rightly submitted by both parties where damages at common law would be an adequate remedy and defendant would be able to pay them, an interlocutory order of injunction should be refused, irrespective of the strength of plaintiff's claim. See *Mkwamba v Indefund Ltd* [1990] 13 MLR 244. On this point, the plaintiffs submit that damages cannot be an adequate remedy because the plaintiffs some of whom are a church organization have ties to the land on which they pray and cannot be adequately compensated in damages.

The plaintiff contended that damages are not an adequate remedy given that we are dealing with an equitable interest in land. They further contended that they have the same equity in the land as the 2nd defendant since they all bought the land from the 1st defendant and both do not have title.

The 2nd defendant responded that it has a better equity to the land herein having bought the land much earlier than the plaintiffs and having been awarded title to the land by a High Court judgment. The 2nd defendant argued that in fact the 1st defendant had no land to sell and that the plaintiffs must proceed against the said 1st defendant to recover damages.

The view of this Court is that indeed both the plaintiffs and the 2nd defendant all bought the land from the 1st defendant. However, the 2nd defendant may be said to prevail as her equity is earlier in time as compared to that of the plaintiffs she having bought the land in dispute in 2007 which is seven years well before the plaintiffs bought the same land.

It appears therefore that damages will be an adequate remedy to the plaintiffs in the event of refusal to grant an injunction given that we are dealing with mere equities and the plaintiffs' equity is later in time and might not prevail all things being constant. This Court will next consider where the balance of convenience lies in this matter.

Most injunction cases are determined on the balance of convenience. In *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396 Lord Diplock said, at p. 408:

> . . . it would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

In other cases, such as *Cayne v Global Natural Resources plc* [1984] 1 All ER 225, the courts have insisted that it is not mere convenience that needs to be weighed, but the risk of doing an injustice to one side or the other. Lord Diplock in *American Cyanamid Co. v Ethicon Ltd* said the extent to which the disadvantages to each party would be incapable of being compensated in damages is always a significant factor in assessing where the balance of convenience lies.

The finding of this Court is that the balance of convenience lies in favour of not continuing the order of injunction because we are dealing with mere equities and the 2nd defendant's equity is earlier in time by seven years.

There is also a Court decision in favour of the 2nd defendant. This decision is preceded by a consent order between the defendants to delineate the land herein. The plaintiffs were served with an order of injunction in September 2014 stopping the sale herein a couple of months after the 1st defendant sold the land to the 1st and 2nd plaintiff in July 2014. These plaintiffs did nothing as the 1st defendant land title holder fought an action it had commenced against the 2nd defendant. In such circumstances it will be just and convenient that an injunction should not continue as it will be against public policy that litigation must eventually come to an end. *Lis pendens* is very likely to catch the claims by the plaintiffs who knew of the legal dispute and chose to wait it out and now want to prolong the legal dispute. The 2nd defendant has fought over this land since 2007. It is not just and convenient that she be stopped from enjoying the fruits of her litigation in the circumstances.

In *American Cyanamid Co. v Ethicon Ltd* Lord Diplock said at p. 408 that, in considering the balance of convenience: 'Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo'. From *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, it appears that the status quo ante is the state of affairs before the defendant started the conduct complained of, unless there has been unreasonable delay, when it is the state of affairs immediately before the application.

The status quo ante in the present matter is where the 2nd defendant would enjoy her rights to the land as granted by the reasoned decision of the High Court and the consent order made between the defendants in circumstances where the plaintiffs decided not to join the legal dispute despite being served with an order of injunction in that regard a couple of months after the 1st and 2nd plaintiff signed a sale agreement with the 1st defendant pertaining to the disputed land.

In *American Cyanamid Co. v Ethicon Ltd* Lord Diplock said at p. 409 that, as a last resort:

> . . . it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.

In the circumstances of this matter we have a situation where the affidavit evidence shows that the case of 2nd defendant is stronger than that of the plaintiffs.

In the foregoing premises this Court finds enough grounds to support the dissolution of the injunction. The ex parte order of injunction obtained by the plaintiffs herein is accordingly dissolved.

In the event that the foregoing premises should not ground the dissolution of the injunction this Court notes that 2nd defendant submitted that the twisting of facts by the plaintiffs and their counsel must compel this Court to find that there was no full disclosure of the material facts by the plaintiffs who on the ex parte application lied that the 2nd defendant only sued the 1st defendant in 2013 when that was not true and in fact it was the other way round. The 1st defendant who sold the same land to several people is the one who sued the 2nd defendant.

There is well established and persuasive authority in Note 29/1A/24 to Order 29 Rule 1A Rules of the Supreme Court to the effect that on any ex parte application, the applicant must proceed "with the highest good faith" see *Schmitten v. Faulkes* [1893] W.N. 64, per Chitty J.. The fact that the Court is asked to grant relief without the person against whom the relief is sought having the opportunity to be

heard makes it imperative that the applicant should make full and frank disclosure of all material facts. R. *v. Kensington Income Tax Commissioners, ex p. de Polignac* [1917] 1 K.B. 486 at 514, CA, per Scrutton L.J., otherwise the order may be set aside without regard to the merits. See *Boyce v. Gill* (1891) 64 L.T. 824. This principle has been approved and applied in *Ex Parte Muluzi and Tembo* [2007] MLR 304.

A party must not benefit from a deliberate failure to make full and frank disclosure of material facts and so to ensure that such is the case the ex parte order of injunction would also be dissolved and not be continued on that ground.

This Court wishes to state in closing that with the current arrangement of civil court work at this registry it is confident that this matter can be tried as soon as it is ready for trial and within the next three months. This Court therefore encourages the parties to quickly settle this matter for trial so that it can be tried within the next sitting of this Court so that the issues are resolved between the parties.

Costs are for the 2nd defendant as against the plaintiffs in this matter.

The 1st defendant did not file papers on this application and did not make any argument at the oral hearing and no order is made with respect to it.

Made in chambers at Blantyre this 29th June 2016.

M.A. Tembo

JUDGE