



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

LAND CAUSE NUMBER 72 OF 2016

BETWEEN:

BERNARD MAULETI KWANDEKHA

PLAINTIFF

AND

ALLI M'BARAKA

DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

Chaponda, Counsel for the Plaintiff

Mwala, Counsel for the Defendant

Mtegha, Official Court Interpreter

ORDER

This is this court's order on the plaintiff's application for continuation of an order of injunction restraining the defendant whether by himself or his servants or agents or otherwise howsoever from trespassing or planting trees or crops or exercising any proprietary rights on a 2.168-hectare piece of land that is the subject matter of this case. The land is situated Balaza II village in the area of Traditional Authority Chigaru in Blantyre near Kholombidzo road block.



The plaintiff filed an affidavit in support of his application together with skeleton arguments. The defendant also filed an affidavit in opposition together with skeleton arguments.

The plaintiff's case is as follows. That on 16th July, 2008 he bought 2.168 hectares of customary land from Mr Keyston Maniya of Balaza Village II, Traditional Authority Chigaru in Blantyre. He then proceeded to apply for a lease of the said land from the Malawi Government and he was offered a lease on 13th June 2011.

On 3rd October, 2011 the plaintiff contracted an estate agent to sell the piece of land herein at K3, 500, 000.00.

The plaintiff stated that he asked the defendant on 7th July, 2012 to find a customer to buy the piece of land herein. He added that the defendant did not find that customer but instead started using the land without the consent of the plaintiff and without paying for the said land.

He further stated that, in September, 2015 the plaintiff reported this matter to Village Headman Balaza and Traditional Authority Chigaru where the defendant was summoned and was told not to do anything on the land herein until the matter was resolved. He added that, however, the defendant on 4th February, 2016 without any justification or consent from the plaintiff started planting trees on the land in issue thereby depriving the plaintiff of use of the said land.

The plaintiff added that the defendant is continuing trespassing and cutting trees on the land herein.

On the other hand, the case of the defendant is that that the injunction obtained by the plaintiff herein must be vacated for having been obtained through suppression of material facts.

The defendant asserted that it is not true that he was engaged by the plaintiff to find a customer for the land herein to be sold at K3, 500, 000 and that instead the defendant started using the land herein.

He stated that the truth of the matter is that the plaintiff did not engage the defendant to find a buyer for him but that the plaintiff sold the land herein to the defendant at a price of K1, 000, 000 which the defendant paid. The defendant exhibited some

documents evidencing receipt of the money amounting to K1, 000, 000 at various times between 31st July, 2012 and 14th December, 2012. One of the payments is actually acknowledged by the plaintiff on a copy of the passport of the plaintiff himself. There is also a receipt issued by the plaintiff acknowledging payment of the initial installment of K500 000 by the defendant.

There is also evidence from a Mr Tambwa who is on the adjoining land to the land in dispute herein. He deponed that he had been introduced by the plaintiff to the defendant in December, 2012. Further, that at that time the plaintiff stated that the defendant is the new owner of the land in dispute after the land sale herein.

Mr Tambwa added that he together with the plaintiff and the defendant decided to go the Village headman Balaza but on their way the plaintiff changed his mind and told them that the village headman would demand 10 per cent of the purchase price from the plaintiff and that therefore the defendant should just send some money to the Village headman through Mr Tambwa which was done and Mr Tambwa delivered K5, 000 to the Village headman that day.

Mr Tambwa confirmed that the defendant has been in possession of and farms the land in dispute herein since 2012 and that the plaintiff does not come to the land.

The defendant stated further that, after he completed payment for the land herein the plaintiff gave him possession of the same and he has been in occupation since December, 2012 without interference from the plaintiff. He added that the plaintiff also surrendered the Government's offer of the lease over the land in dispute to the defendant as well.

The defendant asserts that the plaintiff started bothering the defendant in 2015 upon hearing a rumour that the land in issue would be taken over by Government and that land owners would get compensation.

The defendant added that once the rumour started circulating, the plaintiff came to see the defendant and told him that the plaintiff must take charge of any possible negotiations with Government over the land. The defendant further added that when he told the plaintiff that this was not possible, the plaintiff started causing trouble and reclaimed the land in dispute.

The defendant stated further that, as part of the plaintiff's effort to grab the land herein he started creating all kinds of explanations and among them was the plaintiff's instructions to Makhaira and Company to write the Ministry of Lands that the plaintiff had lost the lease document and that the Ministry of Lands must not entertain any applications in relation to the land in dispute.

The defendant observes that the foregoing instruction to Makhaira and Company is different from what the plaintiff is now alleging that the defendant just started using the land herein upon being instructed to find a buyer for the plaintiff's land.

The defendant stated that he subsequently approached the Ministry of Lands with a view to register his title and then became aware of the plaintiff's claim that he had lost the lease documents. The defendant then advised his lawyers to write Ministry of Lands about the true position in this matter.

The defendant consequently stated that the plaintiff misrepresented facts in this matter by claiming that the plaintiff is a trespasser when in fact the plaintiff had actually sold the land herein to the defendant.

The defendant also contended that he has been using the land since 2012 and the balance of convenience lies in favour of vacating the injunction and that he continues to use the land herein pending determination of the main matter herein.

In response, the plaintiff insisted that his copy of the passport and offer of the lease were collected by the defendant with a view to showing the same to Geoffrey Kachale Banda who was initially interested in buying the land herein. He added that the defendant never returned the documents.

The plaintiff denied selling his land to the defendant at K1, 000, 000.

He then asserted that the receipts for the alleged payment of K1, 000, 000 by the defendant are being used in bad faith by the defendant since the same were not obtained for that purpose.

The plaintiff produced documents from the village headman Balaza, Traditional Authority Chigaru and Ministry of Lands showing that he is owner of the land in issue. All the documents were written in 2015.

This Court is aware of the applicable law on interim injunctions as submitted by both the plaintiff and the defendant. This court will grant an interim injunction where the applicant discloses a good arguable claim to the right he seeks to protect. This 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.

The result is that this 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.

If the plaintiff has shown that he has a good arguable claim and that there is a serious question to be tried, then the court will consider the question whether damages would be an adequate remedy to either party if the injunction is granted or vice versa and it turns out later that the court should have arrived at a different decision on the granting of the injunction. 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.

Where there is an arguable case and damages are not an adequate remedy, the court will then have to 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 Cyanamid Co. v Ethicon Ltd* [1975] 2 WLR 316.

The first question this Court has to resolve is whether the plaintiff has disclosed a good arguable claim to the right he seeks to protect.

The plaintiff argues that he has rights in the land which are at stake and that there is a serious triable issue concerning adjudication of his rights in the land in issue given the sequence of events pertaining to the sale of the land herein.

This Court consequently determines that the plaintiff has disclosed a triable issue that needs to go to trial in this matter.

This Court then has to consider the question whether damages would be an adequate remedy to either party if the injunction is granted or vice versa and it turns out later that the court should have arrived at a different decision on the granting of the injunction. 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.

What this Court wishes to observe is that land is inherently unique and therefore damages are not an adequate remedy where the same is dealt with adversely. Therefore, the issue on adequacy of damages is out of the question in relation to applications for injunction in relation to land. See *Nanguwo v Tembenu and another* civil cause number 451 of 2013 (High Court) (unreported). This Court will then have to consider whether the balance of convenience favours the granting of an injunction herein or not.

As rightly submitted by both parties, 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.

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.

What is significant to note is that, the plaintiff gave two contradicting explanations on what happened to the lease documents in this matter. In one instance, he stated that the documents were taken by the defendant and were never returned and in another instance, he stated that the lease document was lost. This points to the fact that the plaintiff's credibility is questionable.

Despite submissions of the plaintiff casting doubt on the authenticity of the evidence of sale of the land as provided by the defendant at this point, the lack of credibility on the part of the plaintiff makes this Court believe the story of the defendant that he has been in possession of the land in dispute herein since 2012. Further, that the plaintiff has simply most likely started bothering the defendant in 2015, after selling him the land herein in 2012 because the plaintiff got the alleged rumour of Government compensation for land in the area in question in this matter.

In the foregoing circumstances, the balance of convenience lies in favour of vacating the injunction herein so that the defendant who had been in possession of the land in dispute herein upon an alleged purchase of the same must maintain possession until the rights of the parties are determined.

This Court would however make clear that the defendant must not in any way deal adversely with the legal interest in this land by disposal or otherwise until this matter is heard and determined. He may however proceed to farm the land as he used to prior to the injunction that has been vacated.

This Court will not have to consider the relative strength of the parties' cases. This is a matter of last resort.

In *American Cyanamid Co. v Ethicon Ltd* Lord Diplock said at p. 409 that

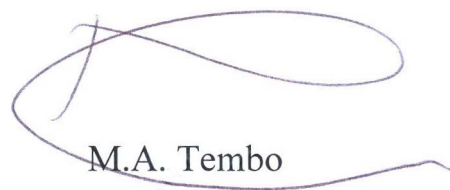
. . . it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which 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.

The parties must ensure that this matter that is exempt from mandatory mediation is escalated to trial as soon as possible since this Court is fully seized of this matter until trial.

Costs on this application shall be for the successful defendant.

Made in chambers at Blantyre this 22nd May 2017.

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a horizontal stroke.

JUDGE