

MALAWI JUDICIARY



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 97 OF 2016**

BETWEEN:

ESTER NSEU MPULULA.....PLAINTIFF

AND

REUBEN MPULULA.....1ST DEFENDANT

PAUL MPULULA.....2ND DEFENDANT

CORAM: THE HON JUSTICE H.S.B. POTANI

Mr. Mickeus, Counsel for the Plaintiff

Mr. Gondwe, Counsel for the Defendants

Mr. Mathanda, Court Clerk

RULING

On May 12, 2016, this court ordered that the defendants should within 48 hours from the service of the order vacate Livonia Lodge and allow the plaintiff to smoothly operate it until the determination of the plaintiff's action or further order of the court. The defendants did not comply with the order and at the instance of the plaintiff, the court on January 25, 2017, ordered that unless within 7 days from the date of the



service of the order the defendants vacate Livonia Lodge they would be arrested and committed to a civil prison for a period of 21 days. Upon being served with the order, the defendants on January 27 made an *ex parte* application for an order of suspension of the execution of the committal order pursuant to order 52 rule 7 of the Rules of the Supreme Court. The court declined to entertain the application *ex parte* and ordered an *inter partes* hearing scheduled for February 10, and gave specific directions regarding filing and service of the necessary processes in readiness for the hearing which the parties complied with. The *inter partes* hearing having taken place, the court now proceeds with its determination.

There is the affidavit of Reuben Mpulula, the 1st defendant, in support of the application in response to which there is the affidavit of Ester Nseu Mpulula, the plaintiff. The court also has had the benefit of arguments and submissions from counsel on both sides.

In essence, the case by the defendants in aid of their plea for the suspension of the execution of the order of committal is that they have nowhere else to stay apart from at the lodge which is one of the properties left by their late father. It is contended by the defendants that as the main reason for the injunction order by the court that they should vacate the lodge was that they were collecting payments from customers, they would undertake to no to do so anymore or interfere with the administration of the deceased estate until a proper and lawful distribution thereof.

In opposing the application, counsel for the plaintiff has gone all the way out to recount the history of the matter with particular focus on how the defendants have demonstrated blatant unwillingness to comply with the orders of the court including their failure to attend the hearing on the date the order of committal was made

thereby denying themselves the opportunity to explain to the court what they are now trying to explain as to why, in the first place, the order of committal ought not to have been made.

There is no dispute whatsoever that the court has the power to suspend the execution of an order of committal that it made and such power is clearly provided for in Order 52 rule 7(1) as follows:

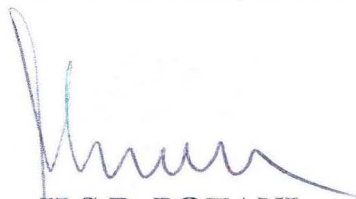
The Court by whom an order of committal is made may by order direct that the execution of the order of committal shall be suspended for such period or on such terms or conditions as it may specify. [Emphasis supplied]

As can be seen from the wording of the above quoted provision, the power is discretionary. It is a settled principle that discretionary power has to be exercised judiciously, that is, on some sound footing and not arbitrarily or capriciously. With this in mind, the court would wish to observe as follows: As rightly argued by counsel for the plaintiff, the way the defendants have presented their case is as if they are applying for a variation of the order of injunction. That cannot be allowed at this stage for two reasons. Firstly, to allow them to do that would be tantamount to letting them to get through the backdoor that which they could have gotten through the front door by either making an application to vary the injunction before this very court or appealing against the order of injunction before the appellate court. Secondly, the defendants are approaching the court with very unclean hands in that they would want the assistance of the very court whose orders they have not complied with. It has not escaped the court's attention that on November 23, 2016, following some negotiations by the parties and undertaking by the defendants, the court, instead of hearing a notice of motion for committal, ordered that the

defendants should vacate the lodge within 7 days. As it turned out, there was no compliance by the defendants of their own undertaking prompting the plaintiff to make a fresh application on January 18, 2017, for leave to move for contempt proceedings which leave was granted and the hearing of the notice of motion for order of committal was scheduled for January 25. Despite being duly personally served with the notice of the hearing, the defendants never appeared before the court to make their representations and did not even send word explaining their nonattendance. As mentioned earlier, that was the opportunity which the defendants denied themselves to raise the pleas they are now raising. All in all, the facts in totality point to the fact that the defendants are taking the court for a ride as they have perpetually defied its orders. They do not deserve to be granted they plea they are now making that the execution of the order of committal made on January 25, 2017, be suspended. The application is accordingly dismissed.

On costs, the defendants are condemned in costs as their application has been abortive,

Made this day of February 15, 2017, at Blantyre in the Republic of Malawi.



H.S.B. POTANI
JUDGE