IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 18 OF 2017

BETWEEN:

MICHAEL MKANDAWIRE — PLAINTIFF

AND

MALAWI HOUSING CORPORATION — DEFENDANT

CORAM:

HONOURABLE JUSTICE JOSEPH CHIGONA

ALEX BONONGWE, OF COUNSEL FOR THE PLAINTIFF

BRUNO MATUMBI, OF COUNSEL FOR THE DEFENDANT

MR. KAMCHIPUTU: OFFICIAL COURT INTERPRETER

CHIGONA, J.

ORDER

This is the plaintiff's application for an interlocutory injunction against the defendant. Suffice to say that this application was brought ex-parte on 13th January 2017. Upon perusal of the supporting documents, the court ordered the plaintiff to take out an inter-parte summons

obtainable on 19th January 2017. On the appointed day, both parties attended the hearing of the summons. The court is very grateful to both counsel for their meticulous submissions.

The application is brought under Order 29 of the Rules of the Supreme Court and is supported by an affidavit sworn by counsel for the plaintiff, Mr. Alex Bonongwe. Counsel also adopted skeletal arguments he filed in this matter.

The facts of the case are that the plaintiff has been a tenant of the defendant as evidenced by a tenancy agreement between the parties exhibited as **AB 1.** It is submitted that at the time of the agreement, the plaintiff was an employee of the University of Malawi, Polytechnic, in Blantyre. He depones that from October 2015, he was employed by Malawi Government Under the Malawi Higher Education Science and Technology Project (HEST). He submitted that his new job involves a lot of travelling supervising various projects. He submits that due to the nature of his job, he left the house in the hands of his half sister, a Miss Chifwiri Nyirongo. He submits that on 5th January 2017, whilst in Lilongwe, he was informed by his sister that the defendant has dropped a termination of tenancy and notice of eviction exhibited as **AB 2.**

Upon receiving the news, he says that he called the defendant's general manager, Mr. Kaphale to complain on the conduct of the defendant. He says the general Manager assured him that he would talk to his juniors. To his surprise, he says on 10th January 2017, he received a phone call from his sister informing him that the defendant's officers were at the plaintiff's house removing plaintiff's property from the house after which they sealed the premises. He says calls to the general manager proved futile as the manager was not picking up the calls.

He submits that the defendant's reason for termination of the tenancy agreement is wrong as the fact remains that the plaintiff has never sub-letted the said house or in any way breached the provisions of the tenancy agreement. It is submitted that the conduct of the defendant has greatly inconvenienced the plaintiff as he is now homeless and has no home to return to once his assignment in Lilongwe is completed.

It is submitted that unless the court grants an interlocutory injunction, the plaintiff will definitely suffer irreparable damage as securing an alternative accommodation at affordable rates as the defendant's is almost impossible. Further it is submitted that the defendant will not suffer any damage once the injunction is granted as he will continue to receive rentals from the plaintiffs. It is submitted that the balance of convenience tilts in favour of granting the interlocutory injunction.

Counsel for the defendant opposed the application. He relied on the affidavit in opposition sworn by Innocent Chitosi, Regional Manager, for the defendant and skeletal arguments that he filed in this matter. In his submission, he submits that there is no any serious issue warranting a trial as the plaintiff is responsible for his actions of not abiding by the terms of the tenancy

agreement. He referred the court to exhibit **PC2** dated 19th December 2016, which is notice of termination and eviction. Counsel also stated that the house has been allocated to another person already. He stated that the reasons for the termination were two fold. First, that the plaintiff has breached the agreement by not paying rentals amounting to MK77, 000, and secondly, that the plaintiff has sub-letted the flat to his half sister. Counsel submitted that the plaintiff has not adduced evidence that he is still in Blantyre and that there is no affidavit from his purported half sister. Counsel submitted that there is no any serious triable issue warranting grant of an injunction herein as no evidence has been adduced.

In reply, counsel for the plaintiff disagreed with his counterpart on the triable issue. He submitted that the issue of sub-letting is an issue that cannot be resolved by affidavit evidence. He stated that the plaintiff travels a lot and that he supervises projects in 5 districts including Mzuzu University in Mzuzu. On the need for the half sister to swear an affidavit, counsel submitted that it is not in dispute that the agreement was between the plaintiff and the defendant and that an affidavit from the half sister, if needed, will be provided at trial. On the reasons for termination of the agreement, counsel submitted that there is no mention of non-payment of rentals in the affidavit in support and hence to them, the only reason is sub-letting, which the plaintiff disputes.

ISSUE(S) FOR DETERMINATION

Whether an interlocutory injunction is appropriate in these circumstances

THE LAW

The law has been settled and is very clear in applications for interlocutory injunctions as pronounced in the landmark case of ***The American Cynamide Company Vs Ethicon***[1]. The usual purpose of an interlocutory injunction is to preserve the ***status quo*** until the rights of the parties have been determined in the action. See Order 29/1/2 of the Rules of the Supreme Court. As was stated in the case of ***Mangulama and Four Others Vs Dematt***[2], by Tambala J, as he then was had this to say:

> "Applications for an interlocutory injunctions are not an occasion for demonstrating that the parties are clearly wrong or have no credible evidence...The usual purpose of an order of interim

[1] [1975] AC 393
[2] Civil Cause Number 893 of 1999

injunction is to preserve the ***status quo*** of the parties until their rights have been determined".

Lord Diplock in the ***American Cynamide Case*** laid down very important principles to be satisfied before granting an interlocutory injunction. The first principle is that the plaintiff must show that he has a good arguable claim to the right that he seeks to protect. Secondly, the court must not attempt to decide the claim on affidavit, 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. The court must consider whether damages would be a sufficient remedy, if so an injunction ought not be granted. In the ***American Cynamide Case*** the court held that there was no rule of law that the court was precluded from considering whether on a balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeed in establishing a ***prima facie*** case or a probability that he would be successful at the trial of the action. The court should be satisfied that the claim was not frivolous or vexatious i.e. that there was a serious question to be tried.

It has to be appreciated that Courts in Malawi have also applied the above principles in many cases before them. One such case is that of ***Amina Hamid Daudi t/a Amis Enterprises Vs Sucoma***[3] Mwaungulu J outlined the following principles:

I. A court will not grant an injunction unless there is a matter to go for trial.
II. Once there is matter that should go to trial, the court has to consider whether damages are an adequate remedy.

The learned judge had this to say on page 4 of his judgment

"First, a court will not grant an injunction unless there is a matter to go for trial. This obviously filters cases not deserving the equitable relief that by its nature prevents exercise of rights before a court finally determines the matter...

Secondly, once there is a matter that should go for trial, the court has to consider whether damages are an adequate remedy. This consideration requires answers to two sequel questions. First

[3] **Civil Cause Number 3191 of 2003**

> from the perspective of the defendant, even if damages are an adequate remedy, the court will refuse the injunction if the plaintiff cannot pay them...Secondly from the perspective of the plaintiff, if damages are an adequate remedy and the defendant can pay them the court will refuse an injunction. The court may therefore allow the injunction, where damages are an adequate remedy and the defendant can pay them."

Further it must be appreciated that damages will be an inadequate remedy where the plaintiff's or defendant's losses are difficult to compute. See ***ICL (Malawi) Limited Vs Lilongwe Water Board***[4].

In ***NOEL FOLE-V-MALAWI HOOUSING CORPORATION,***[5] commenting on the issue of damages and balance of convenience, Kamwambe J had the following to say:

> " an application for an order for an interlocutory injunction is determined on affidavit evidence because it is enough that the applicant has shown that there is a triable issue and that damages would not be adequate compensation. If damages turn out to be adequate compensation the court is better not to grant the request. At times even if damages may be adequate or not the court is called to consider the principle of the least injustice or inconvenience. The court will lean in favour of the least injustice outcome between granting and refusing to grant the injunction".

Since the applicant is also asking this court to issue a mandatory injunction compelling the defendant to open the said premises, it is prudent that we also in a nutshell outline the law on the grant of mandatory injunctions. In the case of ***Nottingham Building Society V Eurodynamics Systems***[6] the court granted a mandatory injunction after taking into account the likely result of the trial. Moreover, the court must be satisfied at the trial that the injunction was rightly granted. However, in some cases like in ***Leisure Date V Bell***[7] where it became necessary that some mandatory order had to be made ***ad interim*** the court will make the order

[4] **Civil Cause Number 64 of 1998**
[5] **Civil Cause Number 48 of 2015**
[6] ***Nottingham Building Society V Eurodynamics Systems*** [993] FSR 1
[7] ***Leisure Date V Bell*** 1988 FSR

whether or not the high standard of probability of success at the trial is made out. A mandatory injunction will most obviously be granted where this is the only way in which to avoid the proven probability of damage and in such a case it is open to the court to award damages.

The Malawi Supreme Court of appeal in the case of the ***Registered Trustees of the Christian Service Committee V Mandala Building and Construction Company Limited***[8] has in a way in my view, restated the law on mandatory injunctions. This is what the then Lordships said:

> "Although what was said by Lord Upjohn in ***MORRIS V REDLAND BRICKS LTD*** was good law in 1970, it would appear that by the eighties the law had taken a different course...in determining whether to grant an interlocutory injunction, the question for the court to consider was not whether it was mandatory or prohibitory, but whether the injustice that would be caused to the defendant if the plaintiff was granted an injunction and later failed at the trial outweighed the injustice that would be caused to the plaintiff if an injunction was refused and he later succeeded at the trial".

Further, as it was stated in ***Shephered Holmes Ltd V Sandham***[9] by Megarry J that in a normal case, the court must ***inter alia*** feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted.

The above is the law on the granting of interlocutory injunctions.

ANALYSIS AND FINDINGS

[8] ***Registered Trustees of the Christian Service Committee V Mandala Building and Construction Co. Ltd*** MSCA Civil Appeal

[9] ***Shepherd Holmes Ltd V Sandham*** 1971 Ch. 340

Reverting to the present case, the first issue for determination is whether the plaintiff has shown to this court that there is a triable issue. Counsel for the plaintiff submitted that the defendant has terminated the contract on the ground that the plaintiff has sub-letted the house, which is contrary to the tenancy agreement exhibited as **AB1**. However, as explained above, the defendant in their affidavit in opposition submitted that the termination was premised on two grounds namely sub-letting and non payment of rentals contrary to the tenancy agreement as exhibit **PC 1** shows.

I have noted that **exhibit AB 2**, which is termination of tenancy and notice of eviction dated 19th December 2016, only talks of alleged breach of tenancy agreement arising from purported sub-letting of the premises. This notice does not talk of any failure on the part of the applicant to pay rentals. This issue of non payment of rentals is only contained in **exhibit PC 1.** I am of the considered view that the applicant was given notice of termination and eviction due to the alleged sub-letting. In fact, it is very clear that the applicant relied on that notice (**exhibit AB 2)** when he was making the present application. This was even admitted by counsel for the applicant during hearing. It is difficult to decipher from the facts whether the applicant was served with the termination of tenancy and notice of eviction (**exhibit PC 1).** In these circumstances, it is adjudged that the main reason for termination and eviction was the issue of sub-letting.

We are of the considered view and we so hold that the issue of sub-letting is a triable issue that cannot be resolved through affidavit evidence. We therefore hold that the plaintiff has established a triable issue, which is that of sub-letting the house. This is the issue that is in dispute between the parties herein.

Let me also deal with issue of allocation of the house to another tenant after the eviction. Counsel for the defendant submitted that the house was already allocated to another tenant and that in the present proceedings therefore, there is nothing to stay. Counsel referred to equitable principles on this point. He relied on hand written notes appearing on **exhibit PC 2** purportedly written by the Regional Manager, allocating the house to Doreen Kumbatira. Counsel for the applicant argued that there is no evidence that the house was indeed allocated to a new tenant. While I warn myself that at this stage of the proceedings, I am not resolving any triable issues, I am of the considered view that evidence of allocation and occupancy of the house has not been adduced herein. The defendant could have adduced evidence, for instance, through a tenancy agreement, to show that the allocation was fully completed. This was not done and this court cannot therefore hold that the house was allocated to another tenant.

Having established that the plaintiff has a triable issue, the court now has to consider whether damages would be adequate compensation herein. The plaintiff through counsel submitted that damages would not be adequate looking at what the plaintiff has to go through. We would

like to differ with the plaintiff on this point. We are of the considered view that damages would be an adequate remedy and that the defendant is in a position to pay those damages. The plaintiff has not shown to this court that the defendant will not be in a position to pay the damages or that the damages will be difficult to compute. We are of the belief that cost of alternative accommodation can be a starting point in assessing the damages. Further, we are of the view that the defendant can as well provide another house to the plaintiff on similar terms and that the time he will be out of the house waiting for the conclusion of this matter, can as well be taken into consideration in the new tenancy agreement. It is therefore my finding that damages are adequate and that the defendant is capable of paying the same.

Having concluded that damages are adequate and that the defendant is capable to pay the same, I have now to look at balance of convenience. In assessing balance of convenience, I have to assess whether the granting or refusal of the injunction will cause more harm to the plaintiff or the defendant. In other words, who between the plaintiff and the defendant will suffer more harm. I am of the considered view that the plaintiff herein will suffer more harm or injustice if I refuse to grant the injunction, than the defendant, who will continue to receive rentals from the plaintiff. In the circumstances, it is my finding that balance of convenience tilts in favour of granting the injunction restraining the defendant from terminating the tenancy agreement and compelling the defendant to re-open the plaintiff's house until determination of the issues herein.

CONCLUSION

For reasons explained above, I grant an interlocutory injunction in favour of the plaintiff . I also order that the trial herein be expedited.

COSTS

Normally costs follow the event and we therefore award costs to the plaintiff.

Pronounced in Chambers on 3rd day of February 2017 in the Republic of Malawi.

Joseph Chigona

JUDGE