

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NUMBER 1016 OF 2016

BETWEEN:

DAVID KAMBALAME AND ALICE KAMBALAME{Administrators of the
Estate of Deveson Kambalame (deceased)}-----PLAINTIFF

AND

TRADEMASTERS LIMITED-----1ST DEFENDANT

MALAWI HOUSING CORPORATION-----2ND DEFENDANT

LILONGWE CITY COUNCIL-----3RD DEFENDANT

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE

Tembo, Counsel for the Plaintiffs

Mlembe, Counsel for the 1st Defendant

Kaphale, Counsel for the 2nd Defendant

Itai, Court Interpreter

RULING

This matter came before this court by way of a summons to discharge an order of injunction which the plaintiffs herein obtained on the 7th of November 2016. It is therefore imperative at this point in time to appreciate what has transpired in this matter.

The case record shows that in 2001, the 2nd defendant did offer Mr David Kambalame (deceased) a house number 15/S/2 on plot number Bwaila 15/261. Mr David Kambalame died in 2013. In 2016, the plaintiffs were appointed administrators of the deceased estate. On 4th October 2016, the 2nd defendant granted a lease to the 1st defendant on plot number 15/260 which plot is adjacent

to the plaintiffs' plot number 15/261. Before the lease of 2016 to the 1st defendant, plot 15/261 had been allocated to Mr J. Lim. There is a letter from the 3rd defendant dated 9th February 2010 in which Mr J. Lim was being requested to stop developments that he was carrying on plot 15/260. On 10th February 2010, the 3rd defendant wrote the 2nd defendant informing it that the developments being carried out on plot number 15/260 which included the building of an office block and a fence should cease and that the said plot should be left vacant. I note from the contents of the letter that there were three reasons for halting the developments on plot number 15/260 which are:

- i. Poor accessibility arrangements especially to the existing structure
- ii. Obscuring existing building from the main road
- iii. Being a long a major road (M1) the proposed structure would be obtrusive.

The 3rd defendant put it very clear in this same letter that plot number 15/260 should be left vacant and that the developer in this case Mr J. Lim should be allocated another commercial plot elsewhere for his intended development.

As already observed, the 1st defendant was granted a lease of this very plot number 15/260 in 2016. Upon being granted the lease, the 1st defendant commenced development of the plot and one of the visible developments was the digging of a foundation around the plot in order to erect a fence. The erection of this fence would thus make it very difficult for the plaintiffs to access their property. This issue is not at all new because it is the very same issue that the 3rd defendant had raised in 2010 where it even directed Mr J. Lim to vacate the said plot. Court records however show that the 3rd defendant in 2016 allowed the 1st defendant to proceed with construction of an automotive workshop at this very plot. It is however not clear as to why the same 3rd defendant had now changed its position on this very same plot. What is however clear from the approvals by the 3rd defendant is that there was no specific approval by the 3rd defendant to the 1st defendant to erect a fence. This therefore means that at the time when the plaintiffs were obtaining the injunction in November 2016, the 1st defendant did not have permission from the 3rd defendant to construct a brick wall fence on plot number 15/260. The 1st defendant obtained the said permission in March 2017 some four months after the injunction herein was already issued. One therefore

wonders as to why the 1st defendant had commenced the project on the fence in the absence of any planning permission from the 3rd defendant.

The first defendant filed an affidavit in support of the application to discharge the injunction in which Mr Abdul Gaffar deponed as follows:

1. That the 1st defendant is the leasehold owner of land situated at and known as Title Number Bwaila 15/260 in Lilongwe having acquired the same from Malawi Housing Corporation as confirmed by a copy of the lease exhibited as AH1.
2. That upon acquiring the plot, the first defendant applied for development permission from the 3rd defendant and that the 3rd defendant granted permission on 2nd July 2015 for the development of an automobile workshop as confirmed by exhibits AG2 and AG3.
3. That the said development permission superseded all decisions previously made submitted by the 1st defendant as shown in AG4.
4. That the 3rd defendant could only have granted planning permission in respect of Title number Bwaila 15/260 upon considering the impact of such developments on all the adjoining property.
5. That the developments being carried out by the 1st defendant are within the scope of the permission granted.

It is therefore the 1st defendant's prayer that the injunction granted to the plaintiff restraining the 1st defendant to proceed with developments of the said property should be discharged.

At this stage let me recall that the plaintiffs' ground for obtaining the injunction was that if the 1st defendant proceeds to carry out the developments on plot number 15/260, it will make it difficult for the plaintiffs and other occupants of house number 15/S/2 to gain physical access to the rear house, as they have been doing for well over 12 years. The plaintiffs feel that they have acquired easement by prescription on plot number 15/260. It is therefore prayed that the injunction herein should be extended until the determination of the matter.

Let me put it on record that I find this matter very mind boggling. Let me first start by saying that the conduct of the 1st and 3rd defendants in this matter leaves a lot to be desired. This court had issued an injunction in November 2016 against all the three defendants. In March 2017 when the said injunction was already in

force, the 1st defendant proceeded to approach the 3rd defendant for a planning permission for the construction of a fence yet it was one of those things that had been ordered to be halted by the court. The 3rd defendant happily granted the permission knowing very well that there was an injunction in place. It is also on record that actually the 1st defendant had started construction of the fence without any planning permission. My observation is that the 1st defendant seems to have very little respect for the law. It is thus very difficult for this court to entertain an application for an equitable remedy when such an application is coming from an applicant who does not have clean hands.

I do not find any merit in the application to have the injunction discharged. It is dismissed with costs. The Registrar should just expedite the hearing of the substantive matter herein.

MADE THIS DAY OF AUGUST 2017 AT LILONGWE

M.C.C. MKANDAWIRE

JUDGE