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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

LAND CAUSE NUMBER 105 OF 2016

BETWEEN:

JULIE F. MULIPA **PLAINTIFF**

AND

MR AND MRS BIBIYANI AND OTHERS UNKNOWN
(Being Grandsons and Granddaughters of Mr and Mrs Bibiyani) **DEFENDANTS**

CORAM: JUSTICE M.A. TEMBO,

Gondwe, Counsel for the Plaintiff

Kaduya, Counsel for the Defendants

Chanonga, Official Court Interpreter

ORDER

This is this court's order on the plaintiff's application for continuation of an order of injunction restraining the defendants, whether by themselves or otherwise, from trespassing or encroaching on the plaintiff's piece of land located at Lunzu-Tipansi village, Traditional Authority Kapeni in Blantyre until the hearing and determination of the plaintiff's claim to the said land.

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

The plaintiffs' case is as follows. That in September, 2014 she and her husband entered into a sale agreement with Magdalene Lackson over a piece of customary land situated at Lunzu-Tipansi village in the area of Traditional Authority Kapeni. The price was K5, 500, 000.

The plaintiff paid the purchase price and enjoyed possession of the land herein from September, 2014 until around May, 2015 when the defendants started trespassing on her land herein.

The sale of the customary land herein was witnessed by Group Village Headman Pasani.

The plaintiff claims that she is a bona fide purchaser of the land herein. She added that the land in issue belonged to the daughters and sons of Aaron Antipasi and that she actually bought the land from a daughter to Aaron Antipasi.

The plaintiff stated that all of a sudden the defendants who are grandchildren of Bibiyani started encroaching the land in issue.

The person who sold the land, namely, Magdalene Lackson, stated that she sold the land herein on behalf of her clan known as Eliza Tipasi. She indicated that the reason for the sale was that her clan wanted to break free from conflicts they have been having with the Aaron Tipasi clan. She added that the defendants belong to the Aaron Tipasi clan who have nothing to do with the land in issue herein.

She insisted that the land herein is under Group Village Headman Pasani and that the plaintiff is a bona fide purchaser of the same.

The plaintiff asserted that the defendants have no claim of right over the land and are trespassing hence the justification for continuation of the injunction herein.

On the other hand, the case of the defendant is made by Kingsley Chimasula who asserts that he is a grandson of Aaron Antipasi.

He states that his great grandfather Mr Antipasi Kwikwi and Mrs Bibiyani were brother and sister and lived together in Antipasi A village under Group village Headman Pasani in Traditional Authority Kapeni's area in Blantyre district.

He added that Antipasi Kwikwi had two sons, namely, Aaron Antipasi and Simoni Antipasi whereas Bibiyani had Lawrence and Anamlauzi.

He then stated that Aaron Antipasi was by then Village Headman and he moved from Antipasi A and was given land to stay on by Group Village Headman Manjombe where he stayed until his death although he was still Village Headman Antipasi A.

He then stated that Magdalene Lackson, who sold the land herein, is a granddaughter of Anamlauzi, who remained in Antipasi A village since only Aaron Antipasi left and he was born where Aaron Antipasi went to live under Group Village Headman Manjombe.

He then stated that in 2009 they applied to the District Commissioner to become an independent village and the District Commissioner approved the application. He added that they stayed like that until 2015 when Magdalene Lackson sold the defendant's land.

He noted and agreed with the plaintiff that the land herein belongs to the children of Aaron Antipasi. He also referred to the letter from the District Commissioner on the land dispute between himself, as a grandchild of Aaron Antipasi, and the grandchildren of Bibiyani, which referred the said land dispute to the Magistrate Court with the observation that the land belongs to the children of Aaron Antipasi.

He contended that Magdalene Lackson cannot sale what does not belong to her hence the sale was void.

He further argued that customary land cannot be bought and sold as was purported by the plaintiff in this matter.

He then stated that the plaintiff deliberately distorted the facts to appear as if she bought the land from the right person. He added that he is the grandchild of Aaron Antipasi and the land belongs to him and the other defendants who have a claim of right.

He added that the land in issue is not under Group Village Headman Pasani but under Group Village Headman Manjombe. He stated that Pasani deliberately witness the land transaction herein so that the defendant's land should be taken away without their knowledge.

The defendant observed that damages would not be an adequate remedy in this matter and that the balance of convenience favours the vacation of the injunction that was granted ex parte herein since some defendants have already started building on the land herein and have incurred expense.

This Court is aware of the applicable law on interim injunctions as submitted by both the plaintiff and the defendants. This 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.

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.

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 Cynamid 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 she seeks to protect.

The plaintiff argues that she has ownership of the land which is at stake and that there is a serious triable issue concerning adjudication over her ownership of the land in issue given the sequence of events pertaining to the sale of the said land herein.

Of course, the defendants rightly pointed out that customary land cannot be sold or bought in terms of title thereto since the title vests in the President on behalf of all Malawians and it is administered by the Chiefs according to the customary law of the area in issue. Section 25 of the Land Act provides that all customary land is hereby declared to be the lawful and undoubted property of the people of Malawi and is vested in perpetuity in the President for the purposes of this Act. And section 26 of the Land Act provides that

> The Minister shall, subject to this Act, and to any other law for the time being in force, administer and control all customary land and all minerals in, under or upon any customary land, for the use or common benefit, direct or indirect, of the inhabitants of Malawi:
>
> Provided that a Chief may, subject to the general or special directions of the Minister, authorize the use and occupation of any customary land within his area, in accordance with customary law.

The defendants therefore submitted that the plaintiff has no claim of right to the purchase of land that she seeks to protect. The defendants cited several cases where the High Court has held that title in customary land cannot be sold as it is vested in the President for the benefit of all Malawians. *Registered Trustees of Church of God of Prophecy v Mkisi* civil cause number 1210 of 2008 (High Court) (unreported) and *Kabaghe v Registered Trustees of Seventh-Day Adventist Church and Regional Commissioner for Lands* miscellaneous civil application number 44 of 2013 (High Court) (unreported). That is the correct position.

However, the plaintiff correctly admitted error in usage of correct wording on the land sale transaction herein. She admits that she did not buy title to the customary

land. Rather, that she however parted with her money and acquired rights to use and occupy the customary land in dispute herein with the sanction of the chief.

Therefore, what is not in dispute is that the plaintiff parted with money to acquire rights to use and occupy the land in dispute herein.

The plaintiff therefore has a claim of right to protect in the customary land, namely, her rights to use and occupy the said land upon parting with some money to the benefit of those entitled to the rights in the land and with the sanction of the Chief who is charged to administer the said customary land. But that is not the end of the matter.

As it turns out, there is also dispute as to who was the right person to sale the rights to use and occupy the customary land and as to which Chief was supposed to witness the transaction on sale of those rights in the customary land.

The plaintiff claims that Magdalene Lackson was entitled to sale her the rights in the customary land, after discussing with all her clansmen, and that Group Village Headman Pasani was the right chief to witness the sale of the rights in the customary land. The defendants do not agree and assert the contrary.

The defendants assert that the seller of the land herein wanted, by the sale of the land in dispute, to get away from the Aaron Antipasi clan. And that this clearly shows that the seller, namely Magdalene Lackson, does not belong to the Aaron Antipasi clan and had no power to sell the land in dispute herein which belongs to Aaron Antipasi clan.

In the supplementary affidavit, Magdalene Lackson clarifies that the land in dispute belongs to her clan, being the Eliza Tipasi Clan.

The defendants additionally assert that the land transaction should have been witnessed by Group Village Headman Manjombe and not Group Village Headman Pasani.

In view of the foregoing, it is disputed as to who is the rightful user and occupier of the land who was entitled to sale the said rights in the customary land to the plaintiff and also as to which chief had jurisdiction to witness the land transaction herein.

It is significant to observe that, at this point this Court is unable to determine whose case bears the correct version.

However, what is clear is that if the plaintiff's story is correct then at trial she would definitely vindicate her rights. Consequently, this Court finds that at this stage the plaintiff has a claim of right that she seeks to protect at trial.

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 ordinarily 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 therefore does not agree with the defendant's submission and the case relied on in that regard, namely, *Chola v Chimera* civil cause number 2610 of 2003 (High Court) (unreported), that an alleged trespasser who has built on land must be presumed to have means to compensate the alleged land owner and consequently the Court must consider damages to be an adequate remedy and not order an injunction. That argument is defeated by the uniqueness of every piece of land that renders compensation for the same in damages undesirable.

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.

The status quo ante to be preserved in this matter appears to be the one that prevailed where the plaintiff acquired the rights to use and occupy the customary land herein before the defendants came on the said land and started acting contrary to the rghts of the plaintiff.

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

This Court would like to however make clear that the plaintiff must not in any way deal adversely with the land herein by disposing or assigning her rights to use and occupy the said land until this matter is heard and determined.

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 which 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 plaintiff.

Made in chambers at Blantyre this 22nd May 2017.

M.A. Tembo

JUDGE