



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
LAND CAUSE No. 46 OF 2013



In the matter between:

MATINDI BUSINESS COLLEGE
AND

PLAINTIFF

THE REGISTERED TRUSTEES OF KWACHA TRUST

DEFENDANT

RULING

The plaintiff commenced this civil action by way of originating summons seeking declaratory reliefs against the defendant's conduct in relation to a lease agreement over a piece of property situate in the City of Lilongwe; an order of injunction restraining the defendant from forcefully re-entering the property in issue or demanding the plaintiff to immediately vacate the premises; damages for breach of the lease agreement and costs of the action. Following an *ex parte* application, the plaintiff obtained an order of interlocutory injunction restraining the defendant from re-entering and/or demanding the plaintiff to vacate the property in issue or in any other way interfering with the plaintiff's peaceful enjoyment of the aforesaid land until the determination of an *inter partes* summons for an injunction. The plaintiff has brought this present *inter partes* summons following the above-mentioned order, seeking a continuation of the interim injunction.

This court has to determine whether this is a proper case which warrants the granting of the continuation of an interim order of injunction.

The arguments of the parties

a. The plaintiff's case

The plaintiff filed an affidavit in support of the summons, sworn by Mr. Phillomon Kalambule, the finance and administration manager of the plaintiff. The deponent states in the affidavit the history and terms of the lease agreement and the reasons why he believes the action of the defendant is unjustified, illegal and inequitable in the terminating the lease agreement and there are attached exhibits in support of his arguments. It is deposed from paragraph 4 to paragraph 14 of the plaintiff's affidavit as follows:

4. 'In or around July, 2012, the plaintiff entered into a written Lease Agreement with the defendant for land comprised in Title Number Bwaila 40/34 in the City of Lilongwe.
5. The plaintiff duly signed the said Lease Agreement and sent the same to the defendant in triplicate who never returned a signed copy to the plaintiff. However, the parties have been carrying out their respective obligations under the said written Lease Agreement.
6. It was a term of the said Lease Agreement that the lease herein would be for a period of 10 years from the 1st day of July, 2012 at the rent of MK500,000.00 per month for the first three years subject to increments. I exhibit hereto a copy of the said Lease Agreement marked PK 1.
7. It was a further term of the said Lease Agreement; in particular clause 3, that the plaintiff should carry out repair and maintenance works, electrical and plumbing works, amounting to a total of not less than MK35,000,000.00 to make the building thereon habitable since the said building was in a dilapidated state.
8. Further, the plaintiff was required to settle outstanding electricity and water bills in the sum of MK178,835.26 and MK129,013.39 respectively.
9. I repeat paragraphs 6 and 7 hereof and state that the maintenance works were supposed to be done in phases and during the first phase the plaintiff spent around the sum of MK8,586,683.90 to carry out the said maintenance works in order to make the property herein habitable. I exhibit hereto copies of receipts marked PK2.
10. The plaintiff has been duly paying the defendant all rentals in respect of the Lease Agreement herein and has so far paid the sum of MK10,360,000.00 through the defendant's bank account The said payments were effected through cheques drawn by the plaintiff to the defendant save the sum of MK1,300,000.00 which was paid by cash to the defendant which the defendant through Mr. Ajson duly acknowledged receipt thereof. I exhibit hereto copies of a schedule of payments made to the defendant by the plaintiff, a note acknowledging receipt signed by the said Ajson and bank statement marked PK 3(a), PK 3(b) and PK 3(d) respectively.
11. Furthermore, it was a term of the said Lease Agreement that the lease would be determined upon occurrence of breach of the agreement and/or at will by either party giving at least 6 months notice.
12. The plaintiff has never been in breach of the Lease Agreement herein, however, the defendant on or about 31st May 2013, wrote the plaintiff demanding them to vacate the said

premises immediately on allegations that the plaintiff has breached the Lease Agreement herein by failing to carry out maintenance works on the said property.

13. The plaintiff on or about 2nd July, 2013, responded through D & A Attorneys that the defendant's demand was in breach of the Lease Agreement herein since the plaintiff has been duly carrying out the said maintenance works and further that the defendant can only determine the Lease Agreement herein by giving the plaintiff a written 6 months notice. I exhibit hereto a copy of the said letter marked PK 4.
14. However, in breach of the Lease Agreement herein the defendant through a letter dated 5th September, 2013, which was only received by the plaintiff on or about 20th September, 2013, gave the plaintiff one month notice to vacate the said premises without any justification. I exhibit hereto a copy of the said letter marked PK 5.'

The plaintiff contends that the defendant's conduct in threatening and demanding that the plaintiff vacate the said premises immediately is in breach of the lease agreement since the period of the lease has not expired and the plaintiff has not breached the agreement. It is asserted by the plaintiff that the defendant has not right to unilaterally terminate the lease agreement without giving the plaintiff the requisite 6 months' notice as sanctioned by the lease agreement. It is the view of the plaintiff that the defendant cannot exercise its right of forfeiture for breach of any condition in the lease agreement without affording the plaintiff a reasonable notice to remedy the breach. The plaintiff argues that its proprietary rights have been and will continue being compromised by the conduct of the defendant if he is not restrained by an order of the court. According to the plaintiff, the plaintiff's and defendant's losses are difficult to compute as the plaintiff has spent a lot of money to maintain the premises in order to make it habitable and that damages are not an adequate remedy as the plaintiff has no alternative place to occupy. It is contended by the plaintiff that it had legitimate expectations to occupy and peacefully possess and use the demised premises herein for a period of 10 years as per the lease agreement. It is the prayer of the plaintiff that justice tilts in favour of extending an order of interlocutory injunction granted by the court restraining the defendant either by himself, his servants, agents or whomsoever from re-entering and or demanding the plaintiff to vacate the said property until the final determination of this matter or until a further order of this court.

To support their argument the plaintiff rely on the case authorities of *John Albert v Sonia Thomas (nee Singh)*, *Sukhdev Singh*, *Samsher Singh and Hellen Singh* to assert that the court should not be engaged to resolve issues of law at an interlocutory stage before the factual landscape of the case unfolds in the hearing of the substantive matter. The plaintiff argues that the purpose of an interlocutory injunction is to preserve the *status quo* of the

parties until the right of the parties are determined in the main action: *Tropical Garments Manufacturing Limited and Lilongwe Textile Limited v Ecobank Limited*¹ and *Mukadam v Chikavu Nyirenda*.²

In response to the defendant's arguments the plaintiff contends that the draft lease was not registered because the defendant had failed to execute it. The plaintiff states that despite this the parties had been carrying out their obligations under the draft lease agreement which amounts to acceptance of the lease. The plaintiff argues that from the defendant's arguments it is clear that there are triable issues which needs to go for trial and the interests of justice requires that the status *quo* be preserved. Accordingly, the plaintiff prays that the order of injunction obtained herein be continued till full trial is held.

b. The defendant's case

The defendant vigorously oppose the plaintiff's application and they filed an affidavit in opposition to the summons sworn by Mr. Louis Chakwantha, a legal practitioner in the employ of the legal firm Armstrong Lawyers and Company, who have conduct of this matter on behalf of the defendant. It is deposed from paragraph 3 to paragraph 8 of the defendant's affidavit as follows:

3. 'That I have read and understood the purported affidavit in support deposed by Phillimon Kalambule and I respond as hereunder;
4. That I refer to paragraphs 4, 5 and 6 of the affidavit in support and depose that there no any written lease agreement between the plaintiff and defendant and the exhibit attached thereto is unsigned one.
5. That I refer to paragraphs 7, 8, 9, 10 and 11 of the affidavit in support and depose that the plaintiff was a periodic tenant and was paying monthly rental to the defendant no any lease was executed.
6. That I refer to paragraphs 13, 14, 15, 16 and 17 and further deposes that the defendant gave the plaintiff herein one month notice to vacate the within premises as a periodic tenant. Produced and shown to me is a Photostat copy of the letter dated 5th September, 2013 addressed to the plaintiff' attorneys marked "Ex. LC1".
7. That I refer to paragraph 6 above and paragraphs 18, 19, 20, 21, 22, 23, 24 of the affidavit in support and further depose that at the expiry of the notice to vacate, the plaintiff became a tenant at sufferance and can be vacated without notice.
8. That from the foregoing, the plaintiff has no any interest in the disputed property and he is illegally occupying the same and the courts of law cannot condone illegalities.'

¹ Civil cause no. 2952 of 2008.

² MSCA Civil Appeal no. 37 of 2007.

The defendant is of the view that the plaintiff's claim is barred in law for the following reasons: first, the lease for 10 years lacks force of law as it was not registered as required under sections 40 and 103 of the Registered Land Act. Secondly, the lease agreement cannot be admitted in evidence as it was dutiable and the said stamp duty was not paid. The defendant's refer to the case of *Magola v Itaye*³ to support their assertions. Thirdly, that the draft lease agreement was not properly executed in that it was never signed. It is the view of the defendant that in this matter the plaintiff is relying on unexecuted lease agreement to buttress its claims and cannot sue claiming it be a lease and that the authority for this position is *Jessica Mzaza Somanje v Daisy Somanje and others*.⁴ The defendant contends that the plaintiff has no arguable case, no any irreparable damages will be suffered by it and that it obtained the *ex parte* injunction without disclosing that it is a tenant at sufferance and not a *lessee*, thereby misleading court, and that he who comes to equity must come with clean hands. The defendant is of the view that the parties to this action have never been lessor and lessee, rather the relationship has been of a tenant and a landlord. The defendant argues that the plaintiff was given a notice to vacate as a periodic tenant. That the plaintiff's occupation of the premises without the consent of the defendant makes it a tenant at sufferance and it can be vacated without notice. The defendant submits that an applicant for an injunction must establish his entitlement to the right he seeks to protect otherwise his claim for an injunction falls away automatically: *Malawi Mobile Ltd v Malawi Communications Regulatory Authority*.⁵

The applicable law

The principles governing the grant or refusal of an interlocutory injunction are those that were enunciated the landmark case of *American Cyanamid Co. v Ethicon Ltd*.⁶ In *Joubertina Furniture (Pty) Limited t/c Carnival Furnishers vs. Lilongwe City Mall*⁷ the court emphasized that the principles and guidelines in *American Cyanamid Co. v Ethicon Ltd*⁸ should be 'applied fervently to avoid injustice and inconvenience from interim reliefs.' The principles have been indorse in several local cases including those cases that have been cited by the parties such as the cases of *Abbas Mukadam v Chikavu*

³ [1995] (2) MLR 601.

⁴ MSCA civil appeal 29 of 1999.

⁵ MSCA civil appeal 17 of 2005.

⁶ [1975] AC 393.

⁷ HC/PR Msc. Civil Cause No. 41 of 2013.

⁸ [1975] AC 393.

*Nyirenda*⁹ and *Malawi Mobile Ltd v Malawi Communications Regulatory Authority*.¹⁰

The decision

This court has considered the whole of the evidence as it stands in deciding whether or not to maintain or discharge the interim order of injunction that was previously made: *Naura t/a K & C General Contractors v CBM Financial Services Ltd*.¹¹ Although the plaintiff argues that there was a lease agreement the defendant contends that the purported lease is invalid as it was neither signed nor registered. The evidence from the defendant shows that the plaintiff did not comply with certain legal requirement, such as section 40 of the Registered Land Act, which requires that a lease for a specified period exceeding three years be registered in the name of the lessee and the provision for payment of stamp duty under the Stamp Duties Act. In light of the failure to comply with these legal requirements it cannot be said that there was a valid lease agreement. This court is not convinced that the plaintiff has a good arguable claim which it seeks to protect and that there are serious questions to be tried.

Further, the plaintiff operates a business which should show clearly how much income and profits it makes in any given period of time therefore damages would be an adequate remedy for the plaintiff if it turns out that the defendant's decision in terminating the purported lease agreement was unlawful. An interim injunction being an equitable remedy that is temporary and discretionary, this court in exercise of its discretion finds that the balance of convenience lies in not granting a continuation of the order of interlocutory injunction. The plaintiff's *inter partes* summons for an order of interim injunction is therefore dismissed and the interim injunction order that was obtained earlier is hereby vacated.

The question of legal costs is discretionary and the defendant having succeeded in opposing this application it is ordered that costs follow the event.

Delivered in open court this 7th day of September 2018 at Chichiri, Blantyre.


Dorothy nyakaunda Kamanga
JUDGE

Case information:

Mr. Khan

Mr. Pearson

Mr. Phiri/ Ms. Million

Counsel for the plaintiff.

Counsel for the defendant.

Court Clerks.

⁹ MSCA civil appeal no. 37 of 2007.

¹⁰ MSCA civil appeal 17 of 2005.

¹¹ [1998] MLR 266 (HC) at 268.