



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE No. 294 of 2011

Between:

EVASON M. NGALANDE

APPLICANT

and

THE CHAIRMAN OF
LIMBE "CONTAINER" (FLEA) MARKET

1st RESPONDENT

MR. A BINALI

2nd RESPONDENT

MR. MISCHEK TCHALE

3rd RESPONDENT

MR DONEX NAMBWALE

4th RESPONDENT

RULING

The applicant herein made an *ex parte* application under Order 29 r. 2 Rules of the Supreme Court (RSC) for an order of injunction restraining the respondents, their servants or agents from barring the applicant to ply his trade in the Limbe "Container" Flea Market on the ground that his right to economic activity and development is at stake and the conduct of the respondents unfairly jeopardizes his business and survival. The court declined to hear the *ex parte* summons for an injunction and directed that the summons should come by way of an *inter partes* hearing. The record also shows that the applicant has not filed an originating process in this matter.

This is the order made following the *inter partes* hearing which was set down before the late Honourable Justice Manyungwa. I was assigned to prepare and deliver the ruling following the demise of His Lordship.

The application is supported by the affidavit of Evason M. Ngalande, the applicant herein and skeletal arguments. The material part of the applicant's affidavit reads:

3. That I am a plastic paper vendor in the Limbe 'Container' Market and documents E.N 1 and E.N 2 attached to this affidavit are my identity cards.
4. That I started plying my trade in the said market in 2008.
5. That my business prospered to the extent that I bought a container and vehicle between April and July 2011.

6. *That rumors started reaching me that I steal money from fellow vendors using magic (Kukawa) from 10 August 2011.*
7. *That on 13th August 2011, I was stopped from plying my trade in the said market by the respondents after Mr. D Mpasu, Dennis Chintengo, Dyson Mukhuna and Shy Ben lodged a complaint to the respondents alleging theft by magic trick (Kukawa).*
8. *That I lodged a complaint to Blantyre City Assembly official (Market Master at Limbe market and he stated that he found no reason why I should be chased out of the said market.*
9. *That when the respondents denied the Market Master's finding, the Market Master referred the matter to his bosses at Civic Center.*
10. *That I lodged the complaint at Civic Center but the matter has never been tabled.*
11. *That since 13th August 2011, I haven't plied my trade which has led to loss of business leading me to face problems in maintaining my family.*
12. *That my net profit on a daily basis was MK 7,000.00.*
13. *That the conduct of the respondents unfairly jeopardizes my business and survival.*

In opposition to the applicant's application, the respondents (all through the 2nd respondent) filed with the court an affidavit and skeletal arguments in opposition to the application. The material parts of the 2nd respondent's affidavit in opposition reads as follows:

2. *That I make this affidavit as a joint affidavit on my own behalf and also on behalf of the 3rd Respondent (Mr. Mischek Tchale) and the 4th respondent (Mr. Donex Nabwale).*
3. *That the matters of fact I depose to herein are personally known to me and I believe the same to the best of my knowledge information and belief.*
4. *That I am the Chairman of Limbe Flea Market Committee and have been since 2001.*
5. *That the 3rd Respondent and the 4th Respondent are the Secretary and the Disciplinarian respectively of Limbe Flea Market committee.*
6. *That as Chairman of the Limbe Flea Market my duties include but are not limited to dealing with issues like quarrels and theft among vendors, and looking at the general welfare of vendors.*
7. *That I deny that the Applicant (Evason M. Ngalande) is a plastic paper vendor in Limbe 'Container' Market because there is no Limbe Container Market and this is substantiated by the absence of the alleged EN 1 and EN2 to his affidavit.*

8. *That when the applicant started his business in 2008, he was doing it with a friend by the name of Peter Maluwa and that at that time their business capital was MK 15,000.*
9. *That later Peter Maluwa came to our office to complain that the Applicant was demeaning him and other vendors by telling them that they will fail in business and would go to the village to farm because they are all his (The Applicant's) children. Ironically however, it was Peter Maluwa who taught the applicant how to run a business.*
10. *That as a committee we called the applicant and asked him to be living in harmony with other vendors and that demeaning amongst vendors was not allowed. The applicant also admitted to have said demeaning words to fellow vendors.*
11. *That vendors started complaining to us that the applicant was stealing their money. For example, money belonging to Dennis Chintengo went missing while he (Dennis Chintengo) was in the company of the Applicant and when he asked the applicant about his missing money, the applicant answered to have stolen the money.*
12. *That as a committee we called the Applicant and he admitted to have stolen Chintengo money and undertook to refund the same and he really refunded the money*
13. *That other vendors who complained about their missing money which was admitted and refunded by the applicant are George Kuwerengeza and Zikhebu.*
14. *That since the rumor of his theft of other vendors' money was growing, other people came and told us (the committee) that the Applicant was chased away from Mulanje Mission Market and Nkando Market because of his stealing habit. Rumor also has it that he was banned from running a grocery at BCA where he stays because of theft. However, when the committee asked him, he admitted doing business in those markets but denied being chased away from those markets on grounds of theft.*
15. *That the Applicant's conduct of stealing other vendors' money and his clear admissions angered a lot of vendors that some vendors wanted to chase him and/or manhandle him.*
16. *That paragraph 15 hereof is repeated and I say that because of the various and numerous complaints from the vendors, on or about the 13th August, 2011 the committee stopped the applicant from conducting his business in Limbe Flea Market for the Applicant's safety and also to pave way for investigations.*
17. *That before investigations were instituted, on the same day, i.e the 13th August 2011 the Committee received a letter from the Police where the*

Applicant complained. We told the police about our fears regarding the Applicant's safety as well as his property and the police applauded our decision to stop the Applicant from plying his business in the market.

- 18. That after the proceedings in paragraph 17 above, the Applicant went to complain to the Market Master who, without asking the Committee what happened, told us to inform the applicant to start doing his business. However after we had explained to the Market Master the basis of our decision to stop the Applicant plying his business in the market, the Market Master told us that he would call a meeting to discuss the whole issue.*
- 19. That the Market Master later told us to go to the City Assembly where the Market Superintendent a Mr. Maunde referred it to the Deputy Chief Executive Officer Mr. Chanza. However, because Mr. Chanza was in a very busy schedule that day, he told us that he would soon call us for the meeting.*
- 20. That paragraph 19 above is repeated and I say that before the referred meeting was called, the following morning we received these court summons from the applicant.*
- 21. That a day after we received this summons the City Assembly called us for the meeting but we told them that the applicant caused to be issued this summons and the meeting did not take place since the matter is now in court.*
- 22. That the development in paragraph 25 above surprised the City Assembly because the applicant did not follow proper channels before commencing the action.*
- 23. That I repeat the foregoing paragraphs and I say that the applicant rushed to commence these proceedings before all avenues were exhausted.*
- 24. That this matter is therefore premature and ought to be dismissed*
- 25. That although the applicant has caused to be issued this summons and the same is in now in court, he has been going to police to complain that the committee and all vendors have chased his tenant which is but a lie aiming at tarnishing the image of the committee and the vendor fraternity*
- 26. That unless stopped from conducting his business in Limbe Flea Market, the Applicant will continue stealing and jeopardizing his fellow vendors' businesses and the more he does that the more the vendor fraternity is angered and the more the Applicant's security is at risk*

The affidavit ends with a humble prayer to the court that the applicant's application be dismissed with costs for being premature and for the sake of his safety.

The Law

The starting point is Order 29 rule 1 of the Rules of the Supreme Court (RSC) which provides that an application for the grant of an injunction may be made by any party to a cause. In *Ian Kanyuka v Thom Chumia & Others*, PR Civil Cause No. 58 of 2003 the court observed that-

“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. The injunction will almost always be negative in form, thus to restrain the defendant from doing some act. The principles to be applied in applications for injunction have been authoritatively explained by Lord Diplock in *American Cyanamid Co v Ethicon Limited* [1975] A.C 396.”

The principles on the grant and/or refusal of an interlocutory injunction are well settled under case law. The guidelines set in the case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 to establish whether an applicant has adequate case for the granting of an interlocutory are a consideration of the following:

- i. whether the applicant had a strong on merely an arguable case;
- ii. the adequacy of damages as a remedy;
- iii. the balance of convenience;
- iv. whether the status quo should be maintained;

If the applicant satisfies the above test, the grant or refusal of an injunction is a matter for the exercise of the court’s discretion on the balance of convenience.

We will now turn to the record of the case to examine how these principles apply to the facts in the present case. In any application for an interlocutory injunction, the first issue before the court has to be “is there a serious issue to be tried?” The facts disclosed in the plaintiff’s affidavit allege that the applicant was a plastic paper vendor in the Limbe ‘Container’ Market and documents E.N 1 and E.N attached to this affidavit are were his identity cards. Facts also reveal that he started plying his trade in 2008 and that rumors started reaching him that he steals money from fellow vendors using magic means (*kukawa*) from 10 August 2011. That on 13th August 2011, he was stopped from plying my trade in the said market by the respondents after Mr. D Mpasu, Dennis Chimtengo, Dyson Mukhuna and Shy Ben lodged a complaint to the respondents alleging theft by magic trick (*Kukawa*). That since 13th August 2011, he has not plied his trade which has led to loss of business leading him to face problems in maintaining my family. That the conduct of the respondents unfairly jeopardizes the applicant’s business and survival.

On their part the respondents contend that there is no serious issue to go to trial since in his view the affidavit evidence show that all avenues that were put in place to have the matter resolved were not fully utilized by the applicants and that the matter is premature as the applicant having jumped some stages in as far as having the matter resolved. The respondents assert that unless the applicant is stopped from conducting his business in Limbe Flea Market, the applicant will continue stealing and jeopardizing his fellow vendors' businesses and that the more he does that the more the vendor fraternity will be angered and the more the applicant's security will be put at risk.

From the facts herein, it will be reasonable to find that the applicant has strong arguable and good case, more especially on the basis that every person is entitled as of right to freely engage in economic activity, to work and pursue a livelihood anywhere in order to advance the right to development.

Another factor which this court is supposed to consider is whether damages be an adequate remedy? According to the principles enunciated in the *American Cyanamid Co* case, if the applicant succeeds and would be adequately compensated by damages for the loss sustained between the application and the trial, no interlocutory injunction should normally be granted. The applicant in his affidavit has stated that his daily net profit was K7,000.00. This, to the court, does not appear to be a figure that would be impossible to calculate in terms of compensating the applicant. The applicant having been evicted from the market in August 2011 damages would be easily calculated and damages would be an adequate remedy in the present case.

The court also notes that the balance of convenience lies in not granting the injunction for sake of securing the applicants safety considering the feared risk of mob justice in the circumstances of this matter.

In conclusion then, this court upon reading the record of the case is of the considered view that an order of injunction would not be an appropriate remedy and proceeds to dismiss the application on the grounds that:

1. there is no originating process that was filed by the plaintiff and it would not be proper for this court to grant the plaintiff the interim relief of an the interlocutory injunction when there is no substantive action.
2. The respondent's affidavit reveals that the applicant suppressed material facts or that applicant was not truthful in that the City of Blantyre set down the

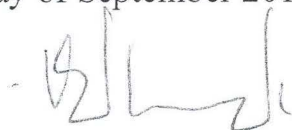
matter for hearing but the applicant elected not to appear for the hearing to give mediation a chance in this civil matter.

3. The applicant can be appropriately compensated for by damages as he has specified how much he makes in the form of profits.

It is for the reasons set out above that the application for an order of interlocutory injunction that was sought by the plaintiff is unsuccessful.

Since the applicant is prosecuting the matter through the Legal Aid this court no makes no order in regard to the costs occasioned by this summons.

Delivered in open court this 26th day of September 2018 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

Case Information:

The late Hon Justice Manyungwa
Mr. Mlauzi
Mr. Kandeya
Mr. Kwakwala
Mr. Phiri / Ms. Million

Presiding Judge
Senior Legal Aid Advocate for the applicant.
Senior Legal Aid Advocate for the applicant.
Counsel for the Defendant.
Court Clerks.