JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
LAND CAUSE NO 11 OF 2017

BETWEEN

NACHILENJE BISHOP ..... 1ST CLAIMANT
PAUL CHIMALA ..... 2ND CLAIMANT

AND

MCLOVA PHULUSA KAMBA ..... 1ST DEFENDANT
MR. KANTEMA ..... 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Kadyampakeni, of Counsel, for the Plaintiffs
Mr. Phokoso, of Counsel, for the Defendants
Mrs. Doreen Nkangala, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is this Court's ruling on an application by the Defendants for an Order of interlocutory injunction [Hereinafter referred to as the "Defendants' application] restraining the Claimants, either by themselves, agents and/or servant or whosoever acting on their behalf, from using, accessing, renting or attempting to rent out or undertaking any activities whatsoever on the piece of land Title Number Likabula 1565 [hereinafter referred to as the "land in dispute"], the subject matter of these proceedings, pending the hearing and final determination of this matter or until further order of the Court.

The Defendants' application is brought under Order 10, rule 27, of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

The background to the Defendants' application is of the simplest. The main proceedings herein were commenced by the Claimants on 7th March 2017. For

reasons that will become apparent in a due course, it is necessary that the statement of claim be quoted in full:

> *"1. The 1st Plaintiff was at all material times an equitable owner of plot Title Number Likabula 1565 ("The Plot" in the city of Blantyre since 1970 or thereabout.*
>
> *2. The 1st Plaintiff sold the said plot to the 2nd Plaintiff in 2012.*
>
> *3. The 1st Defendant was at all material times the 1st Plaintiff's tenant on the said plot from 1987 or thereabout until 1996.*
>
> *4. In breach of the tenancy agreement and unknown to the 1st Plaintiff, the 1st Defendant registered an interest in the Plot at the Lands Department in Blantyre in 1991 and caused a title deed to be issued in his name.*
>
> *5. The 1st Defendant has recently purported to sell the said plot to the 2nd Defendant.*
>
> *6. Since 2016, the 2nd Defendant has wrongfully denied the 2nd Plaintiff to make make developments on the said plot.*
>
> *7. The Defendants intend unless restrained by this Honourable Court to continue to prevent the 2nd Plaintiff from lawfully developing the plot.*
>
> *8. By reason of the said matters aforesaid, the 2nd Plaintiff has suffered loss and damage.*
>
> ***PARTICULARS***
>
> - *Loss in value of building materials kept on the side.*
>
> ***AND** the Plaintiff claim*
>
> *(a) A declaration that the 1st Plaintiff was at all material times an equitable owner of plot Title Number Likabula 1565;*
>
> *(b) A declaration that the 2nd Plaintiff is and has since 2012 been an equitable owner of plot Title Number Likabula 1565*
>
> *(c) A declaration that the 1st Defendant was at all material times the 1st Plaintiff's tenant on plot Title Number Likabula 1565;*
>
> *(d) A declaration that the 1st Defendant's title deed relating to plot Title Number Likabula 1565;*
>
> *(f) A declaration that the title deed given to the 1st Defendant over plot Title Number Likabula 1565;*
>
> *(g) An Order of permanent injunction restraining the Defendants whether by themselves, servants, agents or otherwise whosoever from obstructing and/or*

interfering with the 2nd Plaintiff's developments on plot Title Number Likabula 1565;

(h) An Order of permanent injunction restraining the Defendants whether by themselves, servants, agents or otherwise whosoever from developing and/or constructing any structures on plot Title Number Likabula 1565;

(i) An Order of permanent injunction restraining the Defendants whether by themselves, servants, agents or otherwise whosoever from dealing with plot Title Number Likabula 1565 in any manner adverse to the interests of the 2nd Plaintiff;

(j) Damages for trespass;

(k) Costs of the action."

Almost contemporaneously with the issuance of the writ of summons, the Claimants filed with the Court an application for orders of interlocutory injunctions restraining the Defendants from (a) obstructing and/or interfering with the 2nd Plaintiff's developments on plot Title Number Likabula 1565 [Hereinafter referred to as the "land in dispute"], (b) developing and/or constructing any structures on the land in dispute and (c) dealing with the land in dispute in any manner in adverse to the interests of the 2nd Plaintiff [Hereinafter referred to as the "Claimants' application"].

The Claimants' application came before my brother Judge, Justice Chigona, on 7th March 2017, by way of an ex-parte summons, and he ordered the application to come by way of an inter-partes hearing on 21st March 2017. The Claimants' application was dismissed because the Claimants had failed to effect service of the Court process on the Defendants.

The Defendants' application is supported by a statement, sworn by the 1st Defendant, and the material part thereof provides as follows:

*"1. **THAT** I am the 1st Defendant in these proceedings and currently the legal owner of **Title Number Likabula 1565** and I am duly authorized to swear this sworn statement.*

*2. **THAT** the information I depone to herein is personally known to me, information I verily believe the same to be true.*

*3. **THAT** in **1991** I bought the then piece of unregistered land now know as **Title Number Likabula 1565** from Mr Grenwell Kachere. A sale of Agreement witnessed by the Chief at that time and the MCP Chairperson is now exhibited as **MP1**.*

4. ***THAT*** *in* ***1992*** *I obtained legal Title to the land during the open Adjudication process. A copy of the document proving this and the Title is now exhibited as* ***MP2***.

5. ***THAT*** *the 1st Claimant and her husband were owners of an adjacent land to the* ***Title Number Likabula 1565*** *and neighbours with Mr Glenwell Kachere from whom I bought Title Number Likabula 1565 and have never at any point owned* ***Title Number Likabula 1565***.

6. ***THAT*** *my daughter lived on the land this whole time until* ***2015*** *when I sold it to the 2nd defendant pending change of ownership at the lands registry.*

7. ***THAT*** *in or about* ***2016***, *the 1st Claimant because she was unaware of the history of the land and because she was unaware that I bought it from Mr Glenwell Kachere and I believe thinking that it was ownerless as Mr Kachere left the area and I myself relocated to Mzuzu, started claiming that she owned the land and together with her son cooked up a fraudulent story that I was their tenant, duped the Chief and the 2nd Claimant and sold it to the 2nd Claimant although unknown to her I have Title over the land and had sold it to the 2nd Defendant.*

8. ***THAT*** *when discovered this, she commenced this action and told the 2nd Claimant to occupy my land to which I have Title and sold to the 2nd Defendant.*

9. ***THAT*** *the 2nd Claimant is now using the land in a manner that is detrimental to my interests as the owner and the interest of the 2nd Defendant as a purchaser.*

10. ***THAT*** *further as the matters are in court waiting determination the 2nd Claimant has gone ahead to rent out the land to Second Hand Car Sellers for years who are destroying it, digging trenches etc. A picture showing Garage is now exhibited as* ***MP3.***

11. ***THAT*** *the activities of the 1st and 2nd Claimants as the matter subsists in court will destroy the land from its original form and intended use.*

12. ***THAT*** *during the mediation session, our Lawyer addressed the court on this matter and asked the Claimants' Lawyers to tell the Claimants to stop the activities and renting out of the land which they have not adhered to.*

13. ***THAT*** *I believe that unless restrained by this Honourable Court, the Claimants will continue to use, rent out and destroy the land subject matter of these proceedings."*

The Claimants filed three statements in opposition, sworn by the 2nd Claimant, Mr. Mussa Magasa and Joseph Bishop respectively. The sworn statement of the 2nd Claimant reads as follows:

*"3. In 2012, I bought a plot located in Che Mussa Township from the 1st Claimant for the sum of K1,300,000.00. There is now produced and shown to me a copy of the sale agreement exhibited hereto and marked "**PC1**". The 1st Claimant informed me that her family settled on the plot in the 1970's.*

4. I recently constructed a fence in 2016 around the plot with the aim of constructing a house thereafter.

5. I was shocked when I was recently called by Group Village Headman Che Mussa that he received a complaint from the 2nd Defendant. When I met the Group Village Headman, I was informed that the 2nd Defendant claimed to have bought the plot from the 1st Defendant and I should stop making developments thereon pending resolution of ownership of the plot.

6. I later learnt that the 1st Defendant has been given a title deed over the plot which had been registered plot Title Number Likabula 1565 ("The plot"). I visited the Lands Department in Blantyre to confirm.

*7. A search conducted at the Lands Registry shows that a title deed was given to the 1st Defendant. There is now produced and shown to me a copy of the certificate of official search exhibited hereto and marked "**PC2**".*

No prejudice suffered by the Defendants

8. As stated above, a fence was constructed on the plot and I believe the Defendants were aware of this development. On the other hand, the 2nd Defendant has not made any construction thereon. In the circumstances, the balance of convenience lies in not granting the Injunction sought.

*9. I believe that if the injunction is granted, the Defendants will interfere with my ownership rights on the plot which is now being used as a garage. I deny the Defendants' claims that the land is being destroyed. Pictures taken inside and outside the property are exhibited and marked **"PC2"** and **"PC3"** respectively.*

Damages are an adequate remedy

10. I further believe that it would be possible to assess damages payable for any alleged loss caused to the herein. It is therefore my view that an Order of Injunction is not an appropriate remedy."

Mr. Mussa Magasa is Group Village Headman Che Mussa and the land in dispute is located within his area. He became Village Headman Mussa 34 years ago by way of inheritance from his father. He was later appointed Group Village Headman Che Mussa. Paragraphs 4 to 10 of his sworn statement are material:

"4. The plot was given to Mr. and Mrs. Bishop in the early 1970's by the Village Headman Chief Herbert Magaga. They were business people and settled on this piece of land.

5. The Bishop family constructed a house on the plot and stayed there for a long time. I do not recall at any point being any misunderstanding regarding ownership of the plot.

6. After staying on the plot for more than a decade, the Bishop family decided to go to the Village in Nsanje. Mrs. Nachilenje Bishop, the first Claimant, came to me to bid farewell. She informed me they would leave behind a tenant.

7. After a long time, the house on the plot fell down. No other structure was erected on the plot thereafter. The 1st Claimant returned in 2012 and informed me that she had agreed to sell the plot to the 2nd Claimant, Mr. Paul Chimala. The plot eventually was sold to the 2nd Claimant.

8. The 2nd Claimant constructed a fence on the said plot.

WRANGLES ON PLOT OWNERSHIP

9. I later heard that the 1st Defendant was given a title deed by the Lands Department and that he recently sold the plot to the 2nd Defendant. I do not know how he came to acquire ownership over the plot. To my knowledge, the 1st Defendant was a tenant on the plot and did not make any constructions on it.

10. It is very surprising that a title deed could be given to the 1st Defendant when he has not made any development on the plot and he has no claim over it."

Mr. Joseph Bishop is the first born son of the 1st Claimant. His sworn statement complements the sworn statements by the 2nd Claimant and Mr. Musa Magasa.

It will be recalled that the application is brought under Order 10, rule 27 of CPR, which provides as follows:

"The Court may, on application, grant an injunction by an interlocutory order when it appears to the Court-

(a) there is a serious question to be tried;

(b) damages may not be an adequate remedy; and

(c) it shall be just to do so,

and the order may be made unconditionally or on such terms or conditions as the Court considers just."

An interlocutory injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined: **American Cyanamid Co. v. Ethicon Limited [1975] A.C. 396 (American Cyanamid Case)** and **Ian Kanyuka v. Thom Chumia & Others, PR Civil Cause No. 58 of 2003.** In the latter case, Tembo J, as he then was, observed as follows:

> *"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.***

In the **American Cyanamid Case,** Lord Diplock laid down the following procedures as appropriate in principle:

1. Provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a *prima facie* case

2. The court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory injunction

3. As regards the balance of convenience, the court should first consider whether, if the plaintiff succeeds, he would be adequately compensated by damages for the loss sustained between the application and the trial, in which case no interlocutory injunction should normally be granted

4. If damages would not provide an adequate remedy the court should then consider whether if the plaintiff fails, the defendant would be adequately compensated under the plaintiff's undertaking in damages, in which case there would be no reason upon this ground to refuse an interlocutory injunction

5. Then one goes to consider all other matters relevant to the balance of convenience, an important factor in the balance, should this otherwise be even, being preservation of the status quo

6. Finally, and apparently only when the balance still appears even, 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 sworn statements.

The criteria are not inflexible. They should be read in the context of the principle that discretion of the court should not be fettered by laying down any rules which would have the effect of limiting the flexibility of the remedy. As was aptly put in **R v. Secretary of State for Transport, Ex-parte Factortame Ltd & Others (No.2) (1991) 1 A.C. 603** at 671:

> *"Guidelines for the exercise of the court's jurisdiction to grant interim injunctions were laid down in the* ***American Cyanamid Co. v. Ethicon Ltd [1975] A.C. 396*** *in the speech of Lord Diplock in that case, with which the remainder of their Lordships concurred. The words "guidelines" is used advisedly, because I do not read Lord Diplock's speech as intending to fetter the broad discretion conferred on courts. On the contrary, a prime purpose of the guidelines established in the Cyanamid case was to remove a fetter which appeared to have been imposed in certain previous cases..."*

I now turn to see how these principles apply to the facts in the present case.

Is There a Serious Issue to be Tried?

In any application for an interlocutory injunction, the first issue before the court has to be *"Is there a serious issue to be tried?"*. Indeed this must be so because it would be quite wrong that a claimant should obtain relief on the basis of a claim which was groundless. If a party seeking an interlocutory injunction is able to establish that there is a serious case to be tried, then he or she has, so to speak, crossed the threshold; and the court can then address itself to the question whether it is just or convenient to grant an injunction: **R v. Secretary of State for Transport, Ex-parte Factortame Ltd & Others (No.2).** If the answer to the question whether there is a serious issue to be tried is "no", the application fails in *limine* (see **C.B.S. Songs v. Amstrad [1988] AC 1013**.

Having considered the sworn statements filed with the Court, it is clear that there is a dispute of ownership of the land in dispute and that the dispute is proceeding to trial for determination of the issues it raises. In the premises, I am satisfied that there are triable issues.

Would Damages be an Adequate Remedy?

I now turn to compensability. Once the court has found that there is a serious issue to be tried, it should go to consider the adequacy of the respective remedies in damages available for either party.

As the subject matter of the present case relates to real property, there is really little to say on the matter. It is trite that every piece of land is of particular and unique value to the owner and damages are an inadequate remedy and, in any

case, damages would be difficult to assess. The clearest and fullest statement of the principle regarding inadequacy of damages with respect to land is contained in Chitty on Contract – General Principles, 26th ed., Sweet and Maxwell at paragraph 1868:

> *"Land: The law takes the view that the purchaser of a particular piece of land or of a particular house (however ordinary) cannot, on the vendor's breach, obtain a satisfactory substitute, so that specific performance is available to him. A vendor of land, too, can get specific performance; for damages will not adequately compensate him if he cannot easily find another purchaser or if he is anxious to rid himself of burden attached to the land. It seems to make no difference that the land is readily saleable to a third party; or that after contract but before completion a compulsory purchase order is made in respect of it... Yet in such cases damages (based on the difference between the contract price and the resale price, or the compensation payable on compulsory acquisition) would seem normally to be adequate remedy.".*

The legal position taken by the learned authors of *Chitty on Contract – General Principles* has been fully endorsed by courts in Malawi: see the decision by the Supreme Court of Appeal in **Village Headman Kungwa Kapinya and Others v. Chasato Estates Ltd, MSCA Civil Appeal No. 75 of 2016 (unreported)** and the cases of **Sikawa v. Bamusi, HC/PR Land Civil Cause No. 53 of 2013 (unreported)** and **Mleva v. Simon, HC/PR Land Civil Cause No. 53 of 2013 (unreported)** referred to therein.

In the premises, it is my finding that damages may not be an adequate remedy.

Balance of Justice

It is the contention of Counsel Phokoso that the balance of convenience lies in granting the order of interlocutory injunction being sought so that the Defendants should do not suffer irreparable harm while waiting for the determination of the matter at trial. The Defendants are unhappy that the 2nd Claimant has rented out the land in dispute to second hand car sellers and these sellers are destroying the land in dispute by, among other things, digging trenches thereon.

On his part, Counsel Kadyampakeni urged the Court to maintain the status quo:

> *"In considering the balance of convenience, the Court will have to determine whether it will be doing greater injustice in refusing or granting the injunction. In this regard, there are a number of factors which show that the Court would be doing a greater injustice by granting the injunction than by refusing it.*
>
> *A fence was constructed on the plot in 2016 and the 2nd Claimant has been in possession and use of the plot. On the other hand, the 2nd Defendant has not made any development*

thereon. In the circumstances, the balance of convenience lies in favour of not granting the Injunction sought."

Having considered all relevant facts, I am satisfied that this is an appropriate case warranting the grant of an order of interlocutory injunction for purposes of maintaining the status quo until the determination of the main proceedings herein or until a further order of the Court. The status quo is the state of affairs existing during the period immediately preceding the arising of matters leading to the issuance of the writ of summons: see **American Cyanamid Case and Garden Cottage Foods Limited-and – Milk Marketing Board (1984) HL 1 AC p.130 at p.140.**

For avoidance of doubt, the grant of the order of interlocutory injunction means that:

(a) the Claimants shall forthwith cease to dig trenches on the land in dispute or to undertake thereon any activities that would cause irreparable harm to the plot in dispute; and

(b) the Defendants shall forthwith cease to develop and/or construct any structures on the land in dispute or to deal with it in any manner adverse to the interests of the 2nd Plaintiff.

Conclusion

All in all, the status quo must be maintained till the matter is decided on. Costs in the cause.

Pronounced in Chambers this 26th day of October 2018 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE