IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

CIVIL CASE NO. 199 OF 2018

BETWEEN

LASTON KAMPUNGA..... CLAIMANT

AND

ALAFULEDI BAKUWO.....FIRST DEFENDANT

AND

JACOB KANTAMBO..... SECOND DEFENDANT

Coram Hon Nriva Judge

Mr Nyambo, Counsel for the claimant

Mr Kapoto, Counsel for the defendants

Mrs Mtegha Court Official

RULING

Introduction

The claimant commenced this action claiming that the defendants were interfering with his right to exercise powers as Group Village Headman Nyaka. He is seeking a declaration that he is the bona fide Group Village Headman Nyaka, and an order restraining the defendants from interfering with his exercise of the powers.

Injunction

Pending the determination of the matter, the claimants applied for an injunction restraining the defendants from interfering with his exercise of powers. This, therefore, is the hearing to consider whether to grant an injuction or not.

Arguments for and against the injunction

In support of the application, there is a sworn statement of Laston Kampunga, the claimant. In the statement, Joseph Tutuma, the immediate past Group Village Headman Nyaka died on 4th August, 2015. The family elected him as the next Group Village Headman Nyaka. However, the first defendant does not want him to work as Group Village Headman Nyaka and has been interfering with his position.

According to Mr Nyambo, representing the claimant, the claimant was aggrieved with the defendants' interference with his exercise of powers of Group Village Headman Nyaka and came to the court for assistance by the way of interlocutory injunction to stop the defendants from interfering with his exercise of his powers.

According to Mr Kapoto representing the defendants, the parties are from the same clan and are entitled to chieftaincy and can be appointed as village headmen. In his argument, the second defendant was appointed as a chief under customary law.

The defendants filed several sworn statements against the grant of the injunction. The statements are to the effect that Jacob Kantambo is the rightful person to be Group Village Headman Nyaka. Group Village Headman Mtenje argued that the only reason Mr Kantambo was not accepted by the Chief as Group Village Headman Nyaka was because Mr Kampunga had already represented himself as the one.

Jacob Kantambo gave the background to the issue starting from the time of the late Tutuma and suggested that although the Chief did not accept him, he was already working as the Group Village Headman.

He also said that all the village headmen in the area report to him. This has also been stated in a joint sworn statement of some village headmen under Group Village Headman Nyaka.

The statements also show that the claimant has never discharged any duty of the Group Village Headman Nyaka, but as Village Headman Kampunga. Further the District Commissioner for Blantyre recognises him as Village Headman Kampunga. Counsel argued that the status quo is that the claimant is the acting VH Kampunga and the second defendant is the acting Group Village Headman

Nyaka since 2017. Being from the same family, the issue is whether the family appointed the claimant or the second defendant as a village headman.

Counsel argued that an interlocutory injunction will overturn everything in the village. The injunction will not maintain status quo but change the status quo.

In response, Mr Nyambo insisted that family members endorsed the claimant as Group Village Headman Nyaka. He said it is not in dispute that the claimant was Village Headman Kampunga but insisted that the family appointed him as Group Village Headman Nyaka. From then, the defendants have been interfering with that appointment by the family.

Counsel argued that the exercise of powers claimed to be the *status quo* is probably without lawful authority. Counsel argued that the rightful candidate of Group Village Headman Nyaka is the applicant but for the infringement by the defendants.

In summary, the claimant claims that he is the rightful Group Village Headman Nyaka but the defendants are interfering. On the other side, the defendants argue that the claimant is not the rightful person for the position.

Law

The law on interlocutory injunctions is under Order 10 Rule 27 of the Courts (High Court) (Civil Procedure) Rules. The rule reads:

> "The Court may, on application, grant an injunction by an interlocutory order when it appears to the Court:-
>
> (a) There is 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 conclusions as the Court may consider just."

The principles for granting an interlocutory injunction are enunciated in the case of *American Cynamid v Ethicon Limited* [1975] A.C. 396 where the

House of Lords stated that the court should have regard to the following criteria:

a) First: - Is there a serious issue to be tried?

b) Secondly: - Are damages an adequate remedy?

c) Thirdly: - Where does the "balance of convenience" or "justice" lie?

See: Wilkinson's *Commercial Litigation:- Pre-emptive Remedies* 2nd Ed p. 103.

In the American Cynamid Case, Lord Diplock explained at p 407D that

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious".

In *Mulipa v Mr and Mrs Buliyani and others* Land Cause Number 105 of 2015, the Court said Courts grant an interim injunction where the applicant discloses a good arguable claim to the right he seeks to protect. AT this point it is not for the Court to determine the merits of the case but consider whether the claim establishes a triable issue. The Court only, to a limited extent, investigates the merits to a limited extent only, especially, considering the circumstances and the facts, the claimant's cause of action has substance and reality.

> 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 plaintiffs claim. See *Mkwamba v Indefund Ltd* [1990] 13 MLR 244.

The Court then considers 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. The Court 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 claimant's claim. See *Mkwamba v Indefund Ltd* [1990] 13 MLR 244.
The other factor to consider is whether the balance of convenience favours the granting of an injunction herein or not.

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 decisions, the Courts have suggested that it is not only the aspect of convenience that the Court should weigh, the Court also ought to consider the risk of doing an injustice to one side or the other. (*Cayne v Global Natural Resources plc* [1984] 1 All ER 225). 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. The Learned Lord went on to say that where other factors appear to be evenly balanced, it is prudent to employ measures calculated to preserve the status quo. *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, defines *status quo* as 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.

Determination

In this matter, the issue has been much about the *status quo*. The claimant argues that the family appointed him as a Group Village Headman. The defendants argue that the claimant is not the rightful person to be Group Village.

In *Mangulama and others v Dematt* Civil Case No. 893 of 1996 (unreported), the Court said applications for interlocutory injunctions are not to determine who is right or wrong: the aim is to preserve the status quo until the rights of the parties are determined.

Now, the question is what the *status quo* in the matter is. As I have stated, it is apt at this point to delve into the merits and demerits of the matter. Be that as it may, *prima facie,* much as there is quarrel as to the appropriate person to be the village headman, one defendant is currently holding the position. Perhaps, granting the injunction might not be the appropriate action for the Court to take.

The Court might disturb the status quo. I, therefore, refrain from making the order of injunction.

Conclusion

In the light of my finding, I believe it may not serve justice to grant the interlocutory injunction. I dismiss the application. In my discretion, I make no order of costs. I direct that the matter should be set down for mediation so that the matter might be concluded with speed.

MADE the 10th day of August 2018

J NRIVA

JUDGE