



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY



CIVIL CAUSE NO 113 OF 2017

BETWEEN

MARY NAYEJA PLAINTIFF

AND

FELORD NAYEJA DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mrs. Mwenelupembe, of Counsel, for the Plaintiff

Mr. Kapoto, of Counsel, for the Defendant

Mr. O. Chitatu, Court Clerk

RULING

Kenyatta Nyirenda, J.

On 12th April 2017, the Plaintiff commenced an action by a specially endorsed writ of summons against the Defendant. The Statement of Claim provides as follows:

- “1. *The Plaintiff’s claim is for an injunction restraining the Defendant either by himself or his servants, officers, employees, or agents or whoever acting on his behalf from interfering with, intermeddling with, selling, disposing of or otherwise dealing with the piece of land situated at Bvumbwe belonging to the plaintiff.*
- 2. *Costs of this action.*”

On 11th May 2017, the Plaintiff filed an ex-parte summons for an order of injunction restraining the restraining the Defendant either by himself or his servants, officers, employees, or agents or whoever acting on his behalf from

interfering with, intermeddling with, selling, disposing of or otherwise dealing with the piece of land situated at Bvumbwe belonging to the plaintiff pending the determination of the main action or a further order of the Court.

The ex-parte summons was supported by an affidavit sworn by Mr. Mzati-Kidney Mbeko and the substantive part thereof reads as follows:

- “3. ***THAT*** by a court judgement between the parties dated 28th May 2010, the High Court distributed out of four houses: two houses to the Plaintiff and two other houses to the Defendant situated in Bvumbwe.
4. ***THAT*** the Defendant is in the process of trying to sell the said piece of land behind the house that was awarded to the Plaintiff.
5. ***THAT*** the conduct of the Defendant greatly jeopardizes the Plaintiff's quite enjoyment of her residence and it is conduct that require to immediately stop;”

The ex-parte summons came before me and I ordered the matter to come by way of inter-partes hearing on 24th May 2017. The inter-partes hearing did not take place until on 14th June 2017. The Defendant was not present despite being served with the court process. Counsel Mwenelupembe sought the Court's leave to proceed with hearing the application in the absence of the Defendant and the leave was duly granted. Upon hearing Counsel Mwenelupembe and perusing the supporting affidavit, the injunction was granted.

On 3rd July 2017, the Defendant filed with the Court an ex-parte summons for rehearing of summons for injunction and setting aside the order of injunction. Counsel Kapoto deponed that the inter-partes summons was served on the Defendant's his wife on 13th June 2017 and only brought to his attention of the Defendant after the set hearing date, 14th June 2017. By consent of the parties, the hearing of the inter-partes summons was set for 27th July 2017.

The Defendant filed an affidavit in opposition to the summons for an injunction, sworn by the Defendant. It is the case of the Defendant that the Plaintiff's action is res judicata Matrimonial Cause No. 23 of 2008. The material part of the affidavit is couched in the following terms:

- “4. ***THAT*** after the dissolution of my marriage with the plaintiff, the High Court, before Justice Kamwambe, distributed matrimonial property under Matrimonial Cause number 23 of 2008, where I was the plaintiff.

5. *THAT on the land herein, the High Court determined that the land belongs to me. After taking cognizance that the plaintiff had stayed with me on the land for 33 years, the court decided to give the plaintiff herein 2 houses erected on a portion of the said land of mine as her share as she contributed towards the construction of the said houses. I now exhibit a copy of the judgment as FN 1.*
6. *THAT the plaintiff was not satisfied with the determination of the High Court and appealed to the supreme court of Malawi, which appeal was not prosecuted. I now exhibit copies of documents for appeal as FN 2.*
7. *THAT having failed to appeal, the plaintiff resorted in disobeying the court order, by refusing to surrender my houses, to the extent that I commenced contempt proceedings against her. I now exhibit contempt proceedings documents as FN 3.*
8. *THAT the plaintiff, in blatant disobedience of the court judgment, constructed a third house on the land, which house is still standing, constructed a cattle kraal on my land and molded bricks and burnt them on my land with an intention of building a fourth house.*
9. *THAT I complained of the plaintiff's conduct and the plaintiff's legal practitioner, Juliet Sibale and my legal practitioner, Chagwamnjira & Co, agreed that both parties should visit the land to verify what was on the ground. I now exhibit a letter of Miss Sibale as FN 4.*
10. *THAT when we visited the site, we agreed that she would use the houses given to her by the court while I continue using my houses and the land.*
11. *THAT on the issue of the third house and the cattle kraal, I accepted that the plaintiff may continue using them, that is, I gave her the land she encroached, which is about 20 meters from her house.*
12. *THAT on the new bricks she had molded and burnt on my land, we agreed that she would remove them but up to now, she has not done so and the bricks are still on my land. She was also stopped from constructing the fourth house.*
13. *THAT apart from the two houses the plaintiff was given by the court, the plaintiff encroached onto my land by 20 meters to the right and 10 meters at the back but I just let her occupy the said land while I continued using the land that remained and I continued cultivating on it.*
14. *THAT I believe that as the court that decided on the ownership of the land in this matter has concurrent jurisdiction with this court, there is no issue for this court*

to determine as the same was determined and the plaintiff appealed before abandoning his appeal.

15. *THAT I do not have any intention of selling my said land as I have children depending on the said land.*
16. *THAT the land is mine, was determined to be mine in 2010 by the High Court, hence the plaintiff doesn't have any right to protect on the said land, as I have never ever interfered with her enjoyment of her two houses.*
17. *THAT I believe that the plaintiff did not come to court with clean hands and would like to use the injunction herein to intimidate me and defy the judgment of Justice Kamwambe, as she has been doing.*

WHEREFORE I humbly pray to this hounourable court for the dismissal of the plaintiff's application for an injunction with costs."

The main issue for determination of the court is whether this Court should order continuation of the order of interlocutory injunction, as was argued by Counsel Mwenelupembe, or dismiss the instant summons, as was argued by Counsel Kapoto.

An interlocutory injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined: see Order 29, rule 1(2) of the Rules of Supreme Court, **Series 5 Software Ltd v. Clarke & Others [1996] 1 ALL ER 853** and **Ian Kanyuka v. Thom Chumia & Others, PR Civil Cause No. 58 of 2003**. In the latter case, Justice Tembo, 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**".*

Very summarily, Lord Diplock in **American Cyanamid Co. v. Ethicon Limited [1975] A.C. 396** 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 affidavit evidence.

In any application for an interlocutory injunction, the first issue before the court has to be "*Is there a serious issue to be tried?*". If the plaintiff can establish that there is a triable issue, 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)**, supra. However, on the other hand, 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**).

Counsel Mwenelupembe submitted that there is a serious question to be tried, namely, whether the acts of the Defendant in seeking to sell the land in question violates the Plaintiff's right to property.

The Defendant, on the other hand, contends that there is no issue to go to trial in that the matter is *res judicata*. Counsel Kapoto invited the Court to note that the

issue regarding the ownership of the land in question was already determined in Matrimonial Cause No. 23 of 2008 which was between the same parties. The Court held that the Defendant was the owner of the land in question.

In her response, Counsel Mwenelupembe admitted that the position is indeed as was determined in Matrimonial Cause No. 23 of 2008 but the Plaintiff's concern is that her appeal is taking long to be heard hence her seeking an injunction to protect her rights.

I have considered the respective submissions by Counsel and I fully agree with Counsel Kapoto that the present case is caught by the principle of *res judicata*. If the appeal is taking time to be heard, the answer does not lie in instituting a fresh case: see **Spokes v. Banbury Board of Health (1865) LR 1 Eq 42** wherein Wood V-C said, at 48:

“the simple and only view is that an order must be observed, that those who wish to get rid of that order must do so by the proper course, an appeal. So long as it exists, the order must be obeyed, and obeyed to the letter...”

The matter does not rest there. There are two other equally cogent reasons why the injunction that was granted herein has to be set aside. Firstly, it is trite that as far as an *ex parte* application is concerned, all the facts must be laid before the Court and nothing has to be suppressed. The court requires *uberrima fides* on the part of the applicant: see the judgment of Lord Cozens-Hardy, M.R. in **R v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond de Polignac [1917] 1 KB 486.**

The *ratio decidendi* of **R v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond de Polignac**, supra, is that if an *ex parte* injunction has been granted upon an affidavit which was not candid and did not fairly state the facts, but state them in such a way as to mislead and deceive the court, there is power inherent in the court, in order to protect itself and prevent an abuse of process, to discharge the injunction and even to refuse to proceed further with the examination of the merits: see also **Vitsitsi v. Vitsitsi [2002-2003] MLR 419** wherein the Supreme Court of Appeal stated, at p.422, that:

“it is a perfectly and long settled principle of law that a person who makes an ex-parte application to the court is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not do so he will not be allowed any advantage gained by means of an order which will have been so obtained”

It has to be borne in mind that material facts are facts which if known to the court would have led the court to arrive at a conclusion or order different from the one it arrived at. Therefore, for the conclusion to be reached that the plaintiff suppressed or misrepresented facts, the alleged suppressed facts must be facts which if it were laid before the court the ex-parte injunction could not have been granted: see **Gloria Mchungula Amani v. Stanbic Bank Limited and Another, HC/PR Civil Cause No. 558 of 2007(unreported)**.

I have carefully analysed the affidavit evidence before the Court and I am satisfied that the Plaintiff suppressed material facts at *ex parte* stage and there is just no way in which the interlocutory injunction would have been granted if the Plaintiff had not suppressed the fact that the dispute between the Plaintiff and the Defendant was already the subject matter of determination by the High Court in Matrimonial Cause No. 23 of 2008.

Secondly, it is worth noting that the relief the Plaintiff seeks in the main case is also an injunction in the same terms as the interlocutory injunction: see the Statement of Claim. In other words, the interlocutory injunction has the effect of granting the very relief the Plaintiff seeks in the main action. This is not legally permissible: see **Chirwa v. Kaunda t/a Chirwa Building Contractors (1995) 16(2) MLR 502 HC**.

In light of the foregoing, the interlocutory order of injunction that was granted herein is set aside with costs.

Pronounced in Chambers this 8th day of January 2018 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE