

IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 277 OF 2017

BETWEEN

MAURICE WILLIE CHIKUMBENI.....CLAIMANT

AND

FLONCY NYIRENDA (nee FLONCY CHIKUMBENI) FIRST DEFENDANT

AND

INESS CHIKWEZA (nee INESS CHIKUMBENI)..... SECOND DEFENDANT

AND

RICHARD CHIKUMBENI.....THIRD DEFENDANT

CORAM His Lordship Nriwa, Judge
Mr. O Chidothe of counsel for the claimant
Mr. C Nalanda of counsel for the defendants
Mrs. Mtegha Court Clerk

RULING

Background

This matter arises out of dispute of deceased estate of the father to the parties in this matter. The claimant contends that the deceased gave the disputed house to his exclusive use. The defendants, siblings to the claimant, on the other hand, argue that the house was to the benefit of all the children and that after the deceased's death, their mother was managing the house to the benefit of all the children.

The claimant obtained an injunction restraining the defendants from interfering with the claimant's use, occupation or enjoyment of the land at BCA Hill or collecting monthly rentals from the claimant's tenants currently occupying the house until determination of this matter or further order of the Court.

The claimant got the injunction without notice to the defendants and applied for the continuation of the injunction. The defendants, on the other hand, applied for the vacation of the injunction. At the end of the day, the two applications would yield the same result: whether the injunction should continue or not. That, therefore, is the question in this matter: whether the injunction should continue or should fall down.

The parties, in addition to the oral presentations filed sworn statements as well as skeleton arguments.

Claimant's sworn statement

The sworn statement of the claimant states that he is the last-born son of the Late Mr. Mollen Chikumbeni who died on 10th March, 1997. When the deceased died, the claimant was about 11 years old. Before his demise, the deceased acquired a number of pieces of land, one of which was the plot in this dispute, which he bought from a Mr. Tiyezge Alford Ralph Gondwe on 31st December, 1996 and registered it in the name of the claimant. The deceased told him that the plot was meant to support him with his education in the event of his death. He further stated that when his father died, his mother managed the house for his benefit and she used to appraise him of any development on the said land. The rentals from the said plot were used to pay for his school fees and to buy other requirements such as clothes and food.

When his mother died in 2013, he realised that land registration certificate for the said plot went missing and he failed to trace it. In February 2016, he applied before the Land Registrar to issue him with a new land certificate. On 9th February, 2016 a notice was published in a daily newspaper to give room for any person having any interest in the same land to raise any objection within 21 days and on 8th March, 2016 a new land certificate was issued in his name.

Later, the defendants started to force him to surrender to them the original certificate and he believes that the defendants intend to sell the plot to another person. He further stated that he was reliably informed that the defendants fraudulently obtained Letters of Administration for the said plot by falsifying document to show that the claimant was dead.

At the instigation of the defendants, the police arrested him as a way of forcing him to surrender the said documents to them. He said he released the documents to the police officers in order to secure his release. In the meantime, the defendants advised his tenant to pay them the monthly rentals.

The claimant argues that the acts of the defendants infringe his right to property as well as that he is failing to pursue his studies due to lack of fees since the defendants have caused the tenant to stop paying him rentals.

The applicant states that he believed that he is the rightful owner of the plot arguing that his father never intended joint ownership. Having registered the plot in his name, the defendants, he argued, had no merit in claiming ownership to the plot.

Defendants' Summons

The defendants want the injunction to be discharged. They raise four grounds that (a) the claimant did not disclose material facts;

(b) the injunction application was an abuse of court;

(c) that the within matter lacks a cause of action for trial;

and that

(d) the balance of convenience and or justice lies at vacating the injunction.

Sworn Statement of Iness Chikweza (Nee Iness Chikumbeni), the Second Defendant.

In the sworn statement Mrs. Chikweza states that

- 1) The defendants are of the view that the claimant deliberately misrepresented some pertinent material facts in order to convince the court to grant him the injunction.

- 2) The claimant deliberately purported to refer to himself as Maurice Willie Chikumbeni in the application whilst his identity has never been Maurice Willie Chikumbeni but that his real identity is simply Willie Chikumbeni. She said Maurice Willie Chikumbeni was their father, the deceased.
- 3) She further said the claimant deliberately refers to their deceased father using only his other name of “Molleni Chikumbeni” without disclosing to the court that the said father was the one known as Maurice W. Chikumbeni. She made reference to the copies of the death report.
- 4) The claimant has never been Maurice Willie Chikumbeni but Willie Chikumbeni. The defendant attached copies of his passport, Voters identification card and High School Certificate.
- 5) The claimant deliberately chose not to disclose that the second and the third defendants were Administrators of the Estate of Maurice Willie Chikumbeni (Deceased).
- 6) The claimant did not disclose that soon after the death of their father, their mother control over all the properties and that she supported all the children who were all at school. The first born was at Chancellor College, the second born at Secondary school; third born and the twin brothers (him and 3rd defendant were at school.
- 7) The claimant did not disclose that the whole extended family appointed the second and the third defendant as administrators of the estate after the death of the parties’ mother. However, the defendants obtained the actual letters of administration when they heard that the claimant was obtaining documents behind their back, and that the defendants had in November, 2016 to enter a caution to prevent him from selling the house under contention.
- 8) The claimant did not disclose that he went behind the back of the defendants, and obtained a copy of the deed in allegedly criminal circumstances such that the defendants had to report the claimant to Police, the Police confirmed of the same and detained him for a few days.

- 9) The defendants were not aware that any notice had been put in the newspapers. Further to that, they did not expect that the claimant to do something behind their back and that they would have expected him to inform them if that was done in good faith.
- 10) The first and third defendants are poor persons making it less likely to be aware of what has been posted in newspapers.
- 11) The claimant concealed that there were continuous conflicts with the defendants on collection of rentals from the house said to be part of deceased estate of Maurice W. Chikumbeni that ought to be benefited by all the parties in this matter.
- 12) Thus, the defendant quashed the claimant's assertion that the house was being administered solely for his benefit. The claimant's assertion that the house under contention belongs to him was without reasonable evidence, has no legal basis and unlikely to succeed at trial.

Claimant's Sworn Statement Opposing the Application to Discharge Injunction

The claimant opposed the application to discharge the injunction. He asserts that

- 1) It is not correct to say that he misrepresented or failed to disclose some pertinent facts in order to obtain the injunction.
- 2) From his childhood to date, he had known his late father as Mollen Chikumbeni not "Maurice W. Chikumbeni".
- 3) The defendants have used the Police to compel him surrender the plot to them alleging that he fraudulently changed the lease documents "*but up to now the Police has never found any criminal case against me*".
- 4) When he was arrested he was shown the deceased's original Death Report bearing the name Mollen Chikumbeni, but he did not get a copy.
- 5) The Police Officer who was investigating the matter, Detective Kaufulu, from Blantyre Police has a copy of the said Death Report but refused to give him a copy.
- 6) The detective officer took over the title documents for the land from him but declines to surrender them back to me.

- 7) The defendants admit that the deceased was Mollen Chikumbeni but they seem to suggest that he had two sets of names, namely Mollen Chikumbeni and Maurice W. Chikumbeni. The claimant argues that this is illogical and false.
- 8) The deceased died way back in 1990's and the defendants obtained letters of administration on 1st November, 2016 and Death Report marked was obtained in 2017.
- 9) He is reliably informed that the defendants have found a ready customer to buy this land and they are falsifying documents in order to deprive him of the house.
- 10) for the past 17 years, none of the defendants came to claim interest in the said property as they had their own property registered in their names.
- 11) Regarding disparities in the names, its common to find a person using two names in his official documents when he is known by three names. The claimant referred to this as a minor disparity which does not entitle the Defendants to dispossess him of land.

As I have stated before, the issue is whether to continue with the injunction or to discharge it. As the statements of the parties show, the issues are highly contentious. It is not the duty of the Court, at this juncture, to dispose the matter on merits.

The claimant argues that there is a serious question to be tried in this matter which is whether the claimant is the rightful owner of the plot in dispute. The claimant argues that the 'alleged' letters of administration by the defendants and the conflicting names of the deceased coupled with a seventeen- year delay in obtaining letters of administration by the defendants raise more serious questions than answers which can only be determined by full trial.

The claimant also argued that the credence of the claims of falsification of documents can be determined if evidence is brought before this Court. The evidence, the claimant, argues should be on the events that took place in 1990's when the deceased died. He argues that this Court should have evidence of the deceased estate and how it was distributed and what happened for the Claimant to acquire the property in dispute.

On damages:

On damages the claimant argues that he has no other means of income and that he uses the income to pay for his education. If he is dismissed from studies, he will suffer loss which cannot be quantified in monetary terms.

Justice and equity:

The claimant argued that a current situation can only be maintained if the claimant is allowed to continue using the plot until determination of the substantive issues.

Defendants' Arguments

False Representation of Material Facts

The defendant argued that the claimant failed to disclose several material facts that were relevant to the court. These facts include:

- (a) The claimant deliberately referred to his deceased father using only his other name while in fact the name he intended the Court to believe was the claimant's was actually his deceased's father's name. That actually misguided the Court in believing that the house under contention was registered in his name.
- (b) The claimant did not disclose that the second and third defendants in the within matter are Administrators of the Estate of Maurice Willie Chikumbeni (Deceased), which was very vital for the Court to consider before granting an injunction against the defendants. The claimant did not disclose that the said administrators were actually appointed informally soon after the death of their father by the whole extended family.
- (c) The claimant misdirected the Court that the rentals from the house were exclusively used for his benefit while actually the properties have always been used in support of the whole family.
- (d) He further did not inform the court that he obtained a duplicate of the title deed of the plot without informing his siblings and the same had to be handled by police officers.
- (e) He actually concealed the fact that he has have had continuous conflicts with the defendants on collection of rentals from the house.

Abuse of Court Process

The defendant also raised the issue of abuse of the court process

The defendants argue that this application for an injunction is an abuse of the court process. They argue that the present action concerns the conduct of administrators of a deceased estate. The defendants argue that if the claimant had serious issues against appointment or conduct of the administrators, he would have resorted to The Deceased Estate (Wills, Inheritance and Protection Act).

Balance of Convenience

On the issue of balance of convenience, the defendants argued that the claimant asserted that the house belonged to him since it was registered in his name. However, the defendants argue that the claimant did not substantiate the assertion. They argue that the claimant had not substantiated that the plot was registered in his name since he was only 11 years old at the time of registration. The other issue raised is that the claimant's name was Maurice W. Chikumbeni since he has at all times been called Willie Chikumbeni. Further, the claimant, in the defendant's view failed to show that his siblings, including his twin brother (third defendant), have no beneficial interest in the said house. The defendant therefore suggested that the balance of convenience and or justice would dictate that the court should set aside the injunction. This would enable the rightful administrators to administer the estate to the benefit of all the siblings.

Disposal of the issues

Certainly, courts grant interlocutory injunctions or orders upon being satisfied that there is a serious question to be tried, damages may not be an adequate remedy and that it would be just to do so. In the traditional practice of injunctions, on an application, without notice, for an interim relief the applicant is required to proceed with the highest good faith, and is under an important duty to make full and frank disclosure to the court of all material facts and matters, including matters pointing against the grant of relief.

In *Bon Kalindo v Spring Company Limited* [2013] MLR 25, The Supreme Court of Appeal said material facts are facts which are material for the judge to know and are necessary for the exercise of jurisdiction. The court went on for the failure to make full

and frank disclosure of material facts should lead the discharge of an injunction. *Mkwanda v NBS Bank* [1993] MLR 72, *Brink's MAT Ltd v Elcombe* [1988] 1 WLR 1350).

The rationale for this reasoning is that the court is being asked to grant a relief without hearing the person against whom the relief is sought -*The State v Council for University of Malawi, ex-parte Allan Chihana and Steve Musopole*, Misc. Civil Cause no. 98 of 2006 (HC) (LDR). The test for the exercise of the power the court must discharge an interlocutory order if it could not have made it, had the claimant given all the material facts known to him or her.

The defendants have raised issues which they argue that the claimant did not tell the Court during the application. These included the disparities in the name of the deceased. The other matter of fact with the defendants have claimed that the claimant has not disputed is that their late mother was controlling the property for the benefit of all the children, including his brother. The other fact is that there have been conflicts in the collection of rentals.

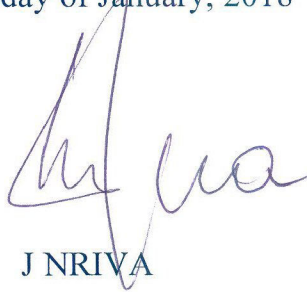
In my considered view, these are matters of facts which the claimant had to disclose when making the application for the introductory injunction. In making the interlocutory application, the claimant intended the court to believe that the house was for his exclusive benefit. The defendants have challenged this.

Actually, the defendants have raised many issues that, in their view, the claimant had to give to the court as full and frank disclosure of the facts of matter. The claimant has not challenged all these allegations. All the claimant has done is to raise counter-arguments against the defendants without challenging the assertions. As I have stated before, this is not a time to examine the merits of the arguments. But, I feel the defendants' argument is strong that the claimant repressed material facts to obtain the injunction. This is cemented by the claimant's failure to respond to the allegations. The claimant This, therefore, leads to the conclusion that the claimant suppressed some material facts which, had he brought to the attention of the court, the court would have been reluctant to grant the injunction. That is enough for the court to discharge the injunction it granted to the applicant.

For that reason, I discharge the injunction with costs.

I do not find it prudent to deal with the other issues that the defendants raised in support of their application to discharge the injunction. Most importantly, in the view of what I have stated the balance of convenience lies in discharging the injunction than continuing with it.

DELIVERED at Blantyre the 17th day of January, 2018

A handwritten signature in blue ink, appearing to read 'J. N. Riva', written in a cursive style.

J NRIVA
JUDGE