JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

LAND CAUSE NO. 64 OF 2017

BETWEEN

THE REGISTERED TRUSTEES OF

BLANTYRE SYNOD ..... CLAIMANT

AND

MR. GOMONDA BANDA ..... DEFENDANT

CORAM: **THE HONOURABLE JUSTICE KENYATTA NYIRENDA**
Mrs. Mnyanga, of Counsel, for the Claimant
Mr. Dziwani, of Counsel, for the Defendant
Mrs. Jessie Chilimapunga, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is my ruling on an inter-partes application by the Claimant for an order for the continuation of an interlocutory injunction.

The background to the application is as follows. On 12th December 2017, the Claimant commenced an action by a writ of summons against the Defendant. The Statement of Case provides as follows:

> *"1. The plaintiff is and was at all material times the owner proprietor and occupier of 0.6530 hectares of land and plot No. SL 1/15/16 situated in South Lunzu in the City of Blantyre.*
>
> *2. The defendants own and occupies land which is adjacent to the plaintiff's land.*

3. *In or around 2001, the defendant encroached onto part of the plaintiffs land and planted trees thereon. The plaintiff through their servants requested the defendant to uproot his trees and vacate the plaintiffs land, but the defendant did not.*

4. *In or around 2013, the plaintiff obtained a lease from Malawi Government in respect of the said land. The plaintiff at once wrote the defendant requiring the defendant to leave the plaintiff's premises and uproot all the trees planted thereon.*

5. *In spite the plaintiff's requests and demands the defendants did not remove his trees but instead proceeded to plant other crops on the land.*

6. *In or around October, 2017 the defendant began to erect a house on the plaintiff's premises. Despite being required by the plaintiff to desist from continuing with the erection of the said house the defendant has continued with the construction up to window level.*

7. *The defendant intends, unless restrained by the Honourable Court from doing so, to complete the erection of the said house and to continue to illegally occupy the plaintiff's land*

And the plaintiff claims:

(i) An order that the defendant do forthwith pull down the house and remove all trees and crops planted on the plaintiff's premises.

(ii) An order of injunction restraining the defendant by himself, his servants or agents or otherwise howsoever from erecting or continuing to erect upon the plaintiff's premises.

(iii) An order of injunction compelling the defendant whether by himself, his servants or agents or otherwise howsoever to stop encroaching on the plaintiff's land.

(iv) A mandatory order compelling the defendant to harvest and remove all trees and crops planted on the plaintiff's land and immediately vacate the plaintiff's premises.

(v) Costs of this action."

Almost contemporaneously with the issuance of the writ of summons, the Claimant filed an ex-parte application for an order of interlocutory injunction restraining the Defendant by himself, or through his servants, agents from constructing on the Claimant's land or in any way interfering with the Claimant's possession of land situate at South Lunzu in Blantyre [hereinafter referred to as the "land in question"].

The ex-parte application was supported by a sworn statement by Mr. Benson Kalonga, the Session Clerk of Mount Carmel CCAP Church which is located in

Machinjiri Area 11 in the City of Blantyre [Hereinafter referred to as the "Claimant's sworn statement"]. The substantive part of the Claimant's sworn statement reads as follows:

> *"3. **THAT** the Claimant owns land, on Plot No. SL1/15/16/ in Machinjiri in Blantyre on which stands a church. Adjacent to Claimant's land is the defendant's land where he lives.*
>
> *4. **THAT** in or around 2001, before the land was leased, the defendant encroached on the Claimant land and planted trees thereon. All attempts to have the defendants leave the premises and remove the trees were unsuccessful.*
>
> *5. **THAT** the defendant continued to remain on the Claimants land despite numerous communication from the Claimant requiring him to leave the premises.*
>
> *6. **THAT** in March 2012, the Claimant had the land surveyed. In October 2013 the Claimant was granted a lease in respect of the land. I attach and exhibit the said lease marked **"CT1"***
>
> *7. **THAT** subsequent to obtain the lease, the Claimant wrote the defendant on the 26th November, 2013 informing him that the land has now been leased and that he should remove his trees, vacate the premises. The defendant refused to accept the letter. Traditional Authority Machinjiri advised that the claimant takes the matter to police*
>
> *8. **THAT** the matter was reported to Machinjiri police station and all copies of the Title Documents were taken to the station. The defendant was summoned at the police station and the letter was delivered to him.*
>
> *9. **THAT** the Claimant gave the defendant an opportunity to sell the trees that were on the land and leave the premises. The defendant matter all these requests and instead came on the Plaintiff's premises again and planted cassava.*
>
> *10. **THAT** in October 2017 the defendant started erecting a structure on the church premises. The claimant went to the defendant asking him to take down the building and vacate the Claimant's premises. He refused to do so and continued to build up to a window level.*
>
> *12. **THAT Unless** the defendant is restrained by this court, he will continue to violate the rights and dispossess the Claimant of their land."*

The ex-parte application came before me and I granted an ex-parte interlocutory injunction subject to an inter-partes hearing for its continuation.

The Defendant is opposed to the continuation of the interlocutory injunction and he filed a sworn statement in reply to the application by the Claimant [Hereinafter referred to as the "Defendant's sworn statement"]. The Defendant's sworn statement is in the following terms:

"4. The contents of paragraph 3 of the statement are denied and I further state that to the best of my knowledge:

4.1 Plot No. SL 1/15/16 which the claimant alleges to own belongs to Mr. Maziya Gwedera.

4.2 According to the original map of the area issued by Malawi Housing Corporation (which used to be the head landlord before its jurisdiction to administer the land in Machinjiri was transferred to the Blantyre City Council) the Claimant's church was/is built on Plot No. SL 1/15/7

5. In reply to the paragraph 4 and 5 of the statement I state that:

5.1 The claimant has omitted to disclose the fact Plot No. SL 1/15/7 (which they allege to be plot No SL1/15/16) was allocated to them in or around 1975.

5.2 The Claimant have omitted to say that in or around 1987 I personally transformed the land which was more or less like a cliff bounded by huge rocks into a level field which is what it is today.

5.3 The Claimant has falsely asserted that the land was encroached by me in or around 2001

6. I repeat the content of paragraph 5 above and I further state that in truth and in fact:

*6.1 A part of the Land in issue (which is edged red on the map exhibited hereto as **GB1)** was first encroached in or around 1975 by my predecessor in title the late Driano Daud (who was my father in law).*

The said late Driano Daud cultivated the land and planted trees thereon.

6.2 Late Driano Daud enjoyed open, peaceful and uninterrupted possession of the land until in or around 1987 when he handed over the said piece of land to me.

6.3 I continued to work on the said piece of land just like my predecessor did and it is for that reason that I do admit the Claimant's allegations made in paragraph 4 and 5 of the Statement to the extent that I continued to remain on the land despite numerous communication from the Claimant's and attempts to make me leave the land in issue.

7. Paragraph 7, 8 and 10 of the Statement are admitted with a qualification to paragraph 10 that the house built thereon is at roofing level and not window level as alleged.

8. In re reply to paragraph 11 of the Statement, I state that I am informed by Counsel that (the Claimants having unequivocally stated in the Statement that (i)

at no point did they authorize me to start using the land and (ii) I did not succumb to the Claimants attempts/request that I leave or cease to cultivate on the land):

8.1 The Claimants lost title to the land at the very earliest in 1987, that is 12 years since my predecessor in title first encroached on the land; or latest in 1999 that is 12 years after I had transformed the land from cliff to what it is today, cultivated it and planted more trees.

8.2 In the circumstances I am not in any way interfering with any right of the claimants whatsoever.

9. In addition to the above I verily believe that the claimants are not entitled to an urgent relief in the form of an Interlocutory order of Injunction because the evidence clearly shows that the defendants have delayed to bring an action against me.

*10. **WHEREFORE**, I humbly but affirmatively pray that the interlocutory order of injunction earlier granted to the Claimants be discharged with costs."*

The main issue for determination is whether this Court should grant an order for the continuation of the interlocutory injunction, as was argued Counsel Mnyanga, or discharge the interlocutory injunction, as was argued by Counsel Dziwani.

In terms of paragraph 4 (Submissions/Prayer) of the Defendant's Skeletal Arguments, the Defendant is opposed to the continuation of the interlocutory injunction on the ground that the suit by the Claimant is statute barred by reason of the Limitation Act. The relevant submissions by the Defendant on this issue are to be found in paragraph 3.1 of the Defendant's Skeletal Arguments. The paragraph is couched in the following terms:

"3.1 LAW OF RE – ENTRY AND FORFEITURE

3.1.1 Under S.6 of the Limitation Act the owner of the land is barred from bringing any claim to recover the land if he neglects to commence proceedings before 12 years is up.

*3.1.2 Generally, the operation of the Limitation Act does not extinguish the debt or other cause of action but merely bars the remedy of bringing the action after the lapse of the specified time from the date when the cause of action arose. See per Lord Goddard at p 704 in **Jones v Bellgrove Properties Ltd** [1949] 2 K.B. 700*

*3.1.3 In relation to claims for the recovery of land, the law is quite radical. **Kelvin Gray** in **Elements of Land Law** at p 283 states that the central feature of the Limitation Act... 'is the idea that if the owner of the property fails within a certain period to secure the eviction of a squatter or trespasser from his land, his own title is extinguished and he is thereafter*

statutorily barred from recovering possession of the land. See ***MISC CIVIL APPEAL CAUSE NO. 21 OF 2013*** *(being High Court Commercial Cause No. 6 of 2012, sitting at Lilongwe.*

3.1.4. *Under* ***S. 134(1),*** *in part IX of the Registered Land Act (Cap 58:01 of the Laws of Malawi):*

'The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of twelve years.'

The arguments by Counsel Dziwani cannot be sustained. There is uncontroverted evidence that the Claimant was granted a lease over the land in question in 2013. This means that the Defendant has been the owner of the land in question for not more than six years. Accordingly, a period of six more years have to elapse before the Defendant can successfully plead the statute of limitation.

In any event, the main issue for determination is whether or not the Court should order the continuation of the interlocutory injunction that was granted ex-parte to the Claimant.

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 RSC, **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 affidavit evidence.

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..."* – Emphasis by underlining supplied

I now turn to see 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?"*. 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**.

Counsel Mnyanga submitted that there are triable issues in the present case, with the main one being the question whether the Defendant can have a claim of right over the land in question when the Defendant was granted a lease in relation to the same. Counsel Mnyanga also submitted that the Court will have to determine whether the Defendant can rely on the Limitation Act when the facts show that the Claimant objected to the Defendant's encroachment at all material times.

On his part, Counsel Dziwani contended that that there is no serious issue to go to trial in that there is no dispute that the Defendant has been in occupation of the land in question for over 16 years during which period the Defendant resisted attempts by the Claimant to have the Defendant vacate the land in question.

I have considered this matter and it is clear from reading the sworn statements that the facts herein are very much in dispute and raise pertinent questions to be determined by the Court at a full trial. As was aptly put in **Mwapasa and Another v. Stanbic Bank Limited and Another, HC/PR Misc. Civ. Cause No. 110 of 2003 (unreported)**, *"a court must at this stage avoid resolving complex legal questions appreciated through factual and legal issues only trial can avoid and unravel"*. It is enough, accordingly, that the Claimant has shown that there are serious questions to be tried: see **Matenda v. Commercial Bank of Malawi (1995) 2 MLR 560.**

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.

On the issue whether or not damages would not be an appropriate remedy, it is my finding, and I so hold, that damages would be an inadequate remedy in the application before me. I am fortified in my holding by the decision of the Supreme Court of Appeal in the case of **Malawi Savings Bank v. Sabreta Enterprises Limited, MSCA Civil Appeal No. 44 of 2015 (unreported)** wherein the Court made the following pertinent observation:

> *"On the matter of adequacy of damages we think each case must be considered on its own facts. There is nothing like one principle fits all scenarios. We think it a little simplistic not to grant an injunction against an appellant just because it has deeper pockets. Just because it can afford to pay damages in case the injunction was erroneously*

granted. There will be instances, and we have a feeling this could be one of them, where damages will never suffice the fact that they can be afforded notwithstanding. This case does not, in our judgment, seem to be about damages." – Emphasis by underlining supplied

In view of the foregoing and by reason thereof, it is my considered view that the balance of convenience tilts in favour of allowing the continuation of the interlocutory injunction. The interlocutory injunction granted herein will, therefore, remain in force until the main action is determined. Costs will be in the cause.

Pronounced in Chambers this 21st May 2018 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE