JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

LAND CAUSE NO. 11 OF 2018

BETWEEN

DAUD PEARSON MAGWEMBERE ..... CLAIMANT

AND

MALAWI HOUSING CORPORATION ..... DEFENDANT

CORAM: **THE HONOURABLE JUSTICE KENYATTA NYIRENDA**
Mr. Dziwani, of Counsel, for the Claimant
Mrs. Mzanda, of Counsel, for the Defendant
Mrs. Doreen Nkangala, 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 26th March 2018, the Claimant commenced an action by a writ of summons against the Defendant. The Statement of Case provides as follows:

> *"1. The Claimant was at all material times the lessee and/or tenant of residential premises known as House Number CW/187 located in Chitawira Township within the City of Blantyre.*
>
> *2. The defendant is a creature of an Act of Parliament with powers to manage housing estates amongst others.*

3. *In or around 1996 the Claimant and the Defendant executed a tenancy/lease agreement in respect of House Number CW/187 under which the Claimant was required to be paying monthly rentals.*

4. *On or about 7th March, 2018 the Defendant illegally re-entered the premises and purported to forfeit the lease when they evicted the Claimant who was in occupation at the material time on the grounds that he had defaulted in rental payments and was in arrears which the Defendant later duly cleared.*

PARTICULARS OF ILLEGALITY

4.1 The Defendant omitted to first give the lessor or his licensee any formal demand for the arrears or the breach committed.

4.2 The Defendant did not first take any court action as required by law before making a re-entry or forfeiting the lease.

4.3 By accepting receipt of the payment made by the Claimant in clearance of the rental arrears the Defendant waived its right to forfeit the lease and re-enter the premises.

5. *Furthermore the acts committed by the Defendant amounts to trespass to the Claimant's leased premises and his goods such acts having been committed illegally.*

6. *Notwithstanding the fact that the Claimant has settled all rental arrears claimed by the Defendant, the Defendant has refused the Claimant to take possession of the said premises and has proceeded to allocate the leased premises to another person.*

AND the Claimant claims:

i. A Declaration that it was unlawful for the Defendant to have re-entered residential premises known as CW/187 located in Chitawira Township within the City of Blantyre considering:

a. The Defendant did not make any formal demand for rental payment as is required by law.

b. The defendant re-entered the said premises without first commenced a court action as is required under law since the premises were at the time of the purported re-entry or forfeiture occupied by the Claimant.

ii. An Order prohibiting the Defendant from making a re-entry onto residential premises known as House Number CW/187 and allocating the same to another person.

iii. Damages for trespass.

iv. *Damages for Degrading and inhumane treatment the Plaintiff was subjected as a result of the Defendant's unlawful acts.*

v. *Costs of this action."*

Almost contemporaneously with the issuance of the writ of summons, the Claimant filed an ex-parte application for an urgent order of interlocutory injunction (a) prohibiting the Defendant either acting by itself or its agents or servants whosoever and howsoever acting from proceeding with the re-entry and forfeiting the Claimant's lease, (b) prohibiting the Defendant either acting by itself or its agents or servants howsoever acting from allocating residential premises leased to the Claimant to another person when the lease is still subsisting and (c) compelling the Defendant to release and deliver back to the Claimant all household which the defendant seized from the said house, until the determination of the matter herein or until a further order of this Court.

The ex-parte application was supported by a sworn statement by the Claimant. In addition to the averments in the Statement of Case, the Claimant's sworn statement states that:

(a) the Defendant sealed House Number CW/187, took away from the house a fridge, double bed and mattresses valued at around K300,000.00 and left the things outside the house;

(b) he settled the rentals arrears between 9th and 14th March 2018;

(c) contrary to the assurance given to him by the Defendant's servants or agents that the house would be re-opened for his continued occupation once the rental arrears were cleared, the Defendant's Regional Manager informed him that the lease/tenancy agreement had been terminated;

(d) other tenants who had arrears like himself have been allowed to continue staying in the houses leased to them after clearance of rental arrears;

(e) as a result of acting unlawfully, the Defendant has caused him to suffer damage in that:

"i. My right to constitutional freedom of residence is being threatened as I will be compelled to re-locate to another township which will not be of my own choice and such violation may in turn impact on my economic rights as I have an established furniture and joinery business within the area and I will end up losing my clients.

ii. *By throwing out my household belongings I have been subjected to degrading and inhumane treatment. I and my family members have been made to seek refuge in various places and one of my sons is being compelled to sleep on the khonde to provide security to my household items. Had the Defendant given me ample notice and complied with the law, I would have co-operated with them*

iii. *My right to privacy has also been breached."*

The ex-parte application came before me and I granted an ex-parte interlocutory injunction subject to the Claimant subject to an inter-partes hearing for its continuation on 28th March 2018.

The Defendant is opposed to the continuation of the interlocutory injunction and it has, through its Legal Services Manager, filed a sworn statement in opposition [Hereinafter referred to as the "Defendant's sworn statement"]. The Defendant's sworn statement is in the following terms:

"3. ***THAT*** *the Claimant is a mere tenant of the Defendant as evidenced by the Tenancy Agreement exhibited hereto marked as 'OM1'*

4. ***THAT*** *the Claimant has breached the said Tenancy Agreement on diver occasions by failing to pay rent as shown in the Customer Activity Report exhibited hereto marked 'OM2'.*

5. ***THAT*** *the default by the Claimant herein warranted eviction from the house to terminate the tenancy under Clause 6(2) and (3) of the Tenancy Agreement, which does not require a notice of eviction to be issued by the Defendant.*

6. ***THAT*** *the Defendant turned into a commercial entity by an amendment to its Act under Government Notice Number 27 of 2016 thereby enabling it to make profits and charge rentals at a commercial rate.*

7. ***THAT*** *the Defendant started charging rentals at almost commercial rate in the financial year beginning July, 2017*

8. ***THAT*** *the Defendant's tenants being ignorant that the Defendant had been commercialise, obtained an order of injunction restraining the Defendant from implementing the new rentals and they stopped paying their rentals pending conclusion of the court case under Judicial Review Cause No. 32 of 2017 at the Zomba Registry.*

9. ***THAT*** *when the case was concluded on 30th October, 2017, the Defendant gave notice to all its tenants nationwide through the media of the highest circulation that all arrears had to be paid by 31st December, 2017. Produced to me and*

*exhibited hereto is the said Notice and the media outlets that published it marked collectively as '**OM3**'.*

10. ***THAT** the Claimant herein did not adhere to the notices like so many other tenants and this compelled the Defendant to commence a nationwide eviction exercise from the month-end of January, 2018.*

11. ***THAT** in addition to the media notices, every month-end the Defendant has a mobile public address system that goes round in all its estates in the evening to warn its tenants that if they do not pay their rentals they lwill be amenable to eviction but still the Claimant herein did not hearken to the said warnings.*

12. ***THAT** upon eviction, the tenancy is deemed terminated and settlement of the arrears does not resuscitate the tenancy agreement*

13. ***THAT** in the premises, the eviction of the Claimant herein was fair and legally justified."*

The main issue for determination of the court is whether the court should grant an order for the continuation of the interlocutory injunction, as was argued by the Claimant through his Counsel or dismiss the instant summons, as was argued by Counsel for the Defendant.

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, r.27, of the Courts (High Court) (Civil Procedure) Rules, **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, 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**.*

Very summarily, 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

5. 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.

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 plaintiff 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 Dziwani submitted that there are at least two triable issues in the present case, namely, whether or not (a) the purported re-entry by the Defendant and forfeiture of the lease was legal and (b) the Claimant is entitled to relief against forfeiture.

Counsel Dziwani placed reliance on the law on re-entry and forfeiture. It may be convenient to set out in full the Claimant's submissions on this point:

> *"3.1.1 The Registered Land Act (RLA) (Cap. 58:02 of the Laws of Malawi) provides for the Landlord's right to forfeit a lease if the lessee commits any breach of, or omits to perform, any agreement or condition on his part expressed or implied in the lease – See section 52;*
>
> *3.1.2 Section 52 RLA further provides for the procedure to be followed before the right of forfeiture can be exercised. This includes the requirement that:*
>
> *a. Where neither the lease nor any person claiming though or under him is in occupation of the land, the lessor can merely enter upon and remain in possession of the land; or*
>
> *b. Re-entry and forfeiture be enforced by action in the court where the lessee or any person claiming through him is in occupation of the land.*
>
> *3.1.3 Section 52 also provides for relief to a lessee affected by a lessor's decision to forfeit a lease. The lessee is entitled to make an application to court for such relief as the Court may deem necessary.*
>
> *3.1.4 The remedy has its roots in equity.*
>
> *3.1.5 The general principles which apply to applications for relief in cases like the present one were explained in the case of Pineport Limited v. Grangeglen Limited [2016] EWCHC 1318 as follows:*
>
> > *"In the eyes of equity, the proviso for re-entry was merely a "security" for rent. Equity is in the "constant course" of relieving against forfeiture where the tenant pays all the rent and expenses. Thus save in exceptional circumstances the function of the court is to grant relief when all that is due for rent and costs has been paid up.*
>
> *3.1.7 To be entitled to the relief the tenant must pay all that is due. However, where the party has not fully paid rent and expenses, he might be entitled to the relief on terms that he fully pays. This is what was decided in the case cited above."*

On her part, Counsel Mzanda contended that the law on forfeiture as stipulated in section 52 of the Registered Land Act has no application to the present case as the

Claimant was not a lessee but a mere tenant as evidenced by the Tenancy Agreement (Exhibit OM1). Counsel Mzanda also submitted that under the Tenancy Agreement, the Defendant has the right to terminate the tenancy without notice whenever the tenant is in breach of the tenancy as was the case in the present in this case.

I have considered this matter and I am very much satisfied that it raises issues that warrant consideration by the Court at a full trial. For example, the Registered Land Act, in section 2 thereof, defines "lease", "lessee" and "lessor" as follows:

> *"lease" means the grant with or without consideration by the proprietor of land of the right to the exclusive possession of his land, and includes the right so granted and the instrument granting it, and also includes a sublease, but does not include an agreement for lease;*
>
> *"lessee" means the holder of a lease;*
>
> *"lessor" means the proprietor of leased land;*

Are these definitions not wide enough to include the relationship between the Claimant and the Defendant herein?

In any case, 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 Plaintiff 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.

It is the case of the Claimant that damages would not be an appropriate remedy in the circumstances of this case. The issue of damages was not addressed by the Defendant. Having given the matter my consideration, I am inclined to agree with Claimant. In such matters, the standard question *"Are damages an adequate remedy"* has to be re-phrased to read *"Is it just, in all the circumstance, that a plaintiff should be confined to his remedy in damages?"*: see dicta of Sachs L.J in **Evans Marshall & Co. Ltd. V. Bertola S.A. [1973] 1 W.L.R. 349 at 379D.**

In the circumstances, 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 Bankv. 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

It also seems to me that the balance of convenience tilts very much in favour of the Claimant in that if the order of interlocutory injunction is continued the Defendant will not have much to lose bearing in mind that the Claimant has fully paid the rental arrears. On the other hand, the Claimant has been rendered destitute, he and his family have no place to stay and his household items are in possession of the Defendant.

In view of the foregoing and by reason thereof, the interlocutory injunction granted herein will remain in force until the main action is determined. Costs will be in the cause.

Pronounced in Chambers this 2nd day of July 2018 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE