

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 351 OF 2017

BETWEEN:

CHINSINSI MASEKO

1st CLAIMANT

KELVIN MASEKO

2nd CLAIMANT

AND

KENNEDY BANDA

1st DEFENDANT

EDDAH BANDA

2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

Mlambe, Counsel for the Claimants
Sitolo, Counsel for the Defendants
Mankhambera, Official Court Interpreter

ORDER

This is this Court's order on the defendant's application for an order setting aside an order of interlocutory injunction made earlier and ex parte in favour of the claimants under Order 10 rule 27 of the Courts (High Court) (Civil Procedure) Rules 2017.

By the instant application the defendants seek an order setting aside an ex parte interlocutory order of injunction compelling the defendants, their family members and anyone claiming through them to vacate the house situate on plot number

SL5/15/2 at South Lunzu in the city of Blantyre which was sold by the defendants to the claimants and to hand possession of the said house to the claimants.

The grounds are that the claimants suppressed material facts and that the order of interlocutory injunction is an abuse of the process of the court.

The application is opposed by the claimants.

The order of interlocutory injunction sought to be set aside was granted on the following facts.

The 1st claimant stated that she together with her husband the 2nd claimant entered into an agreement with the 1st and 2nd defendants, who are husband and wife respectively, for the claimants to buy a house situate on plot number SL5/15/2 at South Lunzu in the City of Blantyre.

She stated that upon the application by the 1st defendant to the Blantyre City Assembly after payment of the agreed purchase price of K9 000 000 by the claimants to the defendants, the transfer of the plot was duly approved. A copy of the approval of transfer was exhibited showing transfer of title from the 1st defendant to the 1st claimant.

The 1st claimant indicated that at some point the 1st defendant told them that his wife, the 2nd defendant, was not well and therefore that they were going to be engaging in negotiations for the purchase of the house with the 1st defendant on behalf of both defendants.

The 1st claimant stated that it was an express agreement between the claimants and the defendants that the defendants shall vacate the house to render it possible for the claimants to occupy the same by 1st November 2017, being 60 days from the date of final payment. A copy of the agreement was also exhibited and shows that it was signed between the 1st claimant and the 1st defendant.

The 1st claimant stated that pursuant to the agreement the claimants' family went to occupy the house only to find the defendants still in the house and refusing to vacate the house in breach of the agreement.

She then stated that as a result of the defendants' refusal to vacate the house, the claimants and their family now do not have a house to live in with dignity and in which they can keep their household items.

The 1st claimant then stated that as if refusing to leave the house was not enough, a few days later the 2nd claimant received a call from the Blantyre Magistrate Court where he was served with an interim protection order obtained by the 2nd defendant against the claimants ordering them not to require the 2nd defendant to vacate the house in dispute claiming that to do so amounts to domestic violence against her. A copy of the order was exhibited.

The 1st claimant stated that the interim protection order herein was a desperate attempt by the defendants to prevent the claimants from occupying their house and was obtained without full disclosure of all the material facts to the lower court despite receipt by the defendants of the agreed full purchase price. She added that the claimants were challenging the protection order and had applied for the discharge of the same.

The 1st claimant stated that she was certain that the defendants would not let the claimants occupy the house unless ordered to do so by this Court. The claimants then sought the order of interlocutory injunction compelling the defendants to vacate the house herein which the claimants bought so that the claimants could occupy the same.

The claimants claim against the defendants by summons is for an order for specific performance against the defendants to vacate the house on the land in dispute herein which was sold by the defendants to the claimants and to hand over possession of the same and for damages for breach of contract in lieu of or in addition to specific performance.

This Court granted the interlocutory order of injunction compelling the defendants to vacate the house and give possession of the same to the claimants considering the strength of the case as presented by the claimants.

The defendants now seek the setting aside of the interlocutory order of injunction on the grounds are that the claimants suppressed material facts and that the order of interlocutory injunction is an abuse of the process of the court.

The 2nd defendant filed a sworn statement in support of the application to set aside the interlocutory order of injunction in which she stated her case as follows.

She stated that she is married to the 1st defendant and they have a son Kennedy Banda Junior who was born on 14th April 1994.

She stated that in 2001 she bought the piece of land in dispute herein from Godrich Manda using her money which was sent to her by her brother. She exhibited a sale agreement showing that the defendants bought a piece of land from Mr Godrich Manda and his family in 20015 at area 5. Mr Godrich Manda signed as a seller and had a witness who was a chief. The 2nd defendant signed as a purchaser and the 1st defendant signed as her witness. The agreement is marked as exhibit EB3.

The 2nd defendant then said that she bought the house herein for her son Kennedy Banda Junior who was a minor at the time she bought the land but who is now an adult and pursuing his tertiary education.

She stated that from 10th May 2017 to 12th May 2017 she was admitted to hospital within Blantyre and thereafter she was treated as an out-patient and she resided at Ndirande at her son's place for a period of four months. She added that she only went back to the house herein, her matrimonial home, in September 2017.

She then stated that during her ailment, the 1st defendant, without her prior consent and prior consent of Kennedy Banda junior, the owner of the land in question, fraudulently offered the land in dispute herein for sale to the 1st claimant as per the offer letter of 12th July 2017 and marked as exhibit EB5.

She added that on 11th August 2017, the 1st defendant fraudulently changed ownership of the land in issue from Kennedy Banda to the 1st claimant, without the 1st defendant's prior consent and consultation. The change of ownership at Blantyre City Assembly is marked as exhibit EB6.

The 2nd defendant then stated that on 14th August 2017, the 1st claimant and 1st defendant without her prior approval and approval of her son, signed a possession agreement that is marked as exhibit EB7.

She then stated that on 1st November 2017, she was surprised to see the claimants arriving at her matrimonial home on the land herein with their household effects

advising that the 1st defendant and her family should move out because the claimants had bought the land from the 1st defendant.

She stated that when she confronted the 1st defendant on the alleged sale of the land herein he apologized for his action of selling the land without the approval of the 2nd defendant and her son.

She then stated that having been aggrieved by the action of the 1st defendant she lodged a complaint before the Senior Resident Magistrate Court at Blantyre being Domestic Violence cause number 362 of 2017.

She added that she obtained an interim protection order restraining the 1st defendant and the claimants from taking possession of the land in dispute herein until the case was determined. A copy of the interim protection order is marked as exhibit EB8.

She stated that the claimants filed an application to discharge the interim protection order before the lower court. The claimants' application is marked as exhibit EB9.

The 2nd defendant then stated that the hearing on the protection order before the lower court failed on several occasions and was last adjourned to 29th November 2017 and the claimants were aware of this fact.

She then stated that the claimants obtained the order of interlocutory injunction herein on 23rd November 2017 fully aware that a similar matter was before the lower court where an interim protection order was in force.

She asserted that the conduct of the claimants is abuse of court process and judge shopping. She added that the claimants did not make any attempts to transfer the matter from the lower court to this Court if it was in their best interests and the interest of justice to dispose of the matter expeditiously. And that as a result there are two matters concerning the same property.

She then stated that, at the time the claimants obtained the order of interlocutory injunction, they deliberately suppressed material facts of the case which was pending before the lower court.

She added that this Court would have determined the matter differently had the claimants disclosed that the lower court was seized of a similar matter and that an

interim protection order had been granted and was pending determination before the lower court.

The 1st claimant filed a sworn statement in opposition to the defendants' application and stated as follows.

She stated that the 1st defendant is Kennedy Banda and his son is Kennedy Banda junior. She then stated that a reading of exhibit EB3 shows that the land herein was sold to both defendants and not to Kennedy Banda junior.

She then stated that she is advised that a minor has no legal capacity to enter into a contract. She further observed that Kennedy Banda junior was seven years old at the time the land was being bought by the defendants and that therefore the land was not bought by him but by the 1st defendant and Kennedy Banda the 2nd defendant.

She then stated that Kennedy Banda junior was the one giving a tour of the house on the land in dispute on two occasions when she visited there firstly with the 2nd claimant and secondly with Mr Gadama and Mr Chirambo members of a house committee at her office. She added that on both occasions Kennedy Banda junior did not show any form of surprise at all.

She then stated that she does not see any explanation how and since when Kennedy Banda junior became the owner of the land herein.

She stated that she has noted that the 2nd defendant alleges that the 1st defendant fraudulently changed ownership of the land without the prior consent of the 2nd defendant and her son. She however stated that it is surprising that Kennedy Banda junior's consent is being spoken about as required when he has never been an owner of the land herein.

She then stated that the 2nd defendant gives the impression that the land in dispute belongs not to the defendants but to their son Kennedy Banda junior when exhibit EB3 is clear that the land was bought by the defendants when Kennedy Banda junior was seven years old. She added that however what comes out clearly is that the land was not owned by the 2nd defendant or her son.

The 1st claimant then stated that, the 2nd defendant alleges, without any evidence, that the 1st defendant fraudulently changed ownership of the land herein from

himself to the 1st claimant without the consent of and without consulting the 2nd defendant.

The 1st claimant stated that she notes that the 1st claimant neither asserts that she was not aware that the land was registered with Blantyre City Assembly in the name of the 1st defendant nor does she allege that she was surprised that the land was transferred to the 1st claimant without the consent of and consultation with the 1st claimant.

The 1st claimant stated that all the 2nd defendant says is that the transfer was done without her consent. She added that she understands the 2nd defendant as saying that she was aware all long and was not surprised that the land was registered in the name of Kennedy Banda. And that the sole problem was the alleged lack of consent or consultation.

She then stated that it is abundantly clear that the only known and registered owner of the land herein was Kennedy Banda. And that Kennedy Banda had accordingly, the right to sell the property. She added that it may have been better practice for Kennedy Banda to sell the property after consulting with his wife the 2nd defendant but that lack of such consultation did not affect his right to sell the property.

She then noted again that the 2nd defendant states that Kennedy Banda junior is the owner of the land herein. She wondered what right the 2nd defendant has now to challenge the claimants' entitlement to the land when the 2nd defendant is not the owner of the same. She added that Kennedy Banda junior is not a minor and has capacity to join the legal proceedings in his own name but has not done so.

The 1st claimant then agreed that the 2nd defendant obtained an interim protection order against the 1st defendant and the claimants and that the 2nd claimant applied for an order discharging the interim protection order which is pending before the lower court.

She then stated that, although the present matter and the one before the lower court involve the same parties, the two matters are fundamentally distinct. She added that the matter before the lower court is about whether the claimants and the 1st defendant committed acts of domestic violence against the 2nd defendant whereas the present matter is about who owns the land in dispute.

She stated that the lower court has no power to grant an order of injunction which the claimants deemed necessary and were entitled to apply for as per their constitutional right to seek an effective remedy. And that it was therefore necessary to take their case to this Court especially because the issue of ownership of the land herein was not before the lower court. She added that it is therefore not correct that the claimants abused the court process by coming to this Court.

The 1st claimant then stated that it is not true that the claimants suppressed the material fact that there was a domestic violence case pending before the lower court involving the same parties herein and that an interim protection order had been granted to the 2nd defendant. She stated that she disclosed to this Court, in her sworn statement on the application for the order of interlocutory injunction herein, about the case that is before the lower court.

She then stated that it must be plain that the available information shows that the 2nd defendant admits not being owner of the land in dispute and that she has no right to challenge the claimants' title to the said land given that the claimants bought the land from the registered owner of the same being the 1st defendant.

She stated further, that the alleged suppression of material facts which the 2nd defendant thought was committed does not exist and that therefore this Court was not misled in any way and that there is nothing new to convince this Court or justify any change of the decision in so far as the granting of the interlocutory order of injunction is concerned.

She asked that the order of interlocutory injunction herein should subsist until the matter is determined.

In reply, the 2nd defendant stated as follows. She stated that all those years since the land was acquired she was not aware that the land in dispute was registered in the name of the 2nd defendant at the Blantyre City Assembly Registry.

She reiterated that during the time the 1st defendant was disposing of the land in dispute she was unwell and was not around to see the claimants' visit to the land in question. She however stated that she is reliably informed that her other younger son Khumbo Banda, who is a look alike of Kennedy Banda junior, showed the claimants

around the house on their visits. She denied that Kennedy Banda junior showed the claimants around the land in dispute on their visits given that he was away at school.

She admitted that the land in dispute was not transferred to Kennedy Banda junior by the time of the sale herein. She however stated that it was the defendants' common understanding that the land in dispute herein was bought for their son Kennedy Banda junior.

She then stated that the mere fact that the 1st defendant fraudulently registered the land in dispute in his name should not disentitle her a claim to the land nor the Kennedy Banda junior as intended beneficiary of the same.

She added that it was in view of the fraudulent dealing in the land by the 1st defendant that she commenced the domestic violence matter before the lower court because the 1st defendant decided to dispose of the disputed land without consulting her and without her knowledge. She added further that the main thrust of her case before the lower court was the transfer and/or proposed possession of the property by the claimants. She therefore denied the claimants' assertion that the matter before the lower court and the present matter are distinct in terms of subject matter.

She then stated that according to the claimants' application to discharge the interim protection order, the main subject matter was possession of the house on the disputed land which agrees with the 2nd defendant's application and contention before the lower court which resulted in the interim protection order concerning disposal of the disputed land without her consent and knowledge.

She then stated that the 1st defendant fraudulently presented himself as a brother to the original owner of the plot and managed to obtain letters of administration in order to facilitate the transfer of the plot in question. She added that a letter from the City Assembly Estates Management Office shows that evidence of fraudulent dealings in the property. The letter is marked as exhibit EB3.

She reiterated that she was not aware of the 1st defendant's disposal of the disputed land herein.

She then stated that both parties occasioned adjournments in the matter before the lower court. And that if the claimants had a serious issue to address the court then they should have applied for a dismissal of the lower court matter for want of

prosecution instead of commencing the instant matter in this Court. She insisted that the instant matter is an abuse of the court process since the lower court is fully seized of the matter until final determination.

The 2nd defendant's son, Khumbo Banda, also swore a statement in support of the 2nd defendant's application.

He stated that his elder brother is Kennedy Banda junior.

He recalled that around the first week of July 2017, the claimants came to his parents' house herein to inspect the house. He added that he showed the claimants around the house and not his elder brother. He added that it was not correct to say otherwise.

Kennedy Banda junior also swore a statement in support of the defendants' application.

He stated that his parents bought the land herein when he was very young but they briefed him that the said plot was bought for him although title was not yet transferred to him.

He added that he was not made aware that the land herein was disposed of. He stated that the 1st defendant informed him on 1st November 2017 that the claimants had bought the house when he had gone home to collect tuition fees. He added that on that day the claimants had come with their household effects to offload at the defendants' house.

He stated that when he noted this he notified the 2nd defendant, his mother, to go to court in order to protect her rights which had been violated by the 1st defendant who had unilaterally disposed of the property.

He added that the following day, the 2nd defendant commenced a domestic violence case before the lower court.

He then stated that he is informed by his younger sibling that around the first week of July 2017 he is the one who partially showed the claimants the house and the plot herein. And that it was not true that he showed the land to the claimants. He added that he has never met the claimants prior to 1st November 2017. He stated that they may have mistaken his younger brother for him since they look alike.

Against the foregoing background, this Court must determine whether there was suppression of material facts and abuse of the court process.

On suppression of material facts, both the claimants and the 2nd defendant submitted on the relevant law.

The relevant and well-known principle is that it is open to the defendant to apply to set aside an order of interlocutory injunction obtained *ex parte* where there is suppression of material facts or failure to fully and frankly disclose material facts.

The Court will determine what the material facts are in the circumstances of the case.

The reason why the *ex parte* order will be set aside in such circumstances is that it serves as a deterrent to ensure that applicants in the absence of the other party must realise that they have a duty of disclosure and of the consequences if they fail in the duty. It also serves to deprive the non-disclosing of any benefit improperly obtained through the non-disclosure. See *Kaliyati and another v Maranatha International Academy and another* [2013] MLR 63 and *R v The General Commissioners for the Purpose of Income Tax Acts for the District of Kensington, ex parte Princess Edmond de Polignac* [1971] 1 K.B. 486 and *Ex parte Capital Radio Limited and Joy Radio Limited* judicial review number 29 of 2011 (High Court) (unreported).

The 2nd defendant contends that the claimants failed to disclose the existence of the prevention of domestic violence proceedings in this matter that are pending in the lower court.

The claimants, on the contrary, contended that they fully disclosed the fact that there were prevention of domestic violence proceedings pending before the lower court. And that therefore there was no failure to fully disclose the material facts in this matter.

What the claimants did was to exhibit the order obtained by the 2nd defendant before the lower court restraining the 1st defendant and persons unknown from disposing of the matrimonial property.

The fact that there were pending proceedings before the lower court was therefore disclosed by the claimants in their application for interlocutory injunction in this matter.

This Court made its decision bearing in mind that indeed the 2nd defendant had commenced prevention of domestic violence proceedings before the lower court.

In fact, the claimants in this matter lamented that these prevention of domestic violence proceedings were a desperate attempt on the part of the defendants to stop the claimants from lawful possession of the house herein the defendants having sold the same to the claimants.

The truth of the matter however is that the prevention of domestic violence proceedings before the lower court alleged that the 1st defendant secretly sold the house without the knowledge of the 2nd defendant who uses the same as matrimonial property. That aspect was watered down and was not frankly disclosed by the claimants. By the time the claimants came before this Court they were aware of that contention of the 2nd defendant which they represented to this Court as a desperate attempt. The claimants imputed that the 2nd defendant sanctioned the sale of the house herein which appears to be contrary to her case before the lower court.

This Court therefore finds that the claimants did not make a full and frank disclosure of the true nature of the proceedings before the lower court, namely, that the 2nd defendant claims that the matrimonial home herein was sold to the claimants herein without her knowledge.

Of course, there are all those other nuances to the case of the 2nd defendant that she bought the land herein together with the 1st defendant for the benefit of their son and that the land was registered in the 1st defendant's name.

This brings this Court to the issue whether there was an abuse of the court process by the claimants.

The argument of the 2nd defendant is that there is abuse of court process in this matter given that the same issue whether the claimants are entitled to possess the house herein as against the 2nd defendant is before the lower court and now before this Court. The 2nd defendant contends that the house in question before the lower court and this Court is the same one that she bought together with the 1st defendant.

The claimants contend that there is no abuse of the court process. They contend that the matter before the lower court pertains to prevention of domestic violence on the part of the 1st defendant as against the 2nd defendant.

And that the present matter pertains to the claimants right to enforce their right to possession and ownership of the house herein having bought the same from the defendants.

This Court has noted the persuasive authority cited by the claimants of *R v Croydon Justices ex parte Dean* [1993] 3 ALL ER 129 which makes clear that courts have power to prevent abuse of the court process arising out of a party's delay and manipulation and misuse of the rules of procedure. That case authority also makes clear that cases of abuse of court process are varied. Further, that courts have inherent power to prevent abuse of court process whatever form it may take, so long as the abuse would result in unfairness to opposing parties to litigation and would result in the administration of justice being brought into disrepute, even if the abuse of process is not inconsistent with the literal application of procedural rules.

This Court observes that the claimants came to this Court and watered down the nature of the dispute before the lower court. They represented the same as a desperate attempt on the part of the 2nd defendant to prevent them from lawful possession of the house herein.

As things stand, the lower court is to determine if the 2nd defendant is entitled to protection of her possession and ownership of the house in question as matrimonial property and home as against the 1st defendant who sold the said house to the claimants. This Court also has to determine the same question in view of the sale of the said house by the 1st defendant to the claimants.

In the circumstances, the argument by the claimants that they were looking for an injunction which the lower court could not grant, and that this was justification for them to come before this Court, cannot hold good given the 2nd defendant's argument that the issue of entitlement to own, possess and occupy the house in dispute is the subject matter of the lower court proceedings.

The same issue of who has the entitlement to own, possess and occupy the house that is before the lower court is the same one that was brought up before this Court by way of injunction.

This Court has had to consider this issue long and hard and concludes that in the circumstances, the claimants have misused the procedure by coming to this Court in view of the true nature of the lower court proceedings.

Notwithstanding that the lower court is proceeding under the Prevention of Domestic Violence Act and this Court is dealing with the contract of sale of the house, the issue before this Court and the court below hinges on the question of who is entitled to own, possess and occupy the house in dispute in this matter.

The manner in which the claimants have proceeded is manifestly unfair as the 2nd defendant was waiting for the same issues to be adjudicated before the lower court only for the claimants to bring the present proceedings in this Court.

At the same time, the manner in which the claimants have proceeded is likely to bring the administration of justice into disrepute as there will be two cases on the same subject matter proceeding before two different courts with the possibility of conflicting determinations being made on the issues that are essentially the same.

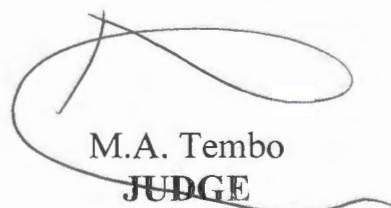
This Court agrees with the 2nd defendant that the claimants should have dealt with the case of the 2nd defendant before the lower court instead of commencing another matter on the basis only that they were seeking an injunction which the lower court cannot grant as it does not have the power to grant the same.

Otherwise, the claimants should have sought a transfer of the matter before the lower court to this Court if they felt that it should be dealt with in a context that is beyond the lower court's jurisdiction under the Prevention of Domestic Violence Act context.

There was therefore abuse of the court process.

For the foregoing reasons, the order of injunction granted ex parte herein is set aside with costs to the 2nd defendant.

Made in chambers at Blantyre this 10th July 2018.



M.A. Tembo
JUDGE