



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**LAND CAUSE NUMBER 65 OF 2017**

**BETWEEN:**

**JESSY CHAKONDWA**

**CLAIMANT**

**AND**

**RUTH CHAKONDWA**

**1<sup>st</sup> DEFENDANT**

**ERIC CHAKONDWA**

**2<sup>nd</sup> DEFENDANT**

**THOMAS CHAKONDWA**

**3<sup>rd</sup> DEFENDANT**

**DOUGLAS CHAKONDWA**

**4<sup>th</sup> DEFENDANT**

**LYDIA CHAKONDWA**

**5<sup>th</sup> DEFENDANT**

**JESSY CHAKONDWA**

**6<sup>th</sup> DEFENDANT**

**ELIZA CHAKONDWA**

**7<sup>th</sup> DEFENDANT**

**FAITH CHAKONDWA**

**8<sup>th</sup> DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO,**

Katsichi, Counsel for the Claimant  
Kamkwasi, Counsel for the Defendants  
Mpasu, Official Court Interpreter

## **ORDER**

This is this Court's order on the claimant's application for continuation of an order of interlocutory injunction made under Order 10 rule 27 of the Courts (High Court) (Civil Procedure) Rules 2017.

By the instant application the claimant seeks continuation of an order of interlocutory injunction, that she had earlier obtained ex parte, restraining the defendants from evicting and depriving her from use of land situated at Kainga village, Traditional authority Bvumbwe in Thyolo District which comprises farming fields, garage and dwelling houses until a further order of this Court or until determination of this matter.

The defendants oppose the claimant's application.

The case of the claimant according to her sworn statement is as follows.

She hails from Kainga village, Traditional Authority Bvumbwe in Thyolo District.

She is the daughter of the late Jeffrey Chakondwa who died on 27<sup>th</sup> March 1998 after suffering a stroke. She is also a sister to the late Pius Chakondwa who died in 2015.

She stated that the late Jeffrey Chakondwa acquired the land in dispute in this matter from his ancestors and did not buy the same. She added that Jeffrey Chakondwa acquired the said land for the benefit of his children including Pius Chakondwa who was her brother.

She stated further that Jeffery Chakondwa used to work on the land and proceeds from the said land were used to support his children. And further, that Jeffrey Chakondwa proceeded to share the land to all his children including the claimant but still some of the land remained and that was meant for the whole family.

She then stated that Jeffrey Chakondwa then instructed his son Pius Chakondwa to build a bar on the land and proceeds from the same were used to support the whole family. She added that with the passage of time, the bar was converted into a garage, known as Chako motors which still stands up to now.

She then stated that her late father, Jeffrey Chakondwa, used to work in the garage with all his children including the late Pius Chakondwa.

She stated that Pius Chakondwa married and settled on the said land and had children of his marriage who are still on the land in question. She added that Pius Chakondwa was given some land by her late father where he built a house.

She stated further that another brother of hers, Thomas Chakondwa, also married and settled on the land. Further, that Thomas' children under the patrilineal system are on the said land.

She then stated that after the death of Jeffery Chakondwa, all the children of the late Jeffrey Chakondwa agreed that they should be working on the land as well as the garage and all the proceeds should go towards the welfare of the children of the family of Jeffrey Chakondwa.

She stated that indeed everybody used to benefit from the proceeds of the land in question.

She then stated that she and her late brother Pius Chakondwa decided to allocate some of the land to his children.

She stated that before the death of his late brother Pius Chakondwa, and during the sickness of their mother, Pius Chakondwa sold part of the family land so as to realise money to assist their sick mother.

She added that at no point did she sell part of the land that was allocated to her.

She then stated that, lately, the children of late Pius Chakondwa, the defendants in this matter, would like to have all the land and use of the garage to themselves.

She stated that if the children of Pius Chakondwa proceed to deny her access to the land that belongs to her late father and the property thereon, the garage, then she would be destitute because she relies on the land for the upkeep and maintenance of her life.

She therefore sought a continuation of the order of interlocutory injunction that she obtained ex parte in this matter contending that if the order is not continued the defendants will continue to deprive her of the use of the land and eventually evict her from the said land which belongs to her late father Jeffrey Chakondwa.

On their part, the defendants filed a sworn statement by which they stated their case as follows.

That they are children and grandchildren of Pius Chakondwa and Jeffrey Chakondwa respectively.

They stated that the claimant lives at Gunde village in Thyolo District with her children where they have a lot of land and that she does not live at Kainga Village. They added that the injunction obtained earlier by the claimant ex parte is therefore nugatory because it cannot be enforced.

They stated that Jeffrey Chakondwa fairly distributed his land during his life to all his children including the claimant and Pius Chakondwa.

They stated that the claimant sold her land at Kainga Village which she was given by Jeffrey Chakondwa.

They then stated that, contrary to the claimant's assertions, their late father's investments on the piece of land in question were intended for himself, his wife and children and not the extended family.

They added that the 1<sup>st</sup> to the 5<sup>th</sup> defendants have built houses on the land which the claimant now intends to grab and the said defendants are raising their families on the said land.

They then stated that they are surprised that the claimant did not come to claim the land against their father Pius Chakondwa when he was alive if she really has and had a competing interest against Pius Chakondwa in relation to the estate of Jeffrey Chakondwa.

They then stated that they are reliably informed that the claimant already secured a buyer for their father's garage and their houses.

They stated further that some of the defendants are mechanics and are actually working at the said garage.

They also claimed that the claimant suppressed material facts.

They then stated that apart from the claimant, there are other relations of Jeffrey Chakondwa who are not doing what the claimant is doing.

The defendants also filed a sworn statement from Group Village Headman Dzungu, the traditional authority of the area in question.

He stated that Kainga Village is under his jurisdiction and headed by Village Headman Kainga. He added that the land in question is customary land.

He then stated that he knows the defendants as his subjects.

He stated that the claimant is not his subject and has never resided at Kainga Village.

He agreed with both parties that the land in question originally belonged to Jeffrey Chakondwa who before his death shared all his land amongst his children including the claimant and her brother Pius Chakondwa, who is the father of the defendants.

He stated that although the claimant was given a portion of land by her late father at Kainga Village, she still continued to live at Gunde Village in Thyolo where she currently resides.

He added that the claimant sold her portion of land at Kainga Village since she did not wish to live at Kainga Village. However, that Pius Chakondwa kept his portion of land for his children who are the defendants in this matter.

He then stated that Pius Chakondwa developed his piece of land and built a bar which was later turned into a garage because he was a mechanic by training.

He stated that five of the defendants have built their houses on the land which belonged to their late father Pius Chakondwa. He added that he was surprised that immediately after the death of Pius Chakondwa the claimant emerged and claimed a portion of the land in this matter.

He stated that he presided over the dispute and ruled in favour of the defendants and that in the end the claimant appealed to the District Commissioner who also ruled in favour of the defendants.

He added that he was disappointed that the claimant did not disclose all this information to this Court on obtaining the ex parte order of injunction.

The defendants seek that the ex parte order of injunction be discharged.

The defendant argued that the main contention that they have is that the claimant suppressed material facts on obtaining the order of interlocutory injunction ex parte.

The defendants contended that they stay on the land at Kainga Village. But that, in contrast, that the claimant did not disclose that she does not stay on the land.

The claimant indicated that she hails from Kainga village and admitted that she does not reside at Kainga Village but rather at Dzungu Village.

The defendants contended that it was therefore wrong for the claimant to inform this Court that she was being evicted from Kainga Villlage when she does not stay there. They added that a person cannot be evicted from a place which she does not possess.

The claimant argued that she stated that, although she stays elsewhere, she is being evicted because she is not being allowed access to the land herein by the defendants.

The defendants contended that in the circumstances the injunction is nugatory as it cannot be enforced given that the claimant stays in a different place and the defendants also stay in a different place where the claimant asserts she was evicted from.

This Court is aware that a party will not be allowed to benefit from an ex parte order obtained upon suppression of material facts. And that, as correctly contended by the defendants, an order obtained ex parte upon suppression of material facts will be set aside.

The question whether a fact not disclosed is sufficiently material to justify the immediate discharge of the injunction depends on the importance of the fact to the issues to be decided.

The test before the court is, has failure to disclose material facts known to the claimant led the court to give a decision that it could not have given had all the material facts been disclosed? If the answer is in the affirmative then the court must set aside the injunction. See *Chiume and others v Alliance for Democracy (AFORD) and another* [2005] MLR 88.

In the present matter, the claimant indeed did not disclose that she does not reside at Kainga Village. By saying that she hails from Kainga Village, the claimant gave the impression that she resides at the said village where the land in dispute is. However,

as pointed out by the defendants and conceded by the claimant, the claimant does not reside at Kainga Village and does possess the land in dispute.

It was therefore misleading for the claimant to state that she was being evicted from a piece of land that she does not have possession of. The right to customary land is in use and possession.

Strouds Judicial Dictionary of Words and Phrases (2000) (Sweet and Maxwell) states that eviction at law must be of a permanent character intended to deprive the tenant of the enjoyment of the thing demised.

The one enjoying use of land must be deprived of enjoyment of such use to amount to an eviction.

It cannot be said in this matter that the claimant was evicted from the land herein. She resides elsewhere. She claims to have been a beneficiary of the land but that is a mere assertion that is not yet proved.

This Court finds as a fact that the claimant suppressed the material fact that she does not reside on the land in question and that she misled this Court into believing that she was resident on the land in question and was being removed from the same by the defendants. This was in fact not the case.

This Court has observed that it has inherent powers to set aside an order of interlocutory injunction though the Courts (High Court) (Civil Procedure) Rules do not expressly say so. This is clear given that this Court has power to set aside other types of injunction that it has power to grant, namely, freezing injunctions and seizing injunctions. See Order 10 rule 16 and rule 26 respectively.

The claimant cannot be allowed to benefit from an ex parte order obtained upon a suppression of material facts as that would not be just. Ex parte orders of interlocutory injunction are granted only where it is just to so grant them. See Order 10 rule 27 (c) Courts (High Court) (Civil Procedure) Rules. The ex parte order of interlocutory injunction obtained by the claimant herein is accordingly set aside on the ground that there was non-disclosure of a material fact by the claimant at the time the order was sought.

In view of the foregoing finding of this Court, that the claimant was not in possession and not resident on the land in dispute, this Court agrees with the defendants' contention that the injunction obtained herein could not be enforced given that there was no eviction to be stopped by the injunction in the first place. The order of interlocutory would have no efficacy. That would make the said order nugatory, and on that ground too, it ought not to continue.

The other issue raised by the defendants was that the claimant simply wants to grab the inheritance of the defendants from their father Pius Chakondwa who built the garage herein. They observe that the claimant surprisingly only emerged after the death of Pius Chakondwa and did not raise the matter after the death of Jeffrey her father and during the life of Pius Chakondwa.

In response, the claimant indicated that the property in the garage is subject inheritance by herself since it is intestate property of either Pius Chakondwa or Geoffrey Chakondwa.

This Court is aware of the applicable law on interlocutory injunctions. The court will grant an interim injunction where the claimant discloses a good arguable claim to the right he seeks to protect. The court will not try to determine the issues on sworn statements but it will be enough if the plaintiff shows that there is a serious question to be tried. See Order 10 rule 27 (a) Courts (High Court) (Civil Procedure) Rules 2017.

The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality. Beyond that, it does not matter if the claimant's chance of winning is 90 per cent or 20 per cent. See *Mothercare Ltd v Robson Books Ltd* [1979] FSR 466 per Megarry V-C at p. 474; *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 per Megaw LJ at p. 373.

If the claimant has shown that he has a good arguable claim and that there is a serious question for trial this Court then next has to consider the question whether damages would be an adequate remedy on the claimant's claim. See Order 10 rule 27 (b) Courts (High Court) (Civil Procedure) Rules 2017.



Where damages at common law would be an adequate remedy and defendant would be able to pay them, an interlocutory order of injunction should be refused, irrespective of the strength of the claimant's claim. See *Mkwamba v Indefund Ltd* [1990] 13 MLR 244.

Where damages are an inadequate remedy the court will consider whether it is just to grant the injunction. See Order 10 rule 27 (c) Courts (High Court) (Civil Procedure) Rules 2017.

This will involve weighing whether the balance of convenience or justice favours the granting of the interim order of injunction. See *Kanyuka v Chiumia* civil cause number 58 of 2003 (High Court) (unreported); *Tembo v Chakuamba* MSCA Civil Appeal Number 30 of 2001 both citing the famous *American Cyanamid Co. v Ethicon Ltd* [1975] 2 WLR 316.

This Court notes that the claimant may have raised a triable issue by reason of her assertion of the fact that she wants protection of her alleged benefits from use of the land herein in the form of maintenance provided to her from proceeds of use of the garage on the land herein.

It is doubtful that damages would be an adequate remedy to the claimant if she lost the alleged benefits from the use of the garage herein.

However, it appears not to be just to let the claimant get possession of the land herein by way of an interlocutory injunction against the defendants who are children of Pius Chakondwa when all along the status quo was that the claimant never asserted such claims of inheritance against Pius Chakondwa during his life after the death of their late father Geoffrey Chakondwa and when the claimant has not been in possession of the said land at all.

The matter of intestate succession to the land herein, as asserted by the claimant, ought to be decided at trial after evidence is adduced by both parties. This implicates the provisions on intestate succession as contained in section 17 of the Deceased Estates (Wills, Inheritance and Protection) Act as cited by the defendants.

As correctly submitted by the defendant section 17 of the Deceased Estates (Wills, Inheritance and Protection) Act clearly provides for intestate succession to be in favour of the immediate family, being surviving spouse and children of the deceased

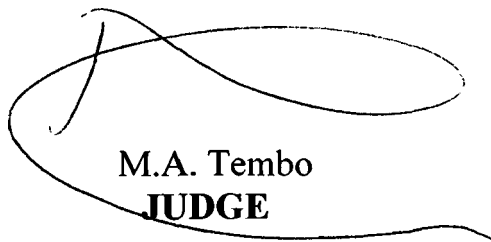
and minor dependents as well as parents of the deceased as opposed to the extended family.

To let the succession claims by the claimant at this interlocutory stage, concerning a garage built by the deceased father of the defendants, affect the defendants' use of the said garage may also not be just.

This Court would also therefore set aside the order of interlocutory injunction on account of the fact that it would not be just to let it subsist in the circumstances of this matter.

Costs are for the defendants on this application.

Made in chambers at Blantyre this 8<sup>th</sup> June 2018.



M.A. Tembo  
**JUDGE**