



IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
MISCELLANEOUS CIVIL CASE NO. 177 OF 2018

BETWEEN

CSL PANEL BEATERS..... CLAIMANT

AND

NUNES PROPERTIES LIMITED..... DEFENDANT

CORAM: HON. JUSTICE J N'RIVA

Counsel for claimant Mr C Gondwe

Counsel for the defendant: Mr P Mpaka

Ms Mtegha Court official

ORDER

Nunes Properties Limited owns some premises in the city of Blantyre. The claimant, CSL Panel Beaters is a tenant on the premises. Nunes Properties Limited (the defendant) intended to remove the claimant, CSL Panel Beaters, from the premises. The claimant obtained a without-notice order of injunction against the defendant's intention to remove them from the premises.

This, now, is a with-notice application for an order for an interlocutory injunction. The sought order is to restrain the defendants from encumbering entry into the claimant's workshop on plot number CC41 in Blantyre City. Alternatively, the order sought is to restrain the defendants from interfering with the claimant's peaceful occupation of the premises until the determination of the matter by this Court or by way of arbitration.

In support of the application, there is a sworn statement of Election Mlaviwa representing the claimant.

According to the sworn statement as well as the arguments during the hearing, the claimant and defendant signed a lease agreement which started on 1 May 2017 and expired on 30 April 2018

The claimant was paying monthly rentals of \$10,600 payable in advance on 25th day of the month before the month to which the rent related. After the expiry of the lease agreement, the parties proceeded in respect of the lease agreement on terms of the lease agreement. The parties were negotiating a fresh contract especially on the rentals because the claimant felt that rentals are high.

Whilst the negotiations were on, the defendant wrote the claimant that they would encumber the premises. The claimant sought a relief from Court against that process up until the issues of negotiations have been resolved by the parties.

Counsel argued that the entry would have affected business operations and the goodwill of the business. Counsel argued that the defendant could have resolved to other civil means to enforce the rental payment.

Counsel responded to an issue raised by the defendants that the matter was a commercial one requiring its commencement to be in the Commercial Division of the Court. Counsel argued that the issue in the Court is not a commercial matter. The matter is between a landlord and a tenant making it not substantially a commercial matter. Counsel argued that the best practice is for the Court to deal with the issue and refer it to Commercial Division.

Counsel for the defendants made reference to Section 45 of the Registered Land Act about holding over and argued that after 30 April, 2018 the parties were under a holding-over tenancy. Counsel also made reference to section 39(2) of the Act arguing that if a tenant is paying rentals month to month the holding over arrangement becomes a month-to-month tenancy, and so on and so forth.

Counsel made reference to clause 3.1 in the lease agreement that if there is default in payment of rentals on part of CSL Panel Beaters for a period of 10 days Nunes Properties Limited is entitled to enter the premises. Therefore, counsel argued that it was open to the defendant to enter the premises. To buttress his point, counsel cited *Sajid SS Jussab v NBS Bank* [2010] MLR 337 and *NBS v Henry Mumba* [2001-2007] MLR (Comm) 43. Counsel quoted *NBS v Henry Mumba* said where the Court said that courts should be slow to intervene contrary to the express desire of the parties

to any lawful agreement as to what should happen when certain specified events take place.

Counsel argued that according to clause 3.1 of the agreement if there was no payment for 10 days Nunes Properties Limited would take over the premises. Counsel argued that the agreement continued by the virtue of the holding over. Counsel argued that the claimant had no right to obtain an injunction. On the issue that the eviction would cause embarrassment to the claimant, counsel argued that that (the eviction) was what the parties agreed should happen in case of non-payment.

In conclusion counsel argued that is no question to be tried. Counsel argued that the law in the Registered Land Act is clear that on holding over, parties are governed by the preceding agreement. Counsel also argued that under the preceding lease agreement, if the claimant defaulted payment for ten days, the defendant was entitled to enter the premises.

Counsel further argued that the claim by the claimant was for an order of injunction and a declaration that CSL Panel Beaters is entitled to peaceful occupation of the premises. Counsel argued that the condition on which a tenant can enjoy the right to peaceful enjoyment of premises is through the payment of rentals. Counsel further argued that the claimant was ultimately claiming an injunction. On that point, counsel argued that the Court cannot grant interim injunction as a relief when the ultimate relief is the injunction itself.

Counsel maintained that the matter at hand is a Commercial matter according to section 2, of Courts Alt. He said the matter involves a landlord and tenant, which is a contract and there is an outstanding payment of K46,000,000

Counsel argued that the case should have been rejected for it contravened the Courts Act and the rules of procedure for not giving notice to the defendant.

On damages, Counsel argued that if the defendants were to be in the wrong, the claimant's remedy lied in damages.

In response counsel for the claimant maintained that the Court should proceed with an injunction against the conduct of the defendants intending to encumber the claimant's workshop. Counsel maintained that the claimant is entitled to peaceful occupation of the premises even where there are rental arrears. Counsel argued that there was a real danger to the business and goodwill of the claimant: the business operations of the claimant would have ceased on the date mentioned by the defendant to encumber the premises.

On jurisdiction, counsel argued that the amount in the matter does not turn it into a commercial matter. He argued that not all contracts are commercial matters. Counsel, therefore, argued that this Court had jurisdiction to deal with the matter. Alternatively, if the Court finds that this is a commercial matter, the Court can transfer it to the commercial division.

The issue is to whether or not to grant the continuation of an injunction.

Order 10 rule 27 of Courts (High Court) (Civil Procedure) Rules provides that

1. The Court may, on application, grant an injunction by an interlocutory order where it appears to the Court that-
 - (a) there is a serious question to be tried;
 - (b) damages may not be an adequate remedy; and
 - (c) it shall be just to do so,and the order may be made unconditionally or on such terms or conditions as the Court considers just.

In *Gwanda Chakwamba v John Tembo Civil Cause No. 2509 of 2001* the court said:

In *American Cyanamid Co v Ethicon Ltd* [[1975] AC 396], the House of Lords, overruled earlier decisions requiring the applicant to raise a *prima facie* case, opted for the applicant to raise a triable issue. The action must not be frivolous and vexatious and must have some prospects of success.

Hubbard v Vosper [1972] 1 All ER 1023 as follows:

In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose any restraint on the defendant but leave him free to go ahead.

Let me start with the issue of jurisdiction.

Section 2 of the Courts Act defines a commercial matter as

a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature, whether contractual or not, including-

- (a) the formation or governance of a business or commercial organization;

- (b) the contractual relationship of a business or commercial organization;
- (c) liabilities arising from commercial or business transactions;
- (d) the restructuring or payment of commercial debts;
- (e) the winding up of companies or bankruptcy of persons;
- (f) the enforcement or review of commercial arbitration award;
- (g) the enforcement of foreign judgments of commercial matters subject to the provisions of the law;
- (h) the supply or exchange of goods and services;
- (i) banking, negotiable instruments, international credit and similar financial services;
- (j) insurance services, or
- (k) the operation of stock and foreign exchange markets, in the event of doubt as to whether a matter is commercial or not, the judge at the outset or during the course of the action, shall have power to resolve the issue";

My considered view is that the matter before me is one of commercial significance arising out of a commercial or business relationship. The Court in *Mulli Brothers Limited v FDH Bank Limited* (Civil Cause No. 53 of 2017) reached a similar conclusion. This matter, therefore ought to have been commenced in the commercial division. Should the claimant intend to proceed with its cause of action, the matter should proceed in the Commercial Division of the Court.

Coming to the issue of whether to grant the injunction or not:

To begin with, taking into account the arguments of the parties, I fail to appreciate that the claimant has a triable issue. First, they have sought an injunction as a cause of action.

An injunction is not in itself a cause of action; it must be auxiliary or incidental to a cause of action. Hon Kenyatta Nyirenda J said in *Jumbe v Robert and Chipagara* Civil Cause Number 186 of 2017,

...it is worth remembering that the right to an injunction is not a cause of action in itself: See *The Siskina* [1979] A.C. 2010 and *Channel Tunnel Group Ltd v Balfour Beatty Construction* [1993] A.C 334 at 360-362.

The Honourable Judge quoted Lord Diplock, in *The Siskina*:

A right to obtain an interlocutory judgment is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.

Therefore, to the extent that the main claim is the injunction itself, I find difficulties to find the real claim of the claimant. Counsel for the claimant argued that apart from the injunction, they are seeking an order for peaceful occupation of the premises. However, taking into account the agreement between the parties prior to the holding over, I also fail to appreciate that claim. Since the defendant's intended to act in accordance with the lease agreement, I do not think that the issue of peaceful occupation would have merits. I also dismiss the injunction on the ground of want of triable issue.

Generally, therefore, I dismiss the injunction. The claimant ought to meet costs of this application.

MADE in Chamber the 4th day of July 2018



J N'RIVA

JUDGE