JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 333 OF 2017

BETWEEN

ABDUL GAFFAR ISMAEL MALIDA ..... CLAIMANT

AND

MONSOOR RASHID KASIM ..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Salimu, of Counsel, for the Claimant
Mr. Chimkango, of Counsel, for the Defendant
Mrs. Doreen Mkangala, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is the Defendant's application whereby he seeks an order discharging a freezing injunction that was granted by the Court on 28th April 2017 [hereinafter referred to as the "Defendant's application"].

It is desirable, before proceeding to consider the 1st Defendant's summons, to state so much of the facts as is necessary to make the 1st Defendant's application intelligible.

The Claimant commenced an action against the Defendant claiming, among other reliefs, "*an order rectifying the land register so that Title number Limbe Central 134 reverts back to the owners, namely, the Claimant and his co-proprietor*".

The Claimant also filed an Ex-parte application for a freezing injunction restraining the Defendant from in anyway dealing with Plot No. LC 945 being Title No. Limbe Central 134 [Hereinafter referred to as the "Claimant's application"]. The Claimant's application was supported by a sworn statement by Mr. Ambokire Bless Salimu [Hereinafter referred to as the "Claimant's sworn

statement"]. The relevant part of the Claimant's sworn statement is in the following terms:

> *"1. THAT the Claimant herein is co-proprietor of Title Number Limbe Central – 134.*
>
> *2. THAT in the year 2001 the defendant fraudulently procured the conveyance of the said property through the Law Practice of Bernard and Harris to third parties. Now produced and shown to me marked "AB1" is a copy of the conveyance in issue.*
>
> *3. THAT by Order dated 5th August 2008 the Court rectified the Land Register on application by the Claimant. Now produced and shown to me marked "AB2", "AB3"and "AB4" are the order of rectification; a covering letter forwarding the Order of rectification to the Commissioner of Lands (South) for his action; and the affidavit of Mr. Malida in support of the application.*
>
> *4. THAT a week ago agents of the plaintiff alerted him that another plot he co-owns is being developed illegally by a Mr. Sartery and this is what prompted the plaintiff to instruct Messrs Salimu and Associates to conduct a search at the Land Registry when it was discovered that after the Order of the Court of 2008 rectifying the record, the defendant somehow found his way again this time to convey the plot to himself, claiming to be the executor and Trustee of late Mohammed Kassam. All this with a caution that the plaintiff registered in 2008 against the Title still in place. Now produced and shown to me marked "AB5" is a copy of the said caution which to the plaintiff's knowledge has not been challenged or dislodged.*
>
> *5. THAT the application is of outmost urgency in that if the defendant fraudulently conveys the title in issue to a third party it will complicate an already complicated factual and legal status quo."*

The Claimant's application came before me and I granted the Claimant, as prayed, a freezing injunction restraining the Defendant from in anyway dealing with Plot No. LC 945 being Title No. Limbe Central 13 [hereinafter referred to as the "freezing injunction"]. The formal Order of the freezing injunction dated 1st November 2017 states:

> *"**UPON HEARING** Counsel for the claimant.*
>
> ***AND UPON READING** the sworn statement of **AMBOKIRE BLESS SALIMU SNR** filed in support of the application.*
>
> ***AND UPON** the claimant through Counsel undertaking to pay damages in the event it later transpires that this Order was irregularly procured from the Court.*

IT IS HEREBY *Ordered that the defendant be restrained from in any way dealing with Title number Limbe Central 134, being plot number LC 94 S pending determination of the substantive action herein or until a further order of the Court."* – Emphasis by underlining supplied

The Defendant's application is supported by a sworn statement by Mr. Bob Chimkango [hereinafter referred to as the "Defendant's sworn statement"] which provides as follows:

> *"3.* ***THAT*** *I have read the application by the claimant, as well as the sworn statement attached thereto, which was the factual basis for the grant of the order of Freezing Injunction herein, and it is clear that the same was obtained on the basis of an order obtained by the claimant on the 5th day of December, 2008, in Civil Cause Number 167 of 2008, which was exhibited as* ***"AB 2" in the Sworn statement of Ambokire Bless Salimu.***
>
> *4.* ***THAT*** *the claimant however deliberately hid or withheld from this court, a material fact that the said order, was set aside by this court, on the 21st day of December, 2010, a copy of such order is exhibited and marked as* ***"BC 1."***
>
> *5.* ***THAT*** *I have taken the initiative to search the Civil Registry as well s the Supreme Court Registry, and I state that there has been no other order setting aside the order of 21st December, 2010 and that no appeal whatsoever was lodged by the claimant in the matter.*
>
> *6.* ***THAT*** *accordingly, if the claimant had disclosed to this court, the fact in paragraphs 4 and 5 above, this court would not have granted the freezing injunction in question.*
>
> *7.* ***THAT*** *in the foregoing, it is clear that the order in question was obtained by way of concealment of a material fact; that the order relied on, was already set aside by the court.*
>
> *8.* ***THAT*** *in every case, the injunction granted herein lacks any legal and/or factual basis and ought to be set aside with costs."*

The Claimant does not dispute the assertion in paragraph 4 of the Defendant's sworn statement to the effect that the Court order relied upon by the Claimant had been set aside but asserts that the Claimant had no notice of such order. Paragraphs 2 and 3 of the Claimant's sworn statement in opposition to the Defendant's application are relevant and they are couched in the following terms:

> *"2.* ***THAT*** *the Claimant was not aware of the existence of the Order of 21st December, 2010 referred to in the 5th paragraph of the defendant's Sworn Statement and could therefore not ordinarily be expected to have brought it to the attention of the court.*

3. ***THAT*** *I repeat the 3rd paragraph hereof and state that in fact the said Order says it was obtained without notice. And further it is clear on the face of it that it was never served on the Claimant. It is unfair therefore for the defendant to seek to imply that the Claimant must have been aware of the said Order when he made the application for the injunction.*

WHEREFORE it is my humble prayer before this Honourable Court that the application be dismissed with costs."

The position at law is that it is always open to an opposing party, where an interlocutory injunction was granted *ex parte*, to apply to the court for its discharge on the ground that there had not been frank and full disclosure of all material matters of both fact and law: **The State v. Malawi Communications Regulatory Authority, ex-parte Capital Radio Malawi Limited and Joy Radio Limited, HC/PR Judicial Review Cause No. 29 of 2011, unreported**.

In **R v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond de Polignac [1917] 1 KB 486**, Lord Cozens-Hardy M.R, observed thus at page 504:

"The authorities in the books are so strong and so numerous that I propose to mention one which has been referred to here, a case of high authority, ***Dalglish v. Jarvie 2 Mac. & G, 231, 238****, which was decided by Lord Langle and Rolfe B. The head-note, which I think states the rule quite accurately, is this: "It is the duty of a party asking for an injunction to bring under the notice of the court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward.". Then there is an observation in the course of the argument by Lord Langdale: "It is quite clear that every fact must be stated, or, even if there is evidence enough to sustain the injunction, it will be dissolved. That is to say he would not decide upon the merits, but said that if an applicant does not act with uberrima fides and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh injunction".* – Emphasis by underlining supplied

It has been held, in the case of **Brink's Mat Ltd v. Elcombe and Others[1988] 1 WLR 1350 at 1356F**, that the duty of the applicant to make a full and frank disclosure of material facts entails the following:

1. material facts are those which it is material for the judge to know in dealing with the application as made

2. materiality is to be decided by the court and not by assessment of the applicant or his legal advisors

3. the applicant must make proper inquiries before making the application

4. the duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such enquiries

5. the extent of the enquiries which will be held to be proper and therefore necessary must depend on all the circumstances of the case

6. if material non-disclosure is established the court will be astute to ensure deprivation of an ex-parte injunction or any relief obtained thereby

7. whether the fact complained of is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depend on the importance of the fact to the issues and that non-disclosure was innocent is an important consideration but not decisive.

The rationale for requiring an applicant to make the fullest and possible disclosure of material facts is not difficult to comprehend. In the words of Rolfe B in the case of **Daglish v. Jarvie (supra)**:

> *"I have nothing to add to what Lord Langdale has said upon the general merits of the case; but upon one point it seems to me proper to add thus much, namely, that the application for a special injunction is very much governed by the same principles which govern insurances, matters which are said to require the outmost degree of good faith, 'uberrima fides.' In cases of insurance a party is required not only to state all material facts within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material it is a fraud; but, besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. So here, if the party applying for a special injunction abstains from stating facts which the Court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the Court to grant. I think, therefore, that the injunction must fall to the ground."*

From the foregoing, I understand the law to be perfectly well settled. A person who makes an *ex-parte* application to the court, that is to say, in the absence of the person who will be affected by that which the court is asked to do, is under an obligation to the court to make the fullest and possible disclosure of all material facts. The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such enquiries. The extent of the enquiries which will be held to be proper and therefore necessary must depend on all the circumstances of the case.

In the present case, it is noteworthy that the order relied upon by the Claimant is on the same case file and same cause as the order being relied upon by the Defendant. This means that had the Claimant made proper inquiries on the case file in question, he would have found that the said order had been set aside. It is needless to say that this Court would not have granted the freezing injunction if it had been made aware that the order upon which the Claimant relied on had been set aside.

The importance of the suppressed fact cannot be overemphasized. The order having been set aside, the only legal means by which the Claimant could have proceeded against the Defendant was by way of appeal to the Supreme Court. It is not difficult to surmise why the Claimant chose not to disclose this fact: the time for appeal against such order had elapsed and any further action in the original matter would be statute-barred.

All in all, I am satisfied that the Defendant has established that the Claimant failed to disclose material facts, which ought to have been known if proper inquiries had been made. In these circumstances, the Defendant's application succeeds. I, therefore, discharge the freezing injunction.

Costs normally follow the event and since the Defendant has succeeded, I order that the costs of these proceedings be borne by the Claimant. I so order.

Pronounced in Chambers this 29th day of August 2018 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE