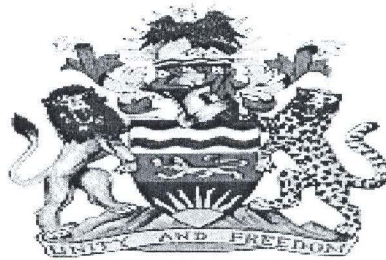


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MALAWI JUDICIARY  
IN THE HIGH COURT OF MALAWI  
CIVIL DIVISION  
PRINCIPAL REGISTRY  
LAND CASE NO. 13 OF 2018

BETWEEN

ANDIYESA MASELULA MHANGO.....CLAIMANT

AND

MR CHABWERA.....DEFENDANT

CORAM: THE HON. JUSTICE J. N'RIVA

Mr Nazombe, of Counsel for the Claimant  
Mr Phokoso, of Counsel for the Defendants  
Ms D Mtegha, Court official

JUDGMENT

The claimant, Mrs Andiyesa Maselura Mhango, commenced this matter claiming that the defendant, Mr Chabwera was encroaching her piece of land.

By the action she commenced, Mrs Mhango seeks to bar Mr Chabwera from encroaching the land in addition to claiming damages for trespass. Pending the hearing of the matter, Mrs Mhango sought an interlocutory order of injunction restraining the defendant from cultivating and making any developments on the land.

The claimant obtained the order on an allegation that the defendant has no consent or licence to cultivate and/or make any developments on the land.

I granted the interlocutory order and also ordered the claimant to bring up the matter for determination whether to continue with the injunction or not.

The defendant argues against the continuation of the injunction on the premises that the claimant had suppressed material facts.

Apart from that the defendant wants the Court to add Malawi Housing Corporation (MHC) as a party to the proceedings.

Therefore, there are two issues to be decided by this Court:

- (1) Whether Malawi Housing Corporation should be added as a party to the proceedings
- (2) Whether the order of injunction should be continued or discontinued

#### Statements by the Defendant

Basically, the issue from the defendant's side is in the sworn statement of Mr Chabwera, the defendant. There is also a sworn statement of Kuleza Richard Phokoso, counsel for the defendant. From the arguments, Mr Chabwera got lease from MHC of freehold land next to the piece of land that is the source of contention. According to Mr Kuleza Phokoso, Mr Chabwera knew that MHC was the owner of the land as a freeholder who had not yet leased it out. Mr Chabwera took possession of the land for 24 years and was conducting his activities on the land. The activities included growing crops. Mr Chabwera started the registration process by prescription as a freehold owner of the land by engaging surveyors to survey the hectarage of the land. Mr Chabwera also engaged Blantyre Land Registry to register the title by prescription. Then he started developing the land. MHC in 2013, through its tried to discuss the issue with him. He told them that they had extinguished their title through prescription. Counsel argued that Mr Chabwera is the current owner of the land. Further, the creation of leasehold (in favour of Mr Mahuka, who later transferred the land to the claimant), was void from the start. Further to that MHC fraudulently purported to create a lease in favour of Mr Mahuka. Counsel therefore argues that the just and effective resolution of this case requires that MHC should be made as a party as a second claimant.



The sworn statement of Mr Chabwera echoes the sentiments that Mr Phokoso expressed.

He added that Ms Mhango knows him very well. She also knows that he took possession of the land in 1994 and that he had tussles with MHC who tried to dispossess him of the land in 2013. She also knows that he vehemently refused to leave the land when Mr Mahuka purported to transfer the land to her. Mr Chabwera, therefore, argued that Mrs Mhango did not disclose these facts to the Court when making the application.

### Arguments

To some extent I have already outlined the arguments of the defendant. In favour of adding MHC as a party, the central argument of the defendant is that MHC knows about the issue from the start. The allegation is that MHC has knowledge that Mr Chabwera claims title to the land by prescription. Further, the argument is that MHC purported to transfer the land to Mr Mahuka and he protested.

In respect of the injunction, Mrs Mhango's argument is that Mr Chabwera has been trespassing on her land despite several attempts to stop him.

The defendant, as I have stated, opposes the continuation of the injunction. The main argument is that Mrs Mhango suppressed material facts. As I have already stated, the issue Mr Chabwera raises is that Mrs Mhango has been aware that he has been on the land for 24 years. He argues that Mrs Mhango found him right on the land amid suggestions that he had told MHC that it had extinguished title on the land. The defence argues that there is no *status quo* that this Court has to maintain. The defence further argues that the application for the injunction was an abuse of the court process.

On damages, counsel for the defendant argued that the claimant did nothing on the land and did not demonstrate if damages would not be a remedy that is adequate. Contrarily, counsel argues that damages would be an adequate remedy for the claimant.

The claimant on the other hand argued that the owner of the land is the claimant and has the title to the land, and the defendant did not show any legal documentation to support his title.

On the issue of *status quo*, counsel argued that the status is that the claimant is the one in occupancy of the land, the status that she wants to protect. He said the claimant has documentation of title to the land.

On material facts, counsel for the claimant argued that the claimant brought the material facts that she was the owner of the land and that the defendant was encroaching on her land.

He said that the claimant attached a lease certificate and that that is the material fact: that the claimant had title to the land. On damages, the claimant argued that it would not be proper to allow a party to encroach on other's land on the pretext that they would be able to pay damages.

### Issues

The issues I have to determine are whether to add MHC as a party to the proceedings and whether to sustain or discontinue the injunction.

On the injunction, the issue arising is whether the claimant did not give facts that could have made the Court arrive at a different decision. If so, I have to throw away the order of injunction. (See *Mr Chalo Ng'ambi T/A Chalo Ng'ambi Investments v BP Malawi Limited* [2006] MLR 295 (HC) and *Press & Shire Clothing v Banda* [1995] 1 MLR 192 (HC). The alternative issue is whether damages would be a befitting reparation to the claimant. If that is the case, an injunction might not be proper- *Mkwamba v Indefund Ltd* [1990] 13 MLR 244 (HC). The other issue is what is the parties' *status quo* in relation to the land.

### My Analysis and Finding

On *status quo* and suppression of material facts the thematic quarrel is who is the owner of the land. The defendant argues that he acquired the ownership of the land through prescription. Furthermore, he says that he resisted the transfer of the land from MHC to Mr Mahuka. The defendant did not inform the Court that fact (that the defendant opposed the transfer of the land).

The question, therefore, is whether the claimant suppressed material facts. In other words, the question is whether what the defendant says the claimant did not say was a fact material to her motion to obtain the injunction. In my judgment, the claimant argues that she has title to the land and the defendant was encroaching. The question



is whether the claim would have had a different angle had the claimant told me that the defendant was making a claim to the land.

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- *State v Malawi Communications Regulatory Authority and Joy Radio Limited* HC/PR Judicial Review Cause No. 29 of 2011 (unreported).

The question is whether the claimant made a reasonably full and possible disclosure in making the application. In my view, I believe she did. The claimant, in my view, had a strong case for an injunction. We have to look at the fact that the defendant had claims to the land, against the differing claim by the claimant that she also had a claim in the land. I, do not find the claim that the defendant had a contrary claim as so material as to make a difference to the assertions of the claimant.

In my judgment, the claimant still has a triable issue- an interest to protect for she has produced documents which purportedly, one can presume that she has an interest to protect.

I, therefore, find all the allegations by the defendant as allegations that would be of use in the trial of the matter and not at this point of interlocutory hearing.

Coming to the issue of damages, the main argument by the defendant has been that damages would be adequate. The claimant argues that a party should not be allowed to encroach another's land on the pretext that they would pay damages. Be that as it may, I am not at this juncture resolving the issue of who owns the land. However, at the grasp of the issues, the claimant equally claims ownership to the land. She claims the defendant is encroaching. This is not a stage at which I have to necessarily settle the matter on the strength of evidence (See *Mangulama and Four Others v Dematt* Civil Cause No. 893 of 1999, *Chalo Ng'ambi T/A Chalo Ng'ambi Investments v BP Malawi Limited* [2006] MLR 295 (HC)).

However, it appears to me, at the expense of repeating, that the claimant has an arguable case.

If her claim is justifiable, her interest in the land might hardly be met by damages. It has been said that issues of land are so unique that damages might not usually be a remedy as adequate as possible.

In *Mulli Brothers Limited v Ecobank Malawi Limited* Civil Cause No. 660 of 2013, Mwaungulu, J (as he then was) said that damages may not sufficiently remedy issues concerning land:

“Damages, in so far as realty is subject matter of an interim injunction, are an inadequate remedy. Pieces of land, even if contiguous, are not the same and are inherently unique that damages are not adequate remedy and courts, therefore, issue of injunctions on realty (*Sikawa vs. Bamusi and Another* (2013) Land Cause No. 53 (HC) (PR). It is unnecessary, therefore, to consider, on the principles in *American Cyanamid Company Ltd and Ethicon Ltd*.

In *Mulipa v Mr and Mrs Buliyani and others* Land Cause 105 of 2015, the Court said:

‘What this Court wishes to observe is that land is inherently unique and therefore damages are not an adequate remedy where the same is dealt with adversely. Therefore, the issue on adequacy of damages is ordinarily out of the question in relation to applications for injunction in relation to land. See *Nanguwo v Tembenu and another* civil cause number 451 of 2013 (High Court) (unreported).’

In all this my finding is that in case the claimant succeeds damages may not necessarily be a completely suitable compensation to her.

#### Adding MHC as a Party

Considering, the arguments, that the parties have raised I form opinion that the reasons the defendant wants to have MHC as a claimant, are not very convincing. The defendant’s claim is that the transfer of land from MHC to Mrs Mhango was unlawful. I fail to appreciate then why then MHC should be made a claimant. It would have been a different story had it been the case that the defendant commenced an action. They could have chosen to have MHC as a defendant or a co-claimant. I fail to appreciate why the defendant should choose MHC to be a claimant. I am at a loss as to why MHC should be a claimant in this matter.

I, therefore, do not form the opinion that MHC would be an appropriate party to the proceedings.

#### General Conclusion

To crown it all, on the interlocutory injunction, I also allow the application to continue with the injunction until the determination of the matter. On the issue of adding MHC as a party, I disallow the application.

MADE in Chamber the 28<sup>th</sup> day of September, 2018

J. N'RIVA

JUDGE