



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CASE NUMBER 238 OF 2018

BETWEEN:

JOSEPH THANGALIMODZI AND 18
OTHERS..... CLAIMANTS

AND

ROADS AUTHORITY..... FIRST DEFENDANT

AND

MOTA ENGIL ENGENHARIA E COSTRUCAO AFRICA
SA.....SECOND DEFENDANT

CORAM: Hon Justice Jack Nriwa, Judge

Mr. Kuleza Phokoso for the claimants

Mr. B Matumbi for the first defendant

Ms. Chisomo Nyemba for the second defendant

Ms. Deliwe Mtegha Court Clerk

RULING

The Claimants and Their Claims

The claimants are tea growers in Thyolo through whose farms, a road project is to pass through. The road project is from Thyolo to Nsanje districts. They have commenced a suit against the defendants, respectively, the government agency responsible for road constructions (The Roads Authority) and the contractor for the project (Mota Engil Engenharia Construção Africa SA).

The claimants are claiming;

- (i) a declaration that the decision of the defendants to take away the claimant's land and destroy tea crops is illegal and in violation of the law conferring rights to property and compensation for expropriation;
- (ii) a declaration that without compensation to the claimants, the acts of the defendants amount to illegal expropriation of land, violation of the claimants' right to property and economic activity, as well as trespass and are illegal;
- (iii) a declaration that the claimants are entitled to compensation under the law for loss of land and destruction of tea crops; and
- (iv) an order directing the defendants to pay compensation to the claimants.

Contemporaneous with the commencement of the action, the claimants seek an interlocutory injunction against the defendants restraining the defendants from

- (i) constructing the Thyolo- Nsanje Fatima Road through the claimants' farm lands;
- (ii) taking or destroying the claimants farm lands, expropriating the claimants' farm lands without compensation or destroying the claimants' tea crops or entering and conducting any activities on any of the claimants' land for purposes construction of the Thyolo- Nsanje Fatima road without compensation;
- (iii) trespassing on the claimants' land and further encroachment and violation of the claimants' quite enjoyment of their right to property and economic activity without compensation until the final determination of this matter or a further order of the court.

The Law on Injunctions

The parties have outlined the law on injunctions. Courts (High Court) (Civil Procedure) Rules 2017, contain the principles under which the Court may grant an interlocutory injunction without conditions or on such conditions as the Court may deem just. The principles are

(a) there must be a serious question the Court may try; (b) damages may not be an adequate remedy; and (c) it shall be just to do so. I will be referring to these principles as I tackle the arguments of the parties and as I make my determination. (Order 10 rule 27)

Arguments

In summary, the claimants argue that their claims cannot be addressed by compensation or damages.

The claimants further argued that even where damages would be adequate where the actions of the defendants constitute violations of rights of the claimants under the constitution, an injunction will be granted. Counsel relied on the decision in *Wanangwa Mbereka v Malawi Housing Corporation* Commercial Case Number 267 of 2017.

Counsel further argued that in the case of *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*.

Contrary to the assertions by the claimants, the defendants argue that the claimants are claiming monetary compensation. They, therefore argue that damages would be an enough redress for the claimants’ claims in the matter.

Issue in Dispute

The main issue is whether damages (compensation) would redress the claimants’ grievances in the action.

Resolution of the Issues

On whether there are triable issues, without delving much into the issues, it seems to me there are triable issues. I remind myself that 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)). I, nonetheless, believe that the claimants have claims worth pursuing in the court.

In *American Cyanamid Company v Ethicon Limited* Lord Diplock said:

The applicant must establish that he has good arguable claim to the rights he seeks to protect. The court must not decide the claim on affidavits before it; it is enough if the application shows that there is a serious question to be tried.

On the issue of damages, I believe this is the case where damages would be a remedy, an adequate remedy for that matter, should the court find in favour of the claimants' complaints. Looking at the claim by the claimants, it is quite apparent that the claimants are seeking compensation for loss of their pieces of land. The main issue is that of compensation.

The claimants have argued that the dispute raises constitutional matters namely:

- (i) Whether the actions of the defendants have violated the constitutional rights of the claimants under Section 28(2) and 29 and 44(3);
- (ii) Whether it was lawful for the defendants in violation of Section 28(2), Section 29 and Section 44(3) of the Constitution to expropriate, take the claimants land without compensating them in line with Section 11(1) (c), Section 28(2) and Section 45 of the Public Roads Act and Public Roads Amendment Act 2016;
- (iii) Whether the actions of the defendants in light of non-compliance with the law constitute trespass to the claimants' land;
- (iv) Whether in violation of applicable law the defendants trespassed the land of the claimants;
- (v) Whether the claimants are entitled to consultation before their land was taken and compensation if their land was to be taken and should have been consulted and compensated as provided under Section 28(2), 44(3) of the constitution, Section 11(1)(c), Section 28(2) and Section 45 of the Public Roads (Amendment) Act 2016.

However, as the defendants argue, and guided by the claimants' statement of case, the claimants are seeking:

Firstly, a declaration based on rights to property and compensation for expropriation. The issue goes beyond the issue of expropriation or the right to property. This is a claim for compensation.

Secondly, a declaration that without compensation to the claimants, the acts of the defendants amount to illegal expropriation of land, violation of the claimants' right to property and economic activity, as well as trespass and are illegal. Again, on this point, the issue is that of compensation.

The third claim is for a declaration that the claimants are entitled to compensation under the law for loss of land and destruction of tea crops; and

Finally, the claimants seek an order directing the defendants to pay compensation to the claimants.

On all these heads of claims, the prominent claim is that of compensation. It, thus goes without saying that the claim for the claimants is for compensation. This is a case where compensation would be ideal. This is more especially taking into account that the issue of the land in question is for road construction. This is not case of parties quarreling over a piece of land. The issue before the court is not whether the road should not be constructed through the claimants' land but whether the claimants should be compensated for the loss of land used for the road. It is clear from the statement of the case that the claimants are seeking a monetary remedy. They fear that they may not be compensated. They are not essentially complaining about loss of land. They are mostly afraid of loss of land without compensation. As Mr Matumbi argued, the issue before the Court is not whether the road should not be constructed through the claimants' land. It is whether the claimants should be compensated for the loss of land used for the road construction.

As the Court said in *the American Cyanamid Case*, the Court said:

If the Applicant satisfies these tests, the grant or refusal of an injunction is a matter for the court's discretion on a balance of convenience. Thus, the court ought to consider whether damages would be a sufficient remedy. If so an injunction ought not to be granted. Damages may not be a sufficient remedy if the wrong in question is irreparable or outside the scope of pecuniary compensation or if damages would be difficult to assess.

The other issue worth commenting on is whether it would be just to entertain the application for the interlocutory injunction.

Again, in *the American Cyanamid Case*, the Court said:

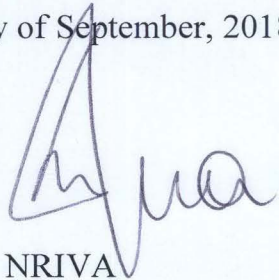
It will be in general material for the court to consider whether more harm will be done by granting or by refusing an injunction.....

This case before me raises issues concerning construction of a public road and consequences of halting such a project. There is also a question of meeting deadlines for the project. The order the claimants seek would halt the whole project which is of a greater public utility. The order may undoubtedly affect the completion of the project. The financial consequences on the defendants would be huge. There is a concept, under the common law, for an applicant for an injunction to make an undertaking of damages to respondents in case of the case

ending in favour of the respondents. The claimants have not done that. The question is if the Court halts the projects, and it turns out that the claimants are not successful, would they compensate the defendants?

In the circumstances, I find that an order of interlocutory injunction would be misplaced. It would not serve justice in the matter. I dismiss the application. I make no order of costs at this point. Each party shall meet its costs.

DELIVERED in Chamber the 13th day of September, 2018



J N RIVA

JUDGE