JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 1010 OF 2018

BETWEEN

PATRICK BANDAWE …...………………………………………. CLAIMANT

AND

MALAWI CONGRESS PARTY …………………………...…… DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Messrs Kubwalo and Namasala, of Counsel, for the Claimant
Mr. Mhone, of Counsel, for the Defendant
Mr. D. K. Itai, Court Clerk

RULING

Kenyatta Nyirenda, J.

On 24th January 2019, the Court struck out the proceedings herein, which also meant that the order of interlocutory injunction (injunction) that had been granted herein lapsed. The Claimant seeks to have the proceedings and the injunction restored.

The application for restoration of proceedings (application) was filed on behalf of the Claimant by Messrs. Lionrock Attorneys at Law. It is supported by a statement, sworn by Mr. Innocent Patheretu Kubwalo, one of the Claimant's legal practitioners [hereinafter referred to as the "Claimant's sworn statement"]. For reasons which appear presently, it is necessary to reproduce the substantive part of the Claimant's sworn statement in full:

> *"2. **THAT** the Claimant commenced on action against the Defendant on the 28th November, 2018 by filing with the Court a summons and all the necessary documents.*

3. ***THAT*** *together with the Summons the Claimant filed an order of Injunction which was granted.*

4. ***THAT*** *in its ruling on the application for injunction I was surprised to note that the Court lamented that the parties did not show interest on the substantive matter.*

5. ***THAT*** *I took up the matter with the Registry and I was advised by Mr. Itai that the summons awaited issuance by the Registrar.*

6. ***THAT*** *since then I have followed up the summons with the Registry and was told the summons was yet to be issued.*

7. ***THAT*** *on the 24th January, 2019, I was shocked to learn that the Court had dismissed the proceedings together with the order of injunction on the basis that the Claimant was not serious in prosecuting the same.*

8. ***THAT*** *I refer to the immediately preceding paragraph and state that on the same 24th January, 2019 the Court issued the Summons that the Claimant had filed on the 28th November, 2018, I now produce a copy of the Summons and mark it* ***IPK 1.***

9. ***THAT*** *however, as is clear from the foregoing, the issuance of the Summons coincided with the order dismissing the proceedings.*

10. ***THAT*** *I therefore state that it is not correct that the Claimant has not been serious in prosecuting the main action. Rather, the Claimant filed the Summons on the 28th November, 2018 and the Summons were only issued on the same date the proceedings were dismissed.*

11. ***THAT*** *having filed the Summons on the 28th November, 2018, I further state the application for injunction was made bonafide and the Claimant is therefore, not guilty of abuse of court process.*

12. ***THAT*** *in the premises, it is only fair that the proceedings and the order of injunction be restored."*

The Defendant is opposed to the application and it filed a statement, sworn by Mr. Charles Martin Mhone, the Defendant's legal practitioner [Hereinafter referred to as the "Defendant's sworn statement"]. The relevant part of the Defendant's sworn statement reads as follows:

"2. ***THAT*** *it is trite practice in our Courts that when a party files an urgent matter, the party takes all reasonable steps to have the matter processed by the Court.*

3. ***THAT*** *what comes out clearly in the present matter is the fact that the Claimant, having obtained the Order of Injunction, neglected to take steps to prosecute the matter notwithstanding the Courts direction.*

4. ***THAT*** *in the premises, the Claimant has been guilty of inexcusable delay or otherwise neglect in prosecuting this matter by particularly failing to take any necessary steps howsoever to have the matter urgently processed especially after the Court had given directions.*

5. ***THAT*** *this indolent conduct on the part of the Claimant in the circumstances clearly evinces that there was no abiding interest in pursuing the main case after the Court had granted him the Order of Injunction.*

6. ***THAT*** *the Defendant did not in any way contribute to this abeyant state of affairs in this matter but the continuance thereof will be prejudicial to its interest and indeed detrimental to good administration of justice.*

7. ***THAT*** *by reason of the foregoing matters, it is written in the interest of justice to have this application dismissed with costs."*

The inter-partes hearing of the application was set for 1st February 2019 at 2 o'clock in the afternoon. A few hours before the set hearing time, Messrs Wiberforce Attorneys filed with the Court a Notice of Appointment to the effect that they had been appointed by the Claimant to act for him in addition to Messrs Lion Rock Attorneys at Law.

At the set hearing time, Counsel Namasala appeared on behalf the Claimant. No reason was given as to why Counsel Kubwalo was not present. We will revert to this development towards the end of this Ruling.

It is expressly stated by the Claimant that the writ of summons (writ) had not been issued by the time he was being granted the injunction. Having regard to this fact, the all important question is whether or not the injunction could competently have been granted before the writ was issued?

The application was brought under Order 10, rule 27, of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as the "CPR"]. Order 10 of the CPR allows a party to bring an application for an injunction at any stage of the proceedings, that is, before a proceeding has started, during a proceeding or after a proceeding has been dealt with: see Order 10, rule 3, of the CPR. Order 10, rule 8, of the CPR applies to an application for an injunction brought before the commencement of the main action.

On the other hand, applications for an injunction after the main action has been commenced, whether during or after the main proceedings, are governed by Order 10, rule 27, of the CPR. In short, the Court should only grant an injunction under Order 10, rule 27, of the CPR after the writ has been issued.

The connection between commencement of the main action and the grant of an injunction under Order 10, rule 37, of the CPR, has a direct bearing on the number of documents that have to be served together with an application for an injunction under Order 10, rule 27, of the CPR. Unless a writ has already been served on a defendant, service of an application for an injunction under Order 10, rule 27, of the CPR must include the writ.

It will be noted that the case of the Claimant is that there is nothing that he could have done to prosecute the case in so far as the writ had not been issued. Having that in mind and taking into account the fact that the writ had not been issued when the injunction was being granted, I asked both Counsel if at all the application for the injunction was accompanied by a copy of the writ when it was being served on the Defendant. In their respective responses, Counsel Namasala said that he did not know and Counsel Mhone was definitive in stating that the writ was not served on the Defendant.

Why is it important that a writ should be included when an application for an injunction is being served on a respondent (defendant)? Order 10, rule 27, of the CPR provides as follows:

> *"The Court may, on application, grant an injunction by an interlocutory order when it appears to the Court-*
>
> *(a) there is a serious question to be tried;*
>
> *(b) damages may not be an adequate remedy;*
>
> *(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."*

Unless a respondent (defendant) has had the chance to peruse the writ, including the statement of case, he or she will be at a disadvantage in that it will be difficult for him or her to determine if the main case raises serious triable issues or not.

The injunction in the present proceedings was granted on 7th January 2019. It is now common ground that the writ had not been issued by then and that it was not served on the Defendant. This means the injunction was granted in error. I am, therefore, puzzled and deeply troubled that the Claimant seeks to have an injunction that was erroneously granted restored. The Court will have none of this.

All in all, the application has no merit and it is, accordingly, dismissed with costs.

Before resting, there are two important matters that cannot go without the Court making comments thereon. Firstly, there is the failure by Counsel to document in writing complaints that are said to have been made to a court clerk. We learnt at law school (what many of us already knew) that written evidence is bound to carry more weight than oral statements. In this regard, one relevant rule of the thumb ingrained in a lawyer from an early stage has to do with confirming in writing a complaint made orally at the Court. This has to be done as soon as one gets back to one's chambers.

Secondly, as already mentioned, the statement in support of the application was sworn by Counsel Kubwalo. He is actually the legal practitioner in the firm of Messrs. Lion Rock Attorneys at Law who was seised of this case. The Notice of Appointment by Messrs Wilberforce Attorneys is to the effect that they would jointly prosecute the case on behalf of the Claimant. Surprisingly, Counsel Kubwalo decided not to show up on the hearing of the application and no reason whatsoever was given for his absence.

The Court is seriously concerned at what now appears to be a growing practice (or is it "tactic") by some legal practitioners who decide to chicken out (in the name of "tactical withdrawal") of a case whenever they have "messed up" the case. This practice must be condemned in the strongest of terms. My word of advice to those who take over such cases is that they must be prepared to own up the "mess".

If I may be allowed to say so, I felt very sorry for Counsel Namasala and I told him as much. He found himself in untenable position. There was just no way he would have competently answered the questions posed by the Court regarding how Messrs. Lion Rock Attorneys at Law handled the writ. As was only to be expected, Counsel Namasala simply ended by parroting hearsay upon heasay.

In the present case, the writ was filed with the Court on 28th November 2018. Counsel Kubwalo claims that he kept following up on the writ with a clerk in the Civil Registry from 28th November 2018 to 24th January 2019. I am astounded that a legal practitioner of his experience could entertain inaction on an urgent matter for almost seven weeks without (a) taking up the matter with the office of Assistant Registrar or Registrar or (b) putting his complaint in writing.

That the Claimant did not bother to take any of the said steps only confirms my conclusion in the Court's Ruling dated 24th January 2019 that, having been granted the interlocutory injunction, the Claimant was not interested in prosecuting the main action.

Pronounced in Chambers this 5th day of February 2019 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE