



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1693 OF 2007

BETWEEN:

JIMMY CHANGA.....PLAINTIFF

AND

MR.JERE t/a KAPIRINTENDE TRANSPORT.....DEFENDANT

CORAM: JUSTICE MR. S.A. KALEMBERA

Mr Chayekha, of Counsel for the Plaintiff

Mrs Gangata, Official Interpreter

ORDER

Kalembera J

This is an Order on the Plaintiff's application for a mandatory injunction ordering the Defendant to remove the foundation of any building on the way to the plaintiff's plot and restraining the Defendant from building any wall or fence or blocking the said way in any way. The application is supported by an affidavit sworn by Mrs Viledina Chigule as well as skeletal arguments. The Defendant has also filed an affidavits in opposition sworn by Edward Edson Gwazantini, of counsel for the Defendant, and the Defendant himself. The Defendant has also filed a supplementary affidavit. There are also filed by the Defendant, skeletal arguments.

The main issue for the court's determination is whether a mandatory injunction order be issued or not.

It is the Plaintiff's case as deposed that sometime in 1990 Mrs Viledina Chigule's mother sold a piece of land to the Defendant. The Defendant built a fence around the said piece of land. In 2005 she sold another piece of land to the Plaintiff and the Defendant was informed and had no objection. A path to the said piece of land was provided and it passed between the Defendant's plot and another person's plot. The Plaintiff started building or developing his land and it later transpired that the Defendant started building across the path thereby closing the Plaintiff's path to the main road.

It is the Defendant's case he has owned his plot for 18 years now. And the plot does not share a boundary with the Plaintiff's plot. There was never a provision for a path between his plot and a Mr Wilmoiff's plot. The Plaintiff had options which are still open as to which path to use. It has further been deposed that the provision for a path should have been discussed when the Plaintiff was purchasing or before purchasing the land, not after purchasing it.

The court has jurisdiction upon an interlocutory application to grant a mandatory injunction directing that a positive act should be done to repair some omission or to restore the prior position by undoing some wrongful act but it is a very exceptional form of relief –(refer **Bonner v. Great Western Railway Company**[1883] 24 Ch.D 1 at p.10. In the case of **Alvares v Mudaliar** 14 MLR 7(HC) at pp.15-16 Mkandawire, J quoted with approval Lord Upjohn in the case of **Redland Bricks Ltd. v Morris and another** [1970] AC 652 at pp.665-666 where he set out the following general principles:

“The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be ‘as of course.’ Every case must depend essentially upon its own particular circumstances. Any general principles for its application can only be laid down in the most general terms:

- 1. A mandatory injunction can only be granted where the Plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future.....It is a jurisdiction to be exercised sparingly and with caution, but, in the proper case, unhesitatingly.*
- 2. Damages will not be a sufficient or adequate remedy if such damage does happen. This is only the application in a general principle of equity.*

3. *Unlike the case where a negative injunction is granted to prevent the continuance or recurrence of a wrongful act, the question of cost to the defendant to do works to prevent or lessen the likelihood of a future apprehended wrong must be an element to be taken into account:*
 - (a) *where the defendant has acted without regard to his neighbour's rights, or has tried to steal a march on him or has tried to evade the jurisdiction of the Court or, to sum it up, has acted wantonly and quite unreasonably in relation to his neighbor, he may be ordered to repair the wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the Plaintiff. As illustrative of this see Woodhouse v Nowry Navigation Co (1898) 1 IR 161;*
 - (b) *but where the defendant has acted reasonably, though in the event wrongly, the cost of remedying by positive action his earlier activities is most important for two reasons. First, because no legal wrong has yet occurred (for which he has not been recompensed at law and in equity) and, in spite of gloomy expert opinion, may never occur or possibly only upon a much smaller scale than anticipated. Secondly, because if ultimately heavy damage does occur, the plaintiff is in no way prejudiced, for he has his action at law and all his consequential remedies in equity.*
4. *If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction, then the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions."*

In the matter at hand, it is not in dispute that the Defendant was the first to own his piece of land, and that it was way later that the Plaintiff acquired his piece of land. And as earlier observed herein, a mandatory injunction is a discretionary remedy which can only be granted, inter alia, where the Plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future.....It is a jurisdiction to be exercised sparingly and with caution, but, in the proper case, unhesitatingly. The Plaintiff has not disputed the assertions by the Defendant that the Plaintiff did not purchase his piece of land on the understanding that he will have access to the path in question.

He has also not disputed the assertions by the Defendant that he had been earlier on offered the Plaintiff's land, and it was only when the same had been offered to the Plaintiff that the Defendant was consulted. It had nothing to do with the pathway in question. Further, the Plaintiff has not disputed the assertions by the Defendant, that there are other options open to the Plaintiff which the Plaintiff has ignored. Thus, the Plaintiff decided to ignore the other options, and commenced this action. Whatever damages he might suffer, cannot therefore be said to have been occasioned by or attributed to the conduct or actions of the Defendant. Whatever damage would accrue to the Plaintiff in future, would have then been caused by himself.

Thus, the Plaintiff having failed to show that grave damage will in future accrue to him due to the conduct of the Defendant; and it being clear that the Plaintiff has other options open to him, it is clear to my mind that granting the Plaintiff's prayer is unnecessary. Further, the Plaintiff has failed to establish that he has a good arguable claim to the right he seeks to protect. All in all, this application must fail and it is hereby dismissed with costs.

PRONOUNCED this 5th day of August 2019, at the Principal Registry, Blantyre.



S.A. Kalembera

JUDGE