

IN THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CIVIL DIVISION
CIVIL CAUSE NO. 237 OF 2018

BETWEEN

IZAKE MBALECLAIMANT

AND

RICHARD SIKANDA.....1ST DEFENDANT

BLACK MULENGA.....2ND DEFENDANT

DeGabriele, J

RULING ON AN INTER PARTES APPLICATION OF ORDER OF INJUNCTION

1. The Claimant, Izake Banda is applying for an order of injunction pursuant to Order 10 rule 27 of the Courts (High Court) (Civil procedures) Rule, 2017. He claims that a portion of customary land situated along North Rukuru River in Village Headman Mwanegha, Traditional Authority Kyungu in Karonga has been in the use of his family since 1950. He claims his father died in 1983 while he was living in Zambia. The Claimant returned from Zambia in 1992, and he discovered that the Respondent were encroaching the land. In September, 2018 he registered a complaint at Group Village Headman Mwahimba's tribunal and a decision was

made in favour of the Defendants. The matter is now before Chief Kyungu for determination, but the Claimant has brought the matter to this court to seek an injunction, compelling the Defendants to stop using the land.

2. The Defendants have argued that they are lawful users of the land and are currently so using the land. The matter was settled at Group Village Headman Mwachimba in their favour. The land was in the defendant's family since 1952 and is situated north of their land which shares a boundary with the Claimant's land. The 1st Defendant claims that it is the Claimant who is encroaching, and the Defendants lodged complaint at different village fora, but the Claimant did not honour summons for any hearings or mediations. The decisions that the land belonged to the Defendant was reached after the Claimant refused to honour summons. When he was not satisfied the Claimant sued the Defendants before Karonga First Grade Magistrate, in March 2018 claiming full possession of the land. The matter is still persisting in the Magistrate Court.

3. Having heard the submissions and read the skeleton arguments, this Court is aware that an order of injunction may be granted under Order 10 Rule 27 where:

- a) There is serious questions to be tried.
- b) Damages may not be an adequate remedy.
- c) It shall be just to do so.

4. I shall proceed to examine the 3 heads in order to establish whether or not an interlocutory order can be granted. Case law abound where guiding principles for granting an interlocutory injunction are outlined. The guidelines are to be used in the court's discretion. **See *Candlex Limited v Phiri Civil Cause No. 713 of 2000.***

5. Whether there is a serious question to be tried

5.1. In this case both parties are claiming that the land was allocated to their families in the 1950s. The Claimant is accusing the Defendants of encroaching on his land. The Defendants, on the other hand, are accusing the Claimant encroaching on their piece of land. Both parties have stated

that the dispute over the land has been taken before Traditional Leaders and a decision was made in favour of the Defendants, albeit in his absence as he did not honour various summons. Both parties agree that the matter was filed at Karonga First Grade Magistrate Court but has not been concluded.

5.2. It is the finding of this court that there is a serious matter of encroachment on the land that has to be tried. However, it is rather premature for the Claimant to come to court to seek an injunction because:

5.2.1. The decision of Group Village Headman Mwachimba was in favour of the defendants. There is no decision at any level that states that the land belongs to the Claimant.

5.2.2. The Claimant states that the matter is before Paramount Kyungu, referred to that forum by Legal Aid who are legal representatives, for the Claimant. There is no outcome of that referral and there is no evidence to show that Paramount Chief Kyungu has refused to cheer and determine the matter.

5.2.3. The matter is subsisting before the Karonga First Grade Magistrate. The Claimant did not disclose this fact to the Court, thereby being guilty of suppression of material information. It is the Defendants who have brought the fact that a claim was commenced in the magistrate court. The Claimant argues that since the enactment of the Customary Land Act of 2016, the Magistrate has no jurisdiction so they were advised to commence the matter in the High Court. While this is understandable, the matter remains open at Karonga First Grade Magistrate Court. The Claimant should have, and must formally closed the matter there before proceeding to this Court.

5.3. It is my finding that even though there is a triable issue, the Claimant has brought the application for an injunction prematurely. For this reason, the

Court would not grant the injunction, but rather order that the matter be dealt with on its merits, after all processes are duly complied with.

6. *Whether damages are an adequate remedy in this case.*

6.1. It is a forgone conclusion that where damages that could possibly be awarded to compensate are inadequate, an injunction may be granted. ***See Chirwa v Kaunda t/a Chika Building Contractor (1993)16 (2) MLR 502 (HC).***

6.2. In this case the Claimant has raised issues with the fact that some trees were cut down. This Court agrees with the Defendants that such damage can be quantified and compensated in monetary terms. The Claimant has stated that land is such a valuable asset and as such it cannot be compensated by mere monetary compensation. Indeed this is true, but in this case both parties are claiming that the other is encroaching and it is not the whole land but part of the land. The Claimant herein has not articulated which part of the land the Defendant is encroaching on. The Defendant has stated that the disputed portion of land is on the North part of their land sharing a border with the Claimant. This Court is therefore not convinced that an injunction should be granted, especially where the Claimant has failed to clearly articulate the disputed piece of land. For this reason the court declines to grant an injunction.

7. *Whether it is just to grant an injunction in these circumstances*

7.1. An order of interlocutory injunction may be granted where it is in interest of justice to do so and when the balance of convenience has in favour of granting the injunction.

7.2. The circumstances of this case as outlined in submissions, statement of claim and statement of defence does not show that the balance of convenience lies in favour of granting an order of injunction. Of particular note is that the Claimant discovered that the Defendants were encroaching on his piece of land in 1983, but seems to have taken action from

September 2018. There is no urgency to this matter and there are no current and persisting rights of the Claimant that are being breached. It is the view of the case shows that it will be unjust to grant an injunction because:

7.2.1. There is another remedy available at law, which is the payment of damages for encroachment should the Claimant succeeds.

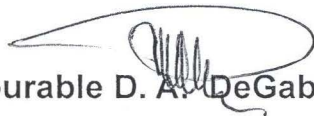
7.2.2. The early determinations of chief is that the land is in the use of the defendants, and as yet there is no pronounce ownership by the complaint.

7.2.3. There are various processes that are still in progress as regards the same dispute.

8. For the reasons outlines above, this Court will **not grant an injunction**. The application by the Claimant fails in its entirety. The matter should be set down for mediation where the Group Village Headman Mwahimba, Paramount Chief Kyungu and those who mediated or know of the case from the Claimant and Defendants' side must attend without fail. Counsel for the Claimant should file the process accordingly.

It is so ordered.

Made in Chambers At Mzuzu Registry this 15th Day of February 2019



Honourable D. A. DeGabriele

J U D G E