



IN THE HIGH COURT OF MALAWI
 LILONGWE DISTRICT REGISTRY
 CIVIL CAUSE NUMBER 810 OF 2021

BETWEEN:

HAPPY NSAKU1ST CLAIMANT
 LUSTIKA BANDA.....2ND CLAIMANT
 MIKE CHIBWE.....3RD CLAIMANT
 MAGANGA MDALA.....4TH APPLICANT

AND

LILONGWE CITY COUNCIL.....RESPONDENT

CORUM: R.M CHINANGWA JUDGE
 Chiume Counsel for the Claimant
 Maoni Counsel for the Defendant
 Chitao Court Clerk

RULING ON APPLICATION FOR AN INTERLOCUTORY INJUNCTION

1. Introduction

This is an application for an interlocutory injunction order restraining the Respondent by themselves, their servants, their agents or otherwise from demolishing their structures built at Lizulu Market up to Kamuzu Central Hospital Round About or evicting us from the said land in the city of Lilongwe in the Republic of Malawi. The application is opposed. Both parties filed affidavits in support of their positions as below.

2. The Affidavits

The claimant's affidavit was filed by Happy Nsaku. His affidavit reads as follows:

4. That since the year 2013, the Malawi Government has allowed us to legally operate at Lizulu Market after the then Lilongwe City Mayor, Mayor Mkandawire ordered us to relocate from Tsoka Market to Lizulu due to over congestion.
5. After relocating to Lizulu Market, the Respondent's agents ensured that they brought in public toilets, clean running water from Lilongwe Waterboard and electricity from ESCOM for the use of people located at Lizulu Market.
6. That since our relocation to Lizulu Market, we have been paying our yearly taxes with the Respondent in order for us to legally operate our business within the said market. Attached and exhibited hereto is a copy of a payment receipt to Lilongwe City Council marked "HNI".
7. That we have also been paying our daily taxes to the Respondent and we continue to do so in order to legally operate in Lizulu Market. Attached and exhibited hereto are copies of our daily payment receipt to Lilongwe City Council marked "HN2" and "HN3" respectively.
8. That in November 2020, the Respondents agents came to Lizulu Market and took measurements and photos of the surrounding shops for the purpose that the Malawi Government is about to start a project of creating a six-lane road.
9. The Respondent informed the people in the area that they would be relocated and compensated if their buildings are in the area where the new road shall pass.
10. That on 14th September 2021, the Director of Commence within the Lilongwe City Council met with few members of the Lizulu Market Committee to discuss on the issue of where to relocate people in Lizulu Market and how to compensate them as well.

11. The meeting was not fruitful, as the said Director of Commence did not give us any clear indications of the relocation or the compensation and just stated that he will communicate to us on a later date.
12. On or about the 22nd of September, 2021 the agents of the Respondent came to Lizulu Market and took down 194 names of people whose shops would be affected and shall be compensated once the construction of the new road began.
13. It was to all our surprise that on 29th September 2021, we received a Notice to Vacate from the Respondent instructing all members that have shops along the Lizulu Market up to Kamuzu Central Hospital Round About to vacate the area by 30th September, 2021. Attached and exhibited hereto is a copy of the Notice to Vacate marked as "HN4".
14. The Respondent has not given us a new area for us to relocate to neither have they given any of us any compensation for their actions.
15. The conduct of the Respondent is unlawful as it violates our constitutional rights to economic activity as well as our legitimate expectations per the negotiations we were having with the Respondent and it will cause economic loss for the members of Lizulu Market.
16. I believe that if not stopped, the Respondent will demolish my shop and other members 'shops without relocating us and compensating us. Until those matters are addressed by the Respondent or resolved by this Court through the main matter cause will be filed, this Court should stop the Respondent from proceeding with the enforcement of the Notice to Vacate.

The respondent's affidavit was filed by Genscher Charles Petros M'bwabwa. His affidavit reads as follows:

3. THAT indeed the Claimants were allowed to operate at a place known as Lizulu Market in Lilongwe from or around 2013 after a good number of them were removed from some unsuitable places, like outside the fence of the Lilongwe Central Market along Malangalanga road, but this Lizulu place was meant to be a temporary measure in an effort to organize the city.

4. THAT the Claimant, in terms of Lilongwe City by-laws are obliged to pay market fee and annual occupation fees for the market, whether the market is of temporal nature or permanent, and they were accordingly paying, as opposed to tax payment as claimed in the Claimants sworn and statement.
5. THAT the Claimants, through their market committee leadership, which the Respondent consults from time to time, were advised of the fact that the occupation on this particular place as a market was temporary and that in case there would be a need to move, there would be no compensation for any structure that would be created and they agreed to this understanding.
6. THAT in 2020 the Respondent indeed went to the place to determine which structures of the Claimants would be affected in light of the expansion of the Kenyatta Road expansion which was embarked after the Roads Authority advised the Respondent to do so for them to consider if there would be need for any compensation.
7. THAT during that time, in 2020, the Claimants were also advised by the Respondent through their committee that due to the upcoming project, those benches and shops will be affected will be allocated alternative places to trade in other markets and they would have to relocate.
8. THAT on 31st August and 21st September, 2021 the Claimants, through the Market Committee were consulted through a meeting where they were advised of the developments, particularly the commencement of the project and were clearly advised that alternative places for those affected was set aside in Area 18 and in Mchesi markets. The minutes of the said meetings are herewith exhibited and marked GM1 and GM2 respectively.
9. THAT the letter that the Respondent wrote to advise the Claimants to move to pave way for the road works was only a follow up of prior notification to the Claimants dating back from the year 2020 and the Claimants were advised alternative areas to ply their trade, contrary to what they allege and contrary to the assertion that they are being denied the right to economic activity which they can exercise if they reallocate to the said alternative markets.
10. THAT for the fact that the Claimants were advised at the time of allocating them at the Lizulu market that they would not be any compensation and the fact that this was a

temporary place of trade with temporary structures, the Claimants are not entitled to any compensation for them to reallocate to the alternative markets.

11. THAT in addition to the above reason, the Claimants are not entitled to compensation from the Respondent as stated in their application for any interlocutory injunction sworn statement and as stated in their statement of the case because: -
 - (i) The project of Kenyatta Road expansion is being carried out by the Road Authority and if any compensation, if at all, should have been claimed against the Roads Authority; the Respondent on that claim is a wrong party, see the invitation for bids herein exhibited and marked GM3, and
 - (ii) All the benches and structures which are to be affected by the road expansion project are within the road reserve where in terms of the law compensation is not payable when the road reserve is required for public use. The documents depicting the direction of the road and the market are exhibited and marked GM4 and GM5.
12. THAT even if the Claimants were entitled to such compensation due to the fact that they have to relocate to another location, they have not followed the set procedure as laid down in the Public Roads Act and this process through court is substantively untenable.
13. THAT on the basis that the Claimants do not have a reasonable and sound justification to pursue the claim for compensation and to claim that there are being denied economic activity and livelihood, and that they are not being honest to the court in alleging that alternative trading places have not been provided, yet the same has been provided, I pray that their application for an order of interlocutory injunction be denied and be dismissed with costs.
14. THAT further to the above, the Kenyatta Road expansion project is a project of national importance that shall cost K19 billion and has a performance period of 18 months and granting the Claimants this prayed for order of injunction will lead to delay of the project execution and thus costing government much more each day, which, if compared to any compensation the Claimant would claim in damages, if at all successful, which is also quantifiable and could adequately compensate them, the balance of convenience and fairness weighs against granting the injunction.
15. THAT the Claimants do not, by sheer imagination, have wherewithal to compensate the affected parties to the road expansion project contract if the injunction is granted leading

to the delay in execution of the contract and if it later transpires that the injunction ought not have been granted.

16. THAT I therefore pray for dismissal of the application for an order of interlocutory injunction with costs.

3. Issue for Determination

This court has to determine whether to grant the injunction or not?

4. Analysis of Law and Evidence

In an application for an injunction the court may grant an injunction where it appears to the court that a) the applicant has a serious question to be tried b) damages may not be an adequate remedy c) it shall be just to do: **Order 10 rule 27 Courts (High Court) (Civil Procedure) Rules 2017**. The applicants argue that the applicants have occupied the market for 8 years and have paid their taxes; there is a serious question to be tried on whether the respondents conduct violates the applicants right to economic activity and legitimate expectation; that damages will not suffice the applicants being smalltime traders and it will take time for them to get damages if at all; the respondents have not given the applicants ample time to relocate or compensation for the inconvenience; that it is unjust to demolish the applicants structures without reasonable notice, compensation and relocating them. On the other hand the respondents argue that the respondent has provided an alternative market and this allows the applicants to exercise their right to economic activity; the applicants were allocated the current market on temporary basis and they were not given the right to own the land the current market place being a road reserve; the applicants are not entitled to compensation under Public Roads Act having built structures on a road reserve; if at all compensation was due, the applicants have not procedurally sought the same under the Public Roads Act.

In **King Flower Ltd v Lingadzi Farm Ltd [1996] MLR 93 (HC)** it was held that a serious question to be tried is one where there is a good arguable claim. From the facts this court notes that the respondents are working on a road extension project which falls within the road reserve; the applicants were allowed to ply their trade and they built structures on the road reserve; the applicants have been given an alternative place to trade that is Mchesi and Area 18 and that the Public Roads Act provides for issues of compensation where road works are taking place. This

court notes that the applicants have not opposed the fact that the road extension works are taking place on a road reserve. This has a critical bearing as to whether the applicants have a serious question to be tried. The claimants have no strong claim or a serious claim to pursue where the land is a road reserve. A road reserve is a road reserve. It has a definite purpose. The provision is made and regulated by statute. The complacency of the respondents in enforcing or applying the law is not legally sound. Despite the applicants being 'legally' allowed to ply their trade in the space in question they do not have title to the said land. It is a road reserve. That being the case they have no serious claim on the decision to relocate them. If for arguments sake there was a serious question to be tried which, the question would be would damages suffice? For a while the courts have held that where damages would suffice an injunction should not be granted. However, the Supreme Court qualified this general application of the law in *Malawi Savings Bank v. Sabreta Enterprises Limited*, MSCA Civil Appeal No. 44 of 2015 (unreported) by stating that:

"On the matter of adequacy of damages, we think each case must be considered on its own facts. There is nothing like one principle fits all scenarios. We think it is a little simplistic not to grant an injunction against an appellant just because it has deeper pockets. Just because it can afford to pay damages in case the injunction was erroneously granted. There will be instances, and we have a feeling this could be one of them, where damages will never suffice the fact that they can be afforded notwithstanding. This case does not, in our judgment, seem to be about damages." — Emphasis by underlining supplied

Indeed, each case is to be examined in its own right on the question of damages. This court observes that the structures which are just a few meters from the court building are not extraordinary in architectural design. This means that damages are quantifiable and would suffice. The respondents have identified another place in which the applicants can ply their trade. This means the applicants will continue to ply their trade as there are people in the said areas who can buy their goods. The only damages to be assessed will be building structures. Much as the applicants have the right to economic activity that right is not absolute and can be limited under section 44 of the Malawi Constitution. It is trite law that within the city, there are by laws which govern operations of business within the city. That is the very reason permits are obtained from the respondents. The court has been informed that the applicants are being moved from Lizulu market for purposes of extending the road within the road reserve. In the circumstances it would

not be just to grant the injunction as the road extension works are within the road reserve and the law allows road extension works within road reserves for the road reserve is left aside for the very purpose of extending a road.

5. Finding

The application for an injunction is dismissed.

Pronounced this 1st day of November 2021 at LILONGWE

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a horizontal line and a loop.

R. M CHINANGWA

JUDGE