



Rose Kalinde & Another v. Martin Msiska & Another

Kenyatta Nyirenda, J.



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
CIVIL CAUSE NO. 703 OF 2021**

BETWEEN

**ROSE HAJIRA SELEMANI KALINDE (VILLAGE
HEADWOMAN MANGWERE) 1ST CLAIMANT**

MR. GUY DE WITTE 2ND CLAIMANT

AND

MARTIN MSISKA 1ST DEFENDANT

VILLAGE HEADMAN BANDAWE 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Nita, of Counsel, for the Claimants

Mr. Kaphamtengo, of Counsel, for the Defendants

Mr. Henry Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is my Ruling on an inter-partes application by the Claimants for an order of interlocutory injunction restraining the Defendants:

"from erecting or building or constructing any structure, encroaching or trespassing or doing whatsoever on a piece of land encroaching, trespassing and cultivating on a piece of land herein exhibited until the determination of this matter or further order of the Court."

The application is brought under Order 10, r. 27, of the Courts (High Court) (Civil Procedure) Rules, 2017 [Hereinafter referred to as the "CPR"].

The application is supported by two statements sworn by the 1st Claimant and the 2nd Claimant respectively. The 1st Claimant is a Village Headwoman under whose jurisdiction the land in dispute is located and the following part of her sworn statement is relevant:

- “3. THAT in March 2018, I assigned a piece of land in my village along Lake Malawi at Lifuwu to a Malawi Government certified investor, Mr Guy De Witte who was introduced to me by Mr. Martin Msiska (1st Respondent) in my capacity as a Village Headwoman of the area.
4. THAT this was witnessed by Mr. Gift Thindwa and the 1st Respondent.
5. THAT Mr Guy De Witte then left for Belgium and instructed the 1st Respondent to erect beacons on the said piece of land with the assistance of a Salima based Lands Officer named Mr. Gregory Manda.
6. THAT when Mr. Guy De Witte returned to Malawi to start constructing his lodge on the assigned land he found that the beacons were misplaced, leaving out a piece of land outside the land that was assigned to him by me. I exhibit and mark a piece of land I assigned the 2nd Applicant as **RHSK1** and a part thereof that has been annexed at the instance of the 1st and 2nd Respondents as **RHSK2**.
7. THAT Mr. Guy De Witte reported this to me and that when he asked 1st Respondent he said that piece of land does not belong to him.
8. THAT Mr. Guy De Witte further reported to me that when he met with the Village Headman Bandawe (2nd Respondent) he (the 2nd Respondent) demanded that Mr. Guy De Witte pays him K1, 000, 000 (One Million Kwacha) for the annexed piece of land or else he would unleash his subjects on him to destroy his property. Mr. Guy De Witte paid the 2nd Respondent K1, 000, 000 (One Million Kwacha).
9. THAT this not the first time the 2nd Respondent has had altercations with me arising from jurisdictional dispute but which was decided in my favour. I exhibit and mark as **RHSK3** a High Court judgement that decided in my favour against the 2nd Respondents and his co-defendants then.
10. THAT the 1st Respondent also demanded K3, 000, 000 (Three Million Kwacha) from Mr. Guy De Witte purportedly for an access road to Mr. Guy De Witte's piece of land which was already in existence. The K3, 000, 000 (Three Million Kwacha) was reduced to K600,000 (Six Hundred Thousand Kwacha) and this was paid to the 2nd Respondent. I exhibit and mark as **RHSK4** an agreement and proof of payment in respect of right of passage as demanded by the 1st Respondent.
11. THAT when Mr Guy De Witte started working on the assigned piece of land the 2nd Respondent demanded that Mr Guy De Witte stops his construction works and threatened he would use people within the village to damage his property on the site.

12. *THAT Mr Guy De Witte left for Belgium but left his employees working on site in the face of the 2nd Respondent's almost daily threats and intimidation*
13. *THAT later the 1st Respondent brought building materials on Mr Guy De Witte's plot and with the help of some people which he supervised started constructing on it.*
14. *THAT they destroyed a pit latrine, a water pump housing and timber on Mr Guy De Witte's plot.*
15. *THAT when Mr. Gift Thindwa reported this matter to counsel Larry Nita he came and visited the place. He sought to meet the 1st and 2nd Respondents but they were both away from their homes.*
16. *THAT Counsel Nita in the presence of Mr. Gift Thindwa and me called the 1st Respondent to ask him why he was building on the plot and under whose authority. The 1st Respondent replied that he had been given the said piece of land by the 2nd Respondent.*
17. *THAT Counsel Nita also attempted to call the 2nd Respondent but he was out of reach.*
20. *THAT Counsel Nita advised that Mr. Thidwa and I report the matter to police as Counsel explored other avenues. We were sceptical about it but Counsel Nita insisted that we nevertheless report the matter as apart from wishing to have it settled out of court with police intervention, Counsel Nita believed the matter also bordered on criminal trespass and malicious damage, among others.*
21. *THAT we reported the matter to Lifuwu Police as per Counsel's advice but the police advised us to go to court.*
22. *THAT as a result of the trespass and forceful occupation of the piece of land I assigned to Mr Guy De Witte I have suffered ridicule, embarrassment and lost respect amongst my subjects and elsewhere and Mr Guy De Witte's construction works have stopped causing him loss in time and labour costs.*
23. *THAT Respondents' trespassing and constructing on a piece of land that I assigned to Mr Guy De Witte, a Government of Malawi certified investor could scare off the investors and could be a recipe for breach of peace in the area as the investor has already started constructing his lodge on the same piece of land.*
24. *THAT This being a matter of public interest the actions of the respondents in continuing with their unlawful acts would very much be prejudicial to government's drive to attract more investors to Malawi and is tantamount to usurping my territorial jurisdiction and dethroning me.*
25. *THAT if the Defendants or their agents are not restrained or evicted the Defendants' conduct shall set a bad precedent for public disorder and I shall not be able to perform some of my statutory duties as a chief and among which is maintaining public order and peace due to this act of provocation at the instance*

of the 1st and 2nd Respondents whereas; the 2nd Applicant may not be able to continue with his project and this could take away investor's confidence in the country.

26. *THAT as such the balance of convenience is in favour of granting an order of injunction.*
27. *THAT, if injunction is wrongfully granted, I undertake to be liable for any damages emanating therefrom"*

The 2nd Claimant depones in his sworn statement thus:

- "3. *THAT I am a Government of Malawi certified investor and I intend to invest in tourism industry. I exhibit and mark GW1 and GW2 a certificate of incorporation of my business and Malawi Investment and Trade Centre respectively.*
4. *THAT in March 2018, with the help of the 1st Respondent I identified piece of land along Lake Malawi at Lifuwu where I have started constructing my lodge.*
5. *THAT having told the 1st Respondent that I liked the piece of land the 1st Respondent introduced me to the Village Headwoman Mangwere in whose jurisdiction the piece of land is.*
6. *THAT upon payment of an agreed sum of money the said piece of land was assigned to me by the said Village Headwoman Mangwere and this was among others witnessed by the 1st Respondent.*
7. *THAT before I left for Belgium I instructed the 1st Respondent to survey and erect beacons on the said piece of land with the assistance of a Salima based Lands Officer named a Mr. Gregory Manda. I exhibit and mark GW3 a sketch map depicting the said piece of land as was assigned to me then and GW4 a Dead Plan.*
8. *THAT when I later returned to Malawi to start constructing my lodge on the assigned piece of land I found that the beacons were misplaced, leaving out a piece of land (annexed piece of land) outside the rest of the piece of land that was assigned to me by the Village Headwoman Mangwere. I exhibit and mark GW5 a sketch map of the said annexed piece of land.*
9. *THAT when I asked the 1st Respondent about this he told me to talk to the 2nd Respondent as the said piece of land belonged to him and lied in his jurisdiction ie the 2nd Respondent's jurisdiction. This surprised me because initially 1st Respondent introduced me to the 1st Applicant as the one whose jurisdiction the said piece of land lied.*
10. *THAT I nevertheless met with the said 2nd Respondent who demanded from me K1, 000, 000 (One Million Kwacha) for the said annexed piece land or else he would unleash his subjects on it to destroy my property. I unwillingly and under duress paid the 2nd respondent K1, 000, 000 (One Million Kwacha).*

11. *THAT the 1st Respondent also demanded K3, 000, 000 (Three Million Kwacha) from Mr. me purportedly for an access path to my plot which was already in existence anyway. The K3, 000, 000 (Three Million Kwacha) was later reduced to K600,000 (Six Hundred Thousand Kwacha) and I paid this to the 1st Respondent. I exhibit and mark GW6 an agreement and proof of payment in respect of right of passage as demanded by the 1st Respondent.*
12. *THAT not sooner had I paid the 2nd Respondent and 1st Respondent K1, 000, 000 (One Million Kwacha) and K600,000 (Six Hundred Thousand Kwacha) respectively and started working on my plot than had the 2nd Respondent resumed his demand and threats that I stop construction works or else he would use people within the village to damage my property on the site.*
13. *THAT I left for Belgium but left my employees working on site in the face of the 2nd Respondent's almost daily threats and intimidation.*
14. *THAT whilst I was away I received report from my employees that the 1st Respondent brought building materials on my plot and with the help of some people which he supervised started constructing on it.*
15. *THAT they destroyed a pit latrine, a water pump housing and timber that were on my plot.*
16. *THAT when Mr. Gift Thindwa reported this matter to counsel Larry Nita who later visited the plot. He sought to meet the 1st and 2nd respondents but they were both away from their homes.*
17. *THAT Counsel Nita in the presence of Mr. Gift Thindwa and 1st Applicant called the 1st Respondent to ask him why he was building on the plot and under whose authority. It was reported to me that the 1st Respondent replied that he had been given the said piece of land by the 2nd Respondent.*
18. *THAT Counsel Nita also attempted to call the 2nd Respondent but he was out reach.*
19. *THAT I received report that Counsel Nita advised that Mr. Thidwa and the 1st Applicant report the matter to police as the Counsel explored other avenues. Though the two were sceptical about the possibility of receiving any help from the local police formation, Counsel Nita insisted that the two nevertheless report the matter as apart from wishing to have it settled out of court with police intervention, Counsel Nita believed the matter also bordered on criminal trespass and malicious damage, among others.*
20. *THAT the matter was reported to Lifuwu Police as per Counsel's advice but the police advised us to go to court.*
21. *THAT as a result of the trespass and forceful occupation of the annexed piece of land I have suffered loss in time and idle labour hours.*

22. *THAT Respondents' trespassing and constructing annexed piece of land that was assigned to me is scary and could be a recipe for breach of peace in the area as I have already started constructing my lodge on the same piece of land.*
23. *THAT if the Respondents or their agents are not restrained or evicted the Respondents' conduct shall set a bad precedent for public disorder and the 1st Applicant shall not be able to perform some of her statutory duties and among which its maintaining public order and peace due to this act of provocation at the instance of the 1st and 2nd Respondents whereas I may not be able to continue with my project and this could take away investor's confidence in the country.*
24. *THAT as such the balance of convenience is in favour of granting an order of injunction.*
25. *THAT, if injunction is wrongfully granted, the Applicant undertakes to be liable for any damages emanating therefrom."*

The Defendants are opposed to application and they both filed sworn statements in opposition. The sworn statement by the 1st Defendant states as follows:

- "3. *That I have been shown and have read the said sworn statement of **Rose Hajira Selemani Kalinde and Guy de Witte** and I do hereinafter respond thereto.*
4. *That the 1st Claimant has asked me to identified a customer for her piece of land which she intended to sell. Accordingly, when the 2nd Claimant through **GIFT THINDWA** approached me that they are looking for land along the lakeshore area, I connected him to the 1st Claimant.*
5. *That in my presence, the 1st Claimant showed the piece of land to the 2nd Claimant which is marked in the 2nd Claimant's sworn statement as **GW 4**. The land under dispute is near a hill on the lake side.*
6. *That I state that as far as I know, the 1st Claimant showed the 2nd Claimant the land in **GW 4** and not any further land. The 2nd Claimant was satisfied and paid about **K12, 000, 000** to the 1st Claimant.*
7. *That I therefore deny completely all the contents of paragraph 7 of the 2nd Claimant's sworn statement and I state that after the transaction was completed I have never been involved in the land under dispute. I was never involved in the preparation of the deed plan or the lease processes. Rather it was the 2nd Claimant himself and his worker **Gift Thindwa** who processed everything including hiring surveyors and processing lease.*
8. *That I also deny having ever instructed the 2nd Claimant to meet the 2nd Defendant on any matter. I therefore deny completely all the contents of paragraph 9 of the 2nd Claimant's sworn statement. As an estate agent my work was completed the day the transaction was completed.*

9. *That I refer to paragraph 11 and 12 of the 2nd Claimant's sworn statement and state that the 2nd Claimant discussed with my extended family to give him a right of passage through the family's land elsewhere away from the land under dispute. I state that the issues of the land under dispute are not connected to the issues of the right of passage which the 2nd Claimant acquired from my extended family. In any event, there is no claim that he has been denied use of the said passage. Further, the 2nd Claimant did not pay that money to me; rather to my family.*
10. *That I reiterate that I and my family are not connected to the land under dispute and there is therefore no claim against me. Accordingly, I state that I am a wrong party to the present claim as there is no claim whatsoever against me.*
11. *That I deny the contents of paragraph 13 and 14 of the 2nd Claimant's sworn statement and state that I never worked for the 2nd Claimant in construction or at all and I have never been to the land under dispute to work after the sale of the land was completed. The 2nd Claimant has a contractor, white man, and I have never worked there.*
12. *That accordingly, I vehemently oppose the granting of the injunction against me as I have nothing to do with the land under dispute. The dispute over the land relates to the 2nd Defendant and other chiefs in the area and not me.*
13. *That I therefore pray that this court dismisses the application for an interlocutory injunction with costs."*

The sworn statement by the 2nd Defendant is couched in the following terms:

- "3. *That I have been shown and have read the said sworn statement of Rose Hajira Selemani Kalinde and Guy de Witte and I do hereinafter respond thereto.*
4. *That the land under dispute lies within my area and does not belong to the 1st Claimant at all. The 1st Claimant has his own area according to the boundaries of our villages.*
5. *That I have seen and I understand that the judgment in the case of Mangwele vs T/A Bibi Kuluunda & Others Civil Cause No. 111 of 2012 never did assign any particular pieces of lands to the 1st Claimant or indeed to anyone. The judgment of the court simply noted that what was shown during evidence was not sufficient to show boundaries; but never decided on that subject. In fact the reliefs that the 1st Claimant sought in that case never included a relief that the Court should re-demarcate boundaries for her.*
6. *That the orders of the court in that matter (Civil Cause No. 111 of 2012) was to the nullifying a sale since sale of customary land was, at that time, strange to law; and to the illegality of deposing of the 1st Claimant; and that the parties therein should submit to the District Commissioner's office. This has nothing to do with boundaries of areas of jurisdiction of the 1st Claimant and the 2nd Claimant.*

7. *That my village existed way before the 1st Claimant's village and it was the former village headmen Bandawe who allocated lands for the 1st Claimant's village. The 1st Claimant's boundaries, do not reach the land under dispute. I reiterate that the land under dispute is within my jurisdiction and the 1st Claimant is not entitled to sell or assign any piece of lands in my area.*
8. *That when I noticed the 2nd Claimant working on the land under dispute, I personally met the 2nd Claimant's contractor without my subjects and I informed him that the land under dispute belonged to me and not the 1st Claimant.*
9. *That I further proceeded to write a letter to the Salima District Lands Officer to assist us to resolve the issue of the boundaries. We also asked the Lands Officer to ask the 2nd Claimant to stop construction. We asked the Lands Officer to help us rather than take the law in our hands. I state that we never destroyed any property belonging to the 2nd Claimant and there was no violence whatsoever. The letter was copied to the 2nd Claimant. I attach a copy of the said letter and I mark it VB 1*
10. *That I therefore deny the contents of paragraph 11 and 14 of the 1st Claimant's sworn statement and paragraph 13 of the 2nd Claimant's sworn statement.*
11. *That other chiefs in our area were interested in the issues also and decided to actually be involved in the dispute. The chiefs were so involved not only because they are in our area, but also because the hill on which is the land under dispute, belongs to all chiefs in the area and not one chief. However, the land itself on which the hill sits to the lakeshore is within my area.*
12. *That later the 2nd Claimant asked to meet me in person in order that we should discuss what I had told the 2nd Claimant's contractor and what I had written Salima District Lands Officer*
13. *That therefore in early May 2021 I together with about fourteen (14) chiefs in my area whose chieftaincy came from the Bandawe chieftaincy, came to meet with the 2nd Claimant as per his request.*
14. *That we had a cordial meeting with the 2nd Claimant and the 2nd Claimant apologised to us that he was misled into buying the land from the 1st Claimant because the 1st Claimant had informed him that she was the main chief in the area; which is a lie.*
15. *That it was after this meeting that the 2nd Claimant gave K1, 000, 000 to all the chiefs who had come with me as he apologised. The money was not forced on him; and neither was it a purchase price for anything.*
16. *That it was agreed with the 2nd Claimant in that meeting, just to keep peace but not accepting that the area belonged to the 1st Claimant, that we would allow him to develop in terms of GW3 which he had showed us and not more, because I had*

*already assigned the land beyond the boundaries of GW 3, to another developer, **MADALITSO GAMA***

17. *That I therefore deny the contents of paragraph 14 of the 1st Claimant's sworn statement and paragraph 15 of the 2nd Claimant's sworn statement; because we never removed anything from the land that we willingly agreed to allow the 2nd Claimant's to develop.*
18. *That when the 2nd Claimant left, **GIFT THINDWA** and the 2nd Claimant's contractor informed me that the 1st Claimant came and removed the beacons of GW 3. When I protested, the 2nd Claimant's contractor went to the Salima District Commissioner again and brought a **GREGORY MANDA** on the land. **GREGORY MANDA** confirmed to **GIFT THINDWA** and the contractor the boundaries of GW 3. It was **GREGORY MANDA** who replaced the removed beacon.*
19. *That after this confirmation with **GREGORY MANDA** I instructed **MADALITSO GAMA** to elect a wall on the boundary to avoid further quarrels.*
20. *That therefore I vehemently oppose the granting of the injunction because the land under dispute does not belong to the Claimants; rather it is in my area, and we, for peace only, permitted the 2nd Claimant to develop GW 3 and not more as per the agreement with the Chiefs.*
21. *That I verily believe that I have a good case and will at trial succeed and it would not be just for the court to make an unnecessary order of injunction. I verily believe that there is no serious question to be decided as prima facie the Claimant doesn't own the land under question.*
22. *That I verily believe that the Claimant has another remedy than an injunction in that they could claim against Village Headwoman Mangwere if at all he has any claim.*
23. *That I therefore pray that this court dismisses the application for an interlocutory injunction with costs."*

An interlocutory injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined. Order 10, r. 27, of the CPR provides that a court may grant an injunction by an interlocutory order when it appears to the court that (a) there is a serious question to be tried, (b) damages may not be an adequate remedy and (c) it shall be just to do so.

Having carefully read and considered the sworn statements and the submissions by Counsel, it is very clear to me that the facts in the present case are very much in dispute. Both parties claim ownership of the land in dispute. This being the case, I hold that the matter raises triable issues.

As the subject of the present case relates to real property, there is really little to say on the matter. It is trite that every piece of land is of particular and unique value to the owner and damages are an inadequate remedy and, in any case, damages would be difficult to assess: see **Julie F. Mulipa v. Mr. and Mrs. Bibiyani and Others unknown, Land Cause No. 105 of 2016 (unreported)**, wherein Tembo, J., while quoting **Nanguwo v. Tembenu and another, HC/PR Civil Cause No. 451 of 2013 (unreported)**, stated as follows:

"What this Court wishes to observe is that land is inherently unique and therefore damages are not an adequate remedy where the same is dealt with adversely. Therefore, the issue on adequacy of damages is ordinarily out of the question in relation to applications for injunction in relation to land."

As regards the balance of justice, sometimes it is best to grant an order of interlocutory injunction so as to maintain the status quo until the trial and at other times, it is best not to impose any restraint on the defendant: see the cases of **Hubbard v. Vosper [1972] 2 Q.B. 84** and **Henry Malista & Others v. Village Headman Sakhama (Enock Mututu), Civil Cause no.66 of 2018**.

Where the act complained of is still in preliminary stages, the preservation of the status quo favours the applicant. If the respondent has gone a long way, he or she claims the benefit of the preservation of the status quo. However the court must desist from availing a benefit to a respondent who rushed his or her work with a view to defeating the applicant's attempt to stop him or her: see **Shepherd Holmes Ltd v. Sandham [1971] Ch. 340**.

In the present case, the unchallenged evidence is that the 2nd Defendant has been developing the land in question for the last few years and it is only recently that the employees of the 1st Respondent brought building materials thereon and begun building a foundation on it. In short, it is my finding that the complained acts are still in the preliminary stages. That being the case, the preservation of the status quo favours the Claimants. In the premises, the order of interlocutory injunction is granted, as prayed.

Pronounced in Chambers this 8th day of November 2021 at Lilongwe in the Republic of Malawi.


Kenyatta Nyirenda
JUDGE