



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
CIVIL CAUSE NUMBER 76 OF 2021**

BETWEEN:

LANESS SANDE..... CLAIMANT

-AND-

MARK SANDE.....DEFENDANT

CORAM: HONOURABLE JUSTICE TS MASOAMPHAMBE

Edwin Banda, of Counsel for the Claimant

Sabina Malimbasa, of Counsel for the Defendant

Alexander Tepeka, Official Court interpreter

RULING

BACKGROUND

Laness Sande, the Claimant, filed an application on the 29th day of April 2020. She seeks Orders from this Court against the Defendant inter alia, for an Interlocutory prohibitory injunction, compelling the Defendant not to treat the partnership property namely one maize mill at Dambo Village, one maize mill at Nampeya Village, the Toyota Voxy, the 2 ton Mitsubishi Canter, and cash derived from the business as his own to the exclusion of the Claimant, collecting money from the maize mills and pocketing it for himself or his sole use and entering into the maize mill premises at all and committing or acting in a violent manner thereon until the determination of this matter.

On 3rd May 2021, this Court granted the Claimant an interlocutory order of prohibitory injunction restraining the Defendant by himself or his servants or agents or whosoever and howsoever appointed from doing all, or any of the acts against which the Claimant sought orders. The defendant, Mark Sande, applies to vacate or vary an ex-parte interlocutory prohibitory injunction of 3rd May, 2021. Counsel for the Defendant, Sabina Malimbasa argues the ex-parte order should not have been granted in the first place. She argued that the order is abuse of court process. She relied on the case of **Kabula vs The Land Registrar and Others, Civil Cause Number 56 of 2015** Mbvundula J, said:

“the relevant principles were considered in the judgement of Nyirenda J, as he then was, in the case of Nthara vs ADMARC [1995] 1MLR 177 (HC) at page 180 where he said ‘we have in the instant case identified the parties and the subject-matter as being the same but the plaintiff wants to attempt a new cause of action. The Lord Chancellor, Lord Cairns in the Lockey case remarked as the follows or such consideration and I think this was the ratio unlike the way Counsel for the plaintiff would want to see it:

I think it is quite sufficient in the present case to say that no man who shews at the time of his first proceedings he had the whole facts within his knowledge, and who had the power to raise them who puts upon his record statements which prove that he had the whole of his knowledge in his possession can be heard, because he does not attempt to prove one part of the case ... to raise again a portion of the case which, if it had any foundation, was perfectly well known to him at the time of his first proceedings.”

Counsel Malimbasa went on to cite the case of **B.M. Kasema vs. National Bank of Malawi Civil Cause No. 2299 of 2001(HC)**, in which the Court was represented with a scenario where the plaintiff obtained an ex parte injunction and the Defendant sought to vacate the same in another matter even before an inter-partes application was heard. The court gave its direction in the following terms:

“The Defendant would have waited for inter-partes hearing or apply to this Court to set aside injunction obtained ex parte.”

She further states that in the case of **Members of P.I.M. Church v Members of the Executive Blantyre City 11 (2008) MLR 172**, Justice Tambala as he was then stated that:

“An interlocutory injunction is a discretionary remedy and the court would not readily exercise its discretionary power in favour of a party who does not come to court with clean hands”

In her submissions she argued that this court has the power to protect the integrity of the court system by ensuring that parties are not allowed to re litigate matters or commence same matters twice. The subject matter in this case is the same as that on which a judgement was already passed in the lower court sitting at Nanyumbu and to which the defendant appealed in the high court. There is no basis on which the very issues in the appeal matter before this court can be recommenced by the Claimant.

Counsel for the Defendant further stated that the second reason why this order should be vacated is noncompliance. She relied on *Order 2 Rule 3 of the Court (High Court) (Civil Procedure) Rules 2017*, which provides that:

‘where there has been a failure to comply with these rules or direction of the court, the court may-

- (a) set aside all or part of the proceeding*
- b) set aside a step taken*
- (c) Declare a document or a step taken in effectual*
- (d) declare a document or a step taken to be effectual and*
- (e) make an order as to costs; or*
- (f) make any order that the Court may deem fit.*

She brought to the attention of the court the case of **Carlos Tchungu v. Corlen Nanseta (2010) MLR 41** where an ex-parte injunction was granted limited to 14 days within which period the Respondent was required to bring a fresh, inter-partes application. When the Appellant’s application to dissolve the injunction came before court, the Respondent failed to explain why they could not bring an inter-partes application within 14 days. The Supreme Court held that the Court below invoked principles of equity to decide in favour of the Respondent however at that time there could have been no order to either discharge or extend the injunction as the same has elapsed 14 days after being granted. The Judge in the Court below had no discretion to exercise, in the circumstances, but he was bound to decide in favour of the Appellant.

She argued that the Claimant obtained the ex-parte injunction on the 3rd of May 2021 on condition that the inter-parties application for the continuation of the injunction be filed within 7 days. The law states under ***Order 2 Rule 3 of the Court (High Court) (Civil Procedure) Rules, 2017***, that where there has been a failure to comply with these rules or direction of the court, the court may set aside all or part of the proceeding, set aside a step taken, declare a document or a step taken in effectual or declare a document or a step taken to be effectual. She avers that it has been 15 days since the injunction was granted and the Claimant has not filed the inter-partes application. In her argument the Claimant has clearly failed to do what was conditional to the interlocutory order obtained and it is only fair and just to let the law take its course by vacating the injunction and rendering it invalid.

Counsel for the Defendant further stated that the last reason why this order should be vacated is by weighing the balance of convenience tilts in favour of maintaining the order of interlocutory injunction or discharging it. She argued that before granting of an injunction, the court is required as according to ***Order 10 Rule 27 of the Court (High Court) (Civil Procedure) Rules, 2017***, to determine whether there is a serious question to be tried, whether damages may not be an adequate remedy and whether it shall be just granting the order. In the case at hand, it has already been stated that the issues are already in this court in another matter as such there is nothing new or serious that this new action is presenting to the court.

Counsel for the defendant relied on the case of ***American Cyanamid Co. v Ethicon Ltd [1975] 2 W.L.R. 316*** in which the case outlines guidelines applicable in applications for interlocutory injunction such as; is there a serious question to be tried? If the answer is yes, then a further question arises; would damages be an adequate remedy for a party injured by the court's grant of, or failure to grant, an injunction? If not and; where does the balance of convenience lie?

She further argued that there is no question to be tried by this court as regards the issue raised in the injunction since it was already commenced as an appeal. As such the question of damages and the balance of convenience thus lie towards discharging the order of injunction.

Counsel for the Defendant finally submitted that the obtaining of an injunction and commencement of the matter is an abuse of the court process since issues are already before this court as an appeal matter, that the Claimant failed to comply with a direction of the court in relation to the injunction obtained as such the injunction ought to be rendered invalid at law or be discharged and that there is no new triable issue that the Claimant is raising in this matter

hence the court need to exercise its discretion in favour of the defendant.

On the other hand, the Claimant wants the injunction sustained because the plots mills were installed on two plots that were independently and solely purchased by the Claimant. The parties having started a partnership with a cash injection from their father acquired a Toyota Voxy, a 2-ton lorry, and two maize mills. The Defendant since 2016 or thereabouts has been treating the partnership business and partnership properties as his own to the exclusion of the participation and the enjoyment of the Claimant. The Defendant even prohibits the Claimant access to the Claimant's plots. The Defendant collects cash from the mills and the Claimant has no access to it and no access to records of the collection. Sometimes the Defendant employs brutal tactics and means.

The Claimant submitted that, he seeks the aid of the Court to stop the Defendant in his acts. There have been other interventions from the parents, the father and mother, and traditional leaders and chiefs but the Defendant has not heeded them. The foregoing actions caused concern to their mother who decided to seek the intervention of the Court to seek redress, under Civil Cause No. 8 of 2021 in the Second Grade Magistrate Court sitting at Nanyumbu, **Yana Lijuni -vs- Mark Sande**. The magistrate in his judgement distributed the business property between the Defendant and the Claimant in accordance with the sharing that the Defendant had consented to. The Magistrate observed in his judgement that the matter was wrongly commenced as distribution of deceased estate but proceeded on the agreed sharing between the Defendant and the Claimant.

The Claimant further submitted that the Defendant has since obtained an order of stay of execution of the judgement and appealed petitioning to the High Court that the proceedings in the Second Grade Magistrate Court be declared null and void for want of jurisdiction. He stated that there is a possibility that the proceedings may be declared null and void, and in that case then the status quo ante is that the maize mills are partnership property excluding the plots. In the event that those proceedings are not declared null and void the maize mills will be excluding the plots are still to be shared. In either case the Defendant is not entitled to exclusive property in the maize mills and therefore he should not and must not exclude him from the maize mills or operate them as his own.

The Claimant submitted that when the Defendant obtained the order of stay, the Defendant has been threatening the more, making situation more volatile, threatening their mother and prohibiting him access to their mills and even to his own plots. The Defendant is obviously

taking advantage of the order of stay. The Defendant will continue to collect business proceeds and to deprive him and defraud him of the same and that he will suffer unquantifiable loss or irreparable loss as it will not be possible to quantify or calculate the daily turnovers since the defendant is keeping everything to himself and not allowing him to have sight of the same.

The Claimant submitted that before the court can exercise its discretionary power of granting an interlocutory injunction it must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. Counsel for the Claimant summarised the conditions for the grant of Interlocutory prohibitory injunction as held in the case of American Cynamid Co v Ethicon Co 1975 1 ALL ER 504 at 509 and Bowler Beverage Company Ltd v Trade Kings Ltd 2007 MLR 53 which are that the purpose of a temporary injunction is if the Claimant were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by and an award of damages for the loss he would have sustained as a result of the Defendant continuing to do what was sought to be enjoined between the time of the application and the time of the trial. Secondly if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Claimant's claim appears to be at that stage. Thirdly, if on the other hand, damages would not provide an adequate remedy for the Claimant in the event of his succeeding at the trial, the court should consider whether, on the contrary hypothesis that the Defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the Claimant's undertakings as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. Fourthly, if damages in the measure recoverable under such an undertaking would be adequate remedy and the Claimant would be in a position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction? These principles were confirmed by the Court in the case of Kawaye and Another v Fungatira[1997] 1 MLR 352.

Serious question to be tried

On the question of serious question to be tried, the question to be tried are:

- i. whether the Defendant can prevent or stop the Claimant from accessing the Claimant's plot;

- ii. whether the Defendant can exclude the Claimant from the shared properties as the Defendant's own;
- iii. whether the partnership exists or subsists in the circumstances or the partnership is deemed to have ceased; and
- iv. whether the Claimant can legitimately insist and enforce his claims against the Defendant for the dissolution of partnership and sharing whilst at the same time keep his land (plots) to the exclusion of the Defendant.

Damages are not adequate remedy

The Claimant's Counsel's submission is that the Claimant has been deprived of properties he shares with the Defendant by the defendant and also his enjoyment of his own plots. Whilst the value of vehicle (Voxy) can be ascertained and therefore damages ascertained, the enjoyment of the vehicle (Voxy) cannot be quantified and therefore damages are not adequate remedy.

Where the allegation is that the Defendant is committing a wrong then an injunction may be granted to stop the wrong, regardless of the fact that damages are payable. The commission of the wrong must be stopped.

No amount of damages would be adequate to compensate the Claimant for enjoyment of his property that he is deprived of and no damages would compensate the anxiety he has had over his deprived property that he is entitled to according to section 28 of the Constitution of Malawi.

An injunction may be granted to stop the continuation of infringement of a constitutional right.

It is just to grant an interlocutory prohibitory injunction

The Claimant's submission is that following the violation of the Claimant's right arbitrarily by the defendant, it would serve justice to grant the interlocutory prohibitory injunction order to ensure that the Claimant's rights over his property are enjoyed. In addition, no injustice would be done to the defendant by allowing the Claimant to have access to his properties as his own only. Justice would be attained by stopping the Defendant from his wrongs and granting injunction with the ancillary orders.

ISSUE(S) FOR DETERMINATION

Whether an order of interlocutory prohibitory injunction should be vacated.

THE LAW AND ANALYSIS

Under **Order 10 Rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017**, provides that a party may apply for an interlocutory order at any stage namely; before a proceeding has started, during a proceeding, or after a proceeding has been dealt with, and whether or not the party mentioned the particular relief being sought in his summons or counterclaim.

Order 10 Rule 27 of the Court (High Court) (Civil Procedure) Rules, 2017, provides that 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,

In **Bates v Lord Hailsham of St Marylebone and others, [1972] 3 All ER 1019** in this case, the plaintiff applied ex parte to stop a meeting due a few hours later. He had three months' notice of the meeting. In rejecting the ex parte application Megarry J, said:

"An injunction is a serious matter, and must be treated seriously. Ex-parte injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion."

This Court has duly considered the pleadings in this application, the sworn statements evidence, the submissions of Counsels for all the parties and the authorities cited. In the case of **Mangulama and Four others vs Dematt Civil Cause 893 of 1999.** Tambala J, as he was then had this to say;

"Applications for interlocutory injunctions are not an occasion for demonstrating that the parties are clearly wrong or have no credible evidence. The usual purpose of an order of interim injunction is to preserve the status quo of the parties until their rights have been determined."

This court is indeed bound by the decision in the case of **American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504**, Lord Diplock formulated the condition of disclosure of an arguable case or serious questions to be tried rather than a prima facie case with a probability of success. He held that the court must no doubt establish or be satisfied that the case is not frivolous or vexatious and that there are serious questions to be tried. Where serious questions have been

established for trial, the court will venture to consider the balance of convenience. At page 510 Lord Diplock held as follows:

“It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. So, unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the Plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.”

This principle was applied in the subsequent case of **British Broadcasting Corporation v Hearn and others [1978] 1 All ER 111** where Lord Denning at page 118 held that:

“If we apply the principles laid down by the House of Lords in American Cyanamid Co v Ethicon Ltd... It seems to me, at the very least, that there is a serious question to be tried, and we have to consider the balance of convenience.” (Emphasis added)

It has to be appreciated that courts in Malawi have applied the principles in the **American Cynamide Case** in many cases before them. In the case of **Amina Hamid Daudi t/a Amis Enterprises vs Sucoma Civil Cause Number 3191 of 2003** Mwaungulu J outlined the following principles; a court will not grant an injunction unless there is a matter to go for a trial and once there is matter that should go to trial, the court has to consider whether damages are an adequate remedy.

The learned judge continued to say on page 4 of the judgement:

“First, a court will not grant an injunction unless there is a matter to go for trial. This obviously filters cases not deserving the equitable relief that by its nature prevents exercise of rights before a court finally determines the matter. Secondly, once there is a matter that should go for trial, the court has to consider whether damages are an adequate remedy. This consideration requires answers to two sequel questions. First from the perspective of the defendant, even if damages are an adequate remedy, the court will refuse the injunction if the plaintiff cannot pay them...Secondly from the perspective of the plaintiff, if damages are an adequate remedy and the defendant can

pay them the court will refuse injunction. The court may therefore allow the injunction, where damages are an adequate remedy and the defendant can pay them."

The Defendant prayed to this court to vacate the interlocutory prohibitory injunction that this court granted to the Claimant giving the following grounds:

1. The Claimant's application is an abuse of court process

I wholeheartedly embrace the decision of Lord Diplock in the case of **American Cyanamid Co v Ethicon Ltd [1975] 1 All ER**. The usual purpose of an interlocutory injunction is to preserve the **status quo** until the rights of the parties have been determined in the action.

In **South Carolina Insurance Co. v Assurantie NV [1987] 1 AC 24**, in this case, Lord Brandon of Oakbrook had this to say;

"The effect of these authorities, so far as material to the present case, can be summarised by saying that the power of the High Court to grant injunctions is, subject to two exceptions to which I shall refer shortly, limited to two situations. Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable."

When there is an interlocutory injunction application, the court, if otherwise minded to make the order, should, as a matter of good practice, pay careful attention to the substantive relief that is, or will be, sought. The interlocutory injunction in aid of the substantive relief should not place a greater burden on the Defendant than is necessary. This court has scrutinized the evidence of the Claimant and therefore the relief which was granted to the Claimant will not place greater burden to the Defendant.

2. Non compliance with Court order or direction

The effect of **Order 2 Rule 3 of the Court (High Court) (Civil Procedure) Rules 2017** is to enable the Court to decide cases on merits and not technicalities. **Order 2 Rule 5 of the Court (High Court) (Civil procedure) Rules**, the overriding objective of these rules is to deal with proceedings justly. In the case at hand, I opine that the noncompliance is not fatal.

CONCLUSION

In the premises, the Defendant's application is rejected, the interlocutory prohibitory order which was granted to the Claimants still subsists. Costs are in the cause.

Made this Wednesday, the 29th day of September, 2021 at Zomba.



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JUDGE