REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
LAND CASE No. 40 OF 2022

BETWEEN:

MAUREEN KACHINGWE..... CLAIMANT

-AND-

MASAUKO POVERTY WHITE ..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE JACK N'RIVA
Counsel for claimant; Mr.
Counsel for Defendant Mr.
Mrs. D Nkangala, Court Clerk

RULING

The claimant is the proprietor of plot BW 1242 Namiwawa, in the city of Blantyre. She sought an interlocutory injunction arguing that the Town and Planning Committee of the City laid out a location plan and development permission that provides among others, the types of development, uses and the appropriate placement of entrances and exists. She argued that her plot was located inland and away from main road reserve on the map.

She said contrary to the designs and directions by the Town and Planning Committee, the defendant started to construct a second gate at the back of his plot adjacent to the claimant's gate. The claimant argued that the defendant's acts were unlawful and they were contrary to the city's plans and contrary to the s 45 of Physical Planning Act.

The claimant argued that she went to complain to Blantyre City Council and the council issued an Enforcement Notice against the defendant which the defendant ignored to comply with. The claimant argued that the defendant was carrying out an unauthorised development with a likelihood of completely changing the fundamental character of the claimant's plot. The claimant was granted the order of injunction without notice to the defendant. The Court ordered further hearing of the application with notice to the defendant.

The defendant opposes the application. He argued that he is the proprietor of plot BW 1240 Namiwawa, Blantyre. He said the access road especially on the western side caters for 3 plots namely plots, BW1239, 1240 and 1242 [the claimant's]. The defendant therefore argued that it was not true that the access road was for the exclusive use of the claimant. He said that the western side is a public road for all the three houses. He said he decided to put the entrance and a gate of the western side of his plot which was a better access for his enjoyment and peaceful living. He said he had been using the entrance all the years until December 2021 when the Town Planning Official approached him and asked him if he had two access roads after the claimant lodges a complaint that the defendant had more than one entrances to his plot.

He said the official was satisfied that there was only one entrance. Thereafter, the claimant came to obtain the without-notice order of injunction.
The defendant argued that there was no serious issue to be tried. He argues that he had not breached any design and directions of Town Planning Committee or any law let alone the Physical Planning Act 2016 as alleged by the claimant. He said the permission he got from the city did not contain the prohibitions alleged by the claimant. He refuted the allegation that he had two entrances to his plot. He argued that that was the whole reason the Planning Committee of the City did not find issues with him and did not enforce the stop notice. He said he did what the city permitted him to do.

The defendant further argued that the claimant suppressed material facts by concealing the facts that the road was for use of the other adjoining plots. He further said that there was only one access gate to the plot. He further said that he has been building the guest house and it is nearing completion. He further said the claimant planted fruit trees on his plot, thereby creating a nuisance and committing a tort of trespass.

Having listened to the parties the question is whether to sustain or discharge the injunction. Order 10 rule 27 of Courts (High Court) Civil Procedure) Rules 2017, provides that the Court may grant an order of interim injunction where it appears to the Court that there is a serious to be tried, that damages may not be an adequate remedy and that it shall be just to do so.

As to whether there is a serious question to be tried, it is a question of considering whether or not the claimant has a dispute worth adjudicating on. As to damages being inadequate, it is a question of whether the claim would be remedied in damages. It is further a question whether the defendant could pay the damages. That is to say if the claimant could be compensated monetarily, the Court ought not to grant the order of interlocutory injunction. See *Amina Daudi t/a Amis Enterprise v Sucoma* Civil case No. 391 of 2003. It has to be appreciated that damages would be a deficient remedy where the claimant's or defendant's losses are difficult to compute.

As to the interest of justice, it is a question of weighing whether the order would do justice or harm to the parties. The Court has to make an order that is just or convenient. It is called balance of convenience. Of course, it has to do more with inconvenience. The claimant has to show that the inconvenience caused to her or him would be greater than that may be caused to defendant if the interlocutory order is not granted. Should the inconvenience be equal, the claimant would suffer. The claimant must show that the comparative mischief from the inconvenience arising from withholding the order would be greater than would arise if it is granted.

There is the allegation of suppression of material facts. I find the main issue being that the defendant told the Court that the claimant told the Court that the entrance was to her exclusive use. The defendant argued that there were other plots entitled to use the road. It seems to me that the claimant might indeed have suppressed some facts on this point.

This makes it questionable as to whether the claimant has a serious question to be tried. Tembo J in *Maseko and another v Banda and another* Civil Cause 351 of 2017, said:

> "The reason why the ex parte order will be set aside in such circumstances is that it serves as a deterrent to ensure that applicants in the absence of the other party must realise that they have a duty of disclosure and of the consequences if they fail in the duty. It also serves to deprive the non-disclosing of any benefit improperly obtained through the non-disclosure. See *Kaliyati and another v Maranatha International Academy and another [*2013] MLR 63 and *R v The General Commissioners for the Purpose of Income Tax Acts for the District of Kensington, ex parte Princess Edmond de Polignac* [1971] 1 K.B. 486 and *Ex parte Capital Radio Limited and Joy Radio Limited* judicial review number 29 of 2011 (High Court) (unreported)."

The law is that where there is suppression of material facts by the plaintiff the Court has power to discharge the injunction on the defendant's prayer for a discharge. In *R v Kensington Income Tax Commissioners,* ex-parte *Princes Edmond de Polignac* [1017]KB 486 Warnington L J said on page 506.

> "It is perfectly well settled that a person who makes an *ex-parte* application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him."

There must therefore be a full and frank disclosure of all material facts otherwise as the Court said in *Phiri v Indefund* Civil Cause Number 366 of 1996, the order of Injunction may be set aside without regard to merits. In *Schmitten v Faulkers* (1893) W.N. 64 Chitty, J stated that the *ex-parte* applicant must proceed 'with the highest good faith'. In *Beese v Woodhouse* [1907] 1WlR 531 similar sentiments were made as per the dictum of Davies L J which who said:-

> "[T]he party making an *ex-parte* application for an injunction should 'show utmost good' faith and that the doctrine of *uberrimae fidei* in effect applies to such cases."

Having found that is questionable that the claimant has a serious question to be tried on the ground of suppression of material facts, the Court discharges the order of interlocutory injunction. Furthermore, having heard both sides, my judgment is that balance of convenience lies in discharging the order. The defendant argued that his project is near completion. I would believe that it would be better to sustain the status

quo. In any event, should the claimant succeed in her claim, the defendant may be ordered to demolish whatever might have been constructed to the detriment of the claimant.

Costs shall be in the cause.

In my discretion, I exempt the dispute from mediation.

The matter should, therefore, proceed before another Judge for determination.

MADE this 13th day of September, 2022

J. N'RIVA

JUDGE