



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 247 OF 2020

BETWEEN:

PAUL JULIUS AND OTHERS

CLAIMANTS

AND

CHINA RAILWAY 20 BUREAU GROUP

CORPORATION

1st DEFENDANT

MALAWI ROADS AUTHORITY

2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

Kazembe, Counsel for the Claimants
Ngunga, Counsel for the 1st Defendant
Kaonga, Counsel for the 2nd Defendant
Mankhambera, Official Court Interpreter

ORDER

1. This is this Court's order on the claimants' application for an order of interlocutory injunction made under Order 10 rule 27 of the Courts (High Court) (Civil Procedure) Rules 2017.
2. By the instant application, the claimants seek an order of interlocutory injunction restraining the defendants from encroaching, excavating and

putting heaps of soil onto the claimants' pieces of land situated at various villages in the areas of Traditional Authorities Chimombo, Malemia, Makoko and N'gabu in Nsanje District. The claimants also further seek that the defendants be restrained from continuing with their road construction project, which causes nuisance to the claimants, which proceeded without consulting and payment of compensation to the claimants contrary to the expropriation procedures as stipulated under section 44 of the Constitution. They seek that the order sought subsist until conclusion of their claim herein.

3. The application is supported by a sworn statement of the claimants. The defendants contested the application and filed sworn statements. The parties made submissions on the application at hand which this Court has considered in arriving at its decision herein.
4. The facts on this matter are not complicated. The claimants commenced an action against the defendants on 10th October, 2020 seeking damages for trespass, nuisance, mesne profits. The claim for damages arises from the defendants' road construction project which is being carried out in Nsanje District. The case of the claimants on this application is that the road construction works affected and continues to affect the claimants adversely and were commenced without consulting and compensating the claimants contrary to the expropriation procedures as stipulated under section 44 of the Constitution. The claimants add that the defendants commenced the project herein without implementing the recommendations in the project's Environmental Impact Assessment Report. However, the details of the alleged noncompliance were not spelt out.
5. The claimants assert that the defendants are carrying on the road construction project herein illegally and that unless they are restrained they will continue to occasion loss and suffering to the claimants.
6. On its part, the 1st defendant agreed that it is indeed carrying out the road works herein connecting Nsanje and Marka boarder post. It however asserted that, contrary to the claimants' claims, the 2nd defendant compensated all people known to be affected herein.
7. The 1st defendant noted that the claimants' claim is for damages and that itself and the 2nd defendant has capacity to pay the same. It also observed that the project in question is nearing completion and that granting an injunction at this stage will result in huge financial loss to the defendants. It added that the

project will benefit many Malawians and that the claimants should not deprive the rest of the Malawians of such benefit by way of injunction. It then asserted that the claimants have inordinately delayed their application given that the project herein commenced in 2018.

8. The 1st defendant then asserted that the claimants have no capacity to pay damages if the injunction is later found to have been wrongly granted. At the same time, it asserted that an injunction will render the case of the claimants academic in case they succeed because the 1st defendant will have no finances to pay the claimants since it only gets paid upon completion of works.
9. The 2nd defendant also concedes that the 1st defendant is carrying out the road works herein. It asserted that there is currently no other road that connects Nsanje to the border and that the old road is now cut off and impassable. It added that the 1st defendant has set up detours through the road works project which must be regularly maintained and that stopping it from the project will make the detours impassable especially during the rainy season.
10. The 2nd defendant asserted that granting an injunction will create more problems for a large group of people, including public functions, as the connection between Malawi and Mozambique will be cut off and many people benefit from the use of the road herein.
11. It then noted that the quest of the claimants is all about money as well as the injunction. And that the claimants have not alleged any long lasting damage that cannot be compensated for. It then asserted that road construction is very expensive and that a contractor on average spends K3.4 million per day and the claimants are unlikely to pay the said sums should the injunction later be found to have been wrongly granted. It also noted that the claimants have not made the usual undertaking to pay damages in such circumstances.
12. The 2nd defendant then asserted that the defendants did compensate people who were affected by the road project herein and attached forms showing families compensated herein. It added that the 1st defendant would once in a while pay for extra land from where it gets soil for road works and that the contractor only buys the soil leaving the land with the respective owners. And that at the end of the project the soil pits are levelled up and the land is returned to the owner.

13. It then stated that the defendants did not deviate from any recommendation of the Environmental Impact Assessment Report, a copy of which the claimants have not produced to show the alleged deviation.
14. It then stated that, contrary to the claimants' belief, the road project herein has been carried out legally and compensation has been given to all to whom it was due and even out of goodwill to those not deserving on account of construction within the road reserve. The 2nd defendant insisted that there has been no expropriation of land by the defendants and that all activities were done by mutual agreement of the parties.
15. It then asserted that the application for injunction ought to be dismissed as it is merely an attempt to force the defendants to illegally pay out public money to persons who did not deserve to be paid or who may have been told by lawyers to demand more money than is due to them.
16. The 2nd defendant pointed out that the defendants have capacity to compensate the claimants should their action herein succeed but that the claimants do not have such capacity.
17. It also stated that the injunction would negatively affect and most likely lead to the road works being abandoned due to excessive costs of maintaining a contractor on site while works are not being done and this would affect not only the people of Nsanje but also all Malawians as the road connects Malawi to Mozambique and is a vital trade corridor as well as being used by ambulances ferrying people from the health centres to Nsanje District Hospital.
18. This Court is aware of the applicable law on interlocutory injunctions as submitted by the parties. This court will grant an interim injunction where the claimant discloses a good arguable claim to the right he seeks to protect. The court will not try to determine the issues on sworn statements but it will be enough if the claimant shows that there is a serious question to be tried. See Order 10 rule 27 (a) Courts (High Court) (Civil Procedure) Rules 2017.
19. The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality. Beyond that, it does not matter if the claimant's chance of winning is 90 per cent or 20 per cent. See *Mothercare Ltd v Robson Books Ltd* [1979] FSR 466 per Megarry V-C at p. 474; *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 per Megaw LJ at p. 373.

20. If the claimant has shown that he has a good arguable claim and that there is a serious question for trial, this Court next has to consider the question whether damages would be an adequate remedy on the claimant's claim. See Order 10 rule 27 (b) Courts (High Court) (Civil Procedure) Rules 2017.
21. Where damages at common law would be an adequate remedy and defendant would be able to pay them, an interlocutory order of injunction should be refused, irrespective of the strength of the claimant's claim. See *Mkwamba v Indefund Ltd* [1990] 13 MLR 244.
22. Where damages are an inadequate remedy the court will consider whether it is just to grant the injunction. See Order 10 rule 27 (c) Courts (High Court) (Civil Procedure) Rules 2017. This will involve weighing whether the balance of convenience or justice favours the granting of the interim order of injunction. See *Kanyuka v Chiumia* civil cause number 58 of 2003 (High Court) (unreported); *Tembo v Chakuamba* MSCA Civil Appeal Number 30 of 2001 both citing the famous *American Cyanamid Co. v Ethicon Ltd* [1975] 2 WLR 316.
23. In determining the instant application for injunction, this Court must determine whether on the sworn statements the claimants have disclosed a triable issue or a good arguable claim.
24. The sworn statements show that the claimants have shown that they have rights that they wish to protect, namely, rights to be paid adequate compensation for the usage of their land by the defendants as well as damages for the alleged nuisance and other actions by the defendants in the course of the road works herein. There is therefore a triable issue in that regard notwithstanding the defendant's denial of the claims.
25. This Court therefore finds that, on the sworn statements, the claimants have disclosed that there is a serious question to be tried between themselves and the defendants as required by Order 10 rule 27 (a) Courts (High Court) (Civil Procedure) Rules 2017.
26. In the foregoing premises, this Court will next consider the question whether damages would be an adequate remedy on the claimants' claim in terms of Order 10 rule 27 (b) Courts (High Court) (Civil Procedure) Rules.
27. On this aspect, the claim as well as the arguments of all the parties on this application point to the fact that what is in issue is that the claimants seek to be paid damages. As such, as correctly submitted by the defendants, damages

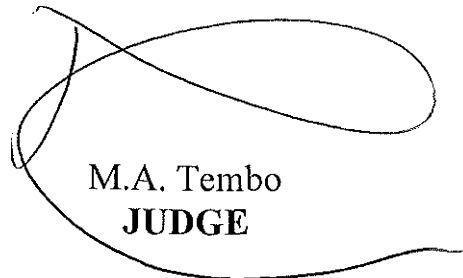
will be an adequate remedy in this matter. It was clearly articulated by the claimants that some of them got paid but that they are of the view that what they got paid was not adequate. And they seek more. The defendants also showed that people got paid compensation before the road works started. They contended that damages are therefore the main thing sought in this matter.

28. This Court is persuaded that the claimants are looking for damages and that the same would be adequate in the circumstances. This is despite their argument that their land got expropriated before they were consulted and paid any compensation. And that only an injunction could enforce the requirement for payment of compensation before expropriation of property under section 44 (3) of the Constitution. The claimants blew hot and cold. The claimants mentioned during oral arguments that some of them got paid compensation which they do not think is enough. That is markedly different from saying that they were never paid under the scheme provided under the Public Roads Act under which the defendants actually assert to have made payments. In any event, section 44 (3) of the Constitution provides that a person shall have a right to appeal to a court of law in the event they feel that compensation is not enough.
29. With regard to the alleged non-compliance with the project's Environmental Impact Assessment Report, that allegation has no bearing on the question of adequacy damages. This is because, as rightly noted by the defendants, no particulars of non-compliance have been spelt out and it is impossible to measure whether damages would be inadequate to compensate for the same.
30. This Court therefore holds that damages would be an adequate remedy on the claimants' claim in terms of Order 10 rule 27 (b) Courts (High Court) (Civil Procedure) Rules. This should have been the end of the matter as an injunction will not be granted where damages are an adequate remedy. For the sake of completeness of the picture, this Court next considers whether it is just to grant the injunction in terms of Order 10 rule 27 (c) Courts (High Court) (Civil Procedure) Rules 2017.
31. Whilst this Court observes that the claimants contended that it is just to grant the injunction so that section 44 (3) of the Constitution be enforced so that their property rights are not expropriated without consultation and payment of compensation. On the other hand, this Court however agrees with the defendants' contention that granting an injunction now will be so costly. It

agrees with the defendants' observation that by this stage the project herein has been ongoing since 2018 and it will be so costly to stop it now when a lot of public resources have already been invested in it. This Court also notes that the project concerns the only road linking Nsanje and Marka boarder. More importantly, this Court notes that numerous people have already been paid compensation by the Roads Authority according to the scheme provided under the Public Roads Act. Such people have a right to get a relief if they do not agree with the amount of compensation. An injunction is not an apt remedy then. This Court therefore agrees with the defendants that it would not be just to grant an injunction in the circumstances. More harm than good will result from an injunction at this stage.

32. This Court therefore holds that it is not just to grant the injunction in terms of Order 10 rule 27 (c) Courts (High Court) (Civil Procedure) Rules 2017.
33. The claimants' application for an order of interlocutory injunction accordingly fails with costs to the defendants. In the circumstances, this matter is exempted from mediation and shall be escalated to trial through a scheduling conference.

Made in chambers at Blantyre this 22nd March, 2022.



M.A. Tembo
JUDGE

