

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.244 OF 1992



BETWEEN:

D.M. CHIKHADZULA ..... PLAINTIFF

- and -

PEARL ASSURANCE CO. PLC ..... DEFENDANT

CORAM: MKANDAWIRE, J.

Ng'ombe, of Counsel for the Plaintiff  
Mbendera, of Counsel for the Defendant  
Manondo (Mrs), Court Clerk

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RULING

This is an application for an interlocutory injunction by the plaintiff to restrain the defendant from selling the plaintiff's property situate in Lilongwe known as Bwaila 47/63 until the conclusion of the trial commenced herein. The application is vehemently objected.

It is common case that as far back as 1982 or thereabouts, one F.M. Chikosa trading as Milimo Building Contractor (hereinafter referred to as the "Contractor") was awarded a contract by the Malawi Government (hereinafter referred to as the "Employer") to undertake some building constructions at Karonga. The contractor then invited the plaintiff to be his quantity surveyor on that building contract. It was a condition that the contractor do take a performance bond with a reputable Insurance Company to the extent of 5% of the contract price and that worked out to be K132,500.00. The purpose of the performance bond was that in the event of the contractor failing to complete the contract and the Employer suffering any loss or damage thereby, the Insurance Company should be able to compensate the Employer for such loss or damage. The above set of facts are not in dispute.

It is the plaintiff's case as deposed in his affidavit that in compliance with the said performance bond requirement, the

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contractor took out a cover with the defendant Insurance Company to the extent of K132,500.00 by way of an insurance policy for which a premium of about K5,000.00 was paid. But then at the same time the plaintiff furnished security by way of a charge on his house on plot number Bwaila 47/63. As it happened the contractor failed to complete the contract and the Employer called for the performance bond. The defendant having paid the sum of K132,500.00 to the Employer has advertised the sale of the plaintiff's property.

It was submitted by Mr. Ng'ombe that it was a term of the contract that in the event of failure on the part of the contractor, an account be taken to establish whatever loss or damage the Employer may have suffered. He submitted further that no such account has been made and since the defendant paid over the money to the Employer without the account being taken the defendant was in breach of the contract. It was submitted that this was a fundamental breach which rendered the payment over premature. It was also submitted that since the performance bond which the contractor had taken was by way of contract of insurance, it was not necessary for the plaintiff to give security by way of a charge on his house. It was contended that the charge on the house was a mistake in law since under the insurance policy, the defendant had undertaken to compensate whatever loss the Employer may have suffered. Mr. Ng'ombe went on to say that if the plaintiff succeeds in the action he has commenced, he will be entitled to his house. The purpose of the trial is therefore to obtain an injunction. He said the house has an ornamental value which cannot be compensated by damages. He therefore submitted that the status quo of the parties be maintained until the action for a permanent injunction is determined.

In reply Mr. Mbendera submitted that the plaintiff's case is one of damages as there is no mention of an injunction in the statement of claim. The contract which is alleged to have been breached was between the defendant and a third party and the plaintiff was not a party to it. In any event in so far as the defendant is concerned there was no breach as the payment of K132,500.00 was made only after receipt of final accounts and those have been exhibited to the affidavit in opposition.

Turning to the performance bond, it was submitted that this was not a contract of insurance but rather a contract of guarantee and the case of Pearl Assurance PLC -vs- The Attorney General M.S.C.A. Civil Appeal No.16 of 1988 was cited in support. It was submitted that the charge was intended to secure the bond. Since the defendant had paid the Employer, the plaintiff became liable under the charge. The statement of claim does not attack the charge. Mr. Mbendera told the Court that there has been no unfairness on the part of the defendant for on 19th December, 1990 a demand letter was sent to the plaintiff. He was given one



month in which to pay failing which the charged property would be sold. The plaintiff did nothing and although a period of one month was given in the demand letter, sale of the house was advertised after one year. It was only then that the plaintiff commenced these proceedings.

I will start with pleadings. I think that Mr. Mbendera has made a valid point when he submitted that the statement of claim ought to carry an endorsement asking for an injunction. Such a submission was made because Mr. Ng'ombe had submitted that the purpose of the trial was to obtain an injunction. It was submitted on behalf of the plaintiff that the status quo of the parties be maintained until a permanent injunction was considered at the trial. This means that the obtaining of an injunction is a substantial object of the action and yet there is no endorsement for an injunction in the statement of claim. Where the obtaining of an injunction is a substantial object, the writ must be endorsed with a claim for an injunction - see Order 29/1/9/R.S.C. The case of Colebourne -vs- Colebourne (1876) 1 Ch.D 690 is very clear on the point. In that case Hall V C said he could only grant injunction upon the plaintiff amending her endorsement to include a request for an injunction. In the present case although Mr. Mbendera did point out the defect in the pleadings, there has been no amendment and the only claim is that of damages. I think that this defect is fundamental and on this ground alone I can refuse to grant the injunction.

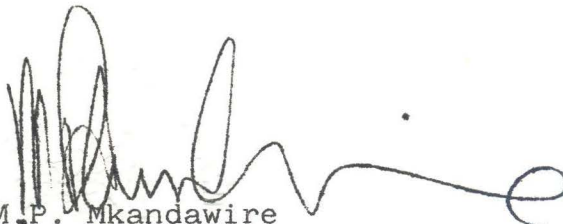
The principles which should guide a Court in considering an application for an injunction are well set in the well known case of American Cynamid Co. -vs- Ethicon Ltd. (1975) AC 396. One of the matters which must come to the Court's mind is whether damages would be adequate remedy. This is a case of alleged breach of contract and the plaintiff is claiming damages arising from the alleged breach. The defendant is threatening to sell the plaintiff's house although this is not in the pleadings, and it is that sale the plaintiff is seeking to prevent.

It is not for me to say whether the contract relating to the performance bond was one of insurance or guarantee. Again, it is not for me to say whether in paying the money the defendant was in breach. But it does seem that the employer did prepare final accounts for I do not think that the defendant would have paid in the absence of such accounts. The plaintiff's case is that if the action commenced herein succeeds, the plaintiff will be entitled to keep his house. That house has ornamental value so that if it is sold damages would not be sufficient remedy. I am not so sure if ornamental value is recognized in law and Mr. Ng'ombe cited no authority for that. Indeed damages would not be sufficient remedy where the wrong is irreparable or outside the scope of pecuniary compensation. Again damages would not be sufficient remedy when they are difficult to assess or where the defendant is unable to pay them. I do not think that the present case comes within any of those situations where damages would not

be sufficient remedy. In the case of a house I think that damages would represent the market value of the house and those damages would be sufficient. There would be no difficulty in assessing the damages and certainly the defendant would be able to pay them.

I therefore dismiss the application with costs.

MADE in Chambers this 25th day of May, 1992.




M.P. Mkandawire  
JUDGE

NG'OMBE: I apply for extension of the interim injunction pending appeal.

MBENDERA: I object, there are no merits for, as the pleadings stand this is just a case of damages. It would be unjust to allow the extension.

COURT: The granting of or refusing the party an injunction is discretionary. So also is the extension of an interim injunction. I do not want the plaintiff to feel that I am standing in his way. It is only on that basis that I extend the interim injunction till appeal. I only hope that the appeal does not take too long.



M.P. Mkandawire  
JUDGE