



HIGH COURT  
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IN THE HIGH COURT OF MALAWI  
MZUZU REGISTRY: CIVIL DIVISION/  
CIVIL CAUSE NO. 215 of 2015

Between

Dr Chimwemwe Mhango ..... Applicant

-and-

Semu Yakwenda Banda ..... 1<sup>st</sup> Respondent  
Alweka Hannock Banda ..... 2<sup>nd</sup> Respondent  
Edward Jungo Banda ..... 3<sup>rd</sup> Respondent  
Nenani Banda (Ms) ..... 4<sup>th</sup> Respondent  
Dalitso Nkwazi (Ms) ..... 5<sup>th</sup> Respondent  
Katanga Ngwira ..... 6<sup>th</sup> Respondent  
Shaibu Family ..... 7<sup>th</sup> Respondent

**CORAM:**

**HONOURABLE JUSTICE D.A. DEGABRIELE**

Mr. W. Mwafulirwa

for the Applicant

Respondents

absent, no cause but duly served

Mr A. Kanyinji

Official Interpreter

DeGabriele, J

**RULING**

**Introduction**

The applicant, Dr Chimwemwe Mhango is seeking an order of injunction under Order 29 RSC restraining the Defendants from evicting her from, or selling, or transferring, or demarcating the land known as Lilenji Estate located at Mpamba village, T/A Timbiri in Nkhata Bay District, pending the determination of the

appeal in the Supreme Court of Appeal. The applicant has sworn an affidavit in support of the application which she is relying on.

The defendants were served and accepted service through their counsel at Legal Aid Bureau on 21<sup>st</sup> February 2017, but neither counsel nor the defendants have availed themselves to court for this hearing, nor did they file affidavits in opposition of this application for an interlocutory injunction. The court proceeded to hear the applicant's submissions.

### **The application**

The applicant filed an *ex parte* summons for an application for an order of an interlocutory injunction on 25<sup>th</sup> November 2016, and was ordered to bring the summons *inter partes* bearing in mind that the matter had been heard by the court and an appeal was already filed. In the affidavit in support of the application, the applicant alleges that the defendants are evicting her from her land, that she now has the evidence to substantiate her right of claim, and that the defendants have no right to use and occupy the said land as the court order did not give them such rights. In a supplementary affidavit sworn by the applicant and filed on 29<sup>th</sup> March 2017, the applicant states that title deed and the deed plan has been issued to her by the Ministry Responsible for land matters and these have been exhibited as **DCM1** and **DCM2**, meaning that she has ownership of the land in question.

The applicant further avers that the defendants' failure to attend court for no cause and the failure to file any affidavits in opposition means that the defendants are not opposing the current application for an order of injunction.

### **The issues**

In the skeleton arguments filed by the applicant on 11<sup>th</sup> January 2017, the applicant raises one issue for determination, which is whether an order of an injunction can be granted in the circumstances, as she now has evidence to substantiate her right to claim.

## The law

Order 29 r1 of the RSC, provides that

*“an application for an injunction can be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not the claim for the injunction was included in the party’s writ, originating summons, counterclaim or third party notice, as the case may be”.*

The applicant ought to show that he or she has a triable issue and if this is established, the court will consider whether or not the balance of convenience lies in favour of granting or refusing to grant the injunction (*see American Cyanamid Co. v Ethicon Ltd [1995] AC 396*). It is established law that granting or refusing to grant an injunction is a matter of the discretion of the court based on the balance of convenience.

## Analysis

The defendants have not availed themselves to this court hearing. However, I will examine the applicant’s affidavits and evidence to see whether or not the balance on convenience lies in favour of granting the order of injunction.

Before doing so, I will outline a brief background of the matter. The court record shows that the applicant had applied by way of originating summons for summary possession of the land as well as an *ex parte* summons for an interlocutory injunction before this court on 4<sup>th</sup> August 2015. An order for injunction was granted on 12<sup>th</sup> August 2015 restraining the defendants from entering into possession, cultivating any crop or erecting any buildings on the property known as Lilenji Estate situated at Mpamba Village, T/A Timbiri in Nkhata Bay District, until the determination of the matter. Following an *inter partes* hearing, the court made an order on 15<sup>th</sup> July 2016 that the applicant had failed to substantiate her claim to the land she was seeking to possess as there was no evidence of title or lease hold. The injunction that had been granted on 12<sup>th</sup> August 2015 naturally ceased to exist. The court further stated that the decision of the court did not grant any right to the use and occupation of the said land to the defendants.

On 15<sup>th</sup> August 2016, the applicant filed an *ex parte* application to seek leave to apply for an order of committal for contempt of court under O52 of the RSC. On

26<sup>th</sup> September 2016 the court stated that the application was ill-premised as the court had not made any order which could have been said to have been disobeyed. The applicant then sought leave to appeal out of time which leave was granted. The applicant seeks to adduce evidence to the appeal court to show that her right of claim had come after the decision of the lower court had been made.

In the present application, the applicant filed an *ex parte* summons for an application for an order of an interlocutory injunction on 25<sup>th</sup> November 2016, and was ordered to bring the summons *inter partes* bearing in mind that the matter had been heard by the court and an appeal was already filed.

In the sworn affidavit in support of this application, the applicant claims that there was a change of circumstances in that the offer for a lease was granted to her on 1<sup>st</sup> July 2016 and that there is now proof of her right of claim. This change of circumstances is the subject of the appeal, in which the applicant is seeking to have evidence adduced at the appeal hearing to show that she had a right of claim after the lower court had already made its determination. I will not discuss this as it is not my ambit to do so and the applicant should proceed with the appeal case.

The subject matter for this application is that the defendants are now evicting her from the said land on the basis that the court had given them the land. She claims that she had reported the matter to T/A Timbiri and the police but the defendants continue to evict her. However apart from her claim, there is no evidence or sworn affidavits as to the fact that the applicant is being evicted from the land. The only evidence the applicant has given the court is evidence to show that she has substantiated her right to claim and that the deed for the lease has now been given to her. She seeks that this court grants an order of injunction pending the hearing of the appeal based on the documents which are proving that she has the right to claim.

I have looked at the applicant's affidavits in support of this application and, without touching on the subject matter of the appeal, I make the following observations;




- i. The offer of a 21 year lease for 16.64 hectares attached to the main affidavit in support filed on 11<sup>th</sup> January 2017 was to be effected once the applicant paid the fee of MK32,310.00 within 60 days of the said offer. There is no evidence that the payment was done. It is not clear therefore that the right to claim on which I must base this order of injunction has been substantiated and proper procedures have been followed.
- ii. The applicant has exhibited a purported lease document granted to her by the Ministry of Lands, marked as **DCM1**, which lease document is not dated, nor is it signed by the commissioner for lands, nor is it witnessed. The document is only bearing the signature of the applicant. The document is not complete and cannot be relied on as clear and unambiguous proof of the right to claim, on which I would base an order of injunction.

### **The Determination**

Having discussed the above, I find that the balance of convenience does not lie in favour of granting the order of injunction. Consequently, in the absence of evidence of the said eviction and a clear and unambiguous demonstration of the right to claim, I am not able to grant the injunction as prayed for.

The application is dismissed with costs, for being frivolous and vexatious.

**Made in Chambers at Mzuzu Registry this 4<sup>th</sup> day of April 2017**

  
D.A. DeGabriele

**JUDGE**