JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 14 OF 2018

BETWEEN:

ALIDI NATHANIEL MKAMA ..... CLAIMANT

-AND-

HONOURABLE NOEL MASANGWI ..... 1ST DEFENDANT

ROBERT TINOSI t/a TINOSI CONTRACTOR AND GENERAL SUPPLIERS ..... 2ND DEFENDANT

CORAM: **THE HONOURABLE JUSTICE KENYATTA NYIRENDA**
Mr. Kapoto, of Counsel, for the Applicant
The 1st Defendant, absent and unrepresented
Mr. Chalamanda, of Counsel, for the 2nd Defendant
Mrs. Jessie Chilimapunga, Court Clerk

ORDER

Kenyatta Nyirenda, J.

This is an application by the Claimant for continuation of an interlocutory injunction granted ex-parte on 18th January 2018, restraining the Defendants from *"constructing a fence or any structure in front of the claimant's shop at Kanjedza, Plot No. LW 150 in Blantyre or putting the claimant's shop into Kanjedza Primary School fence"* pending the determination of substantive case or until a further court order (interlocutory injunction).

The background to the application can be briefly stated. On 17th January 2018, the Claimant commenced an action against the Defendants claiming (a) a declaration that the Claimant is the de facto owner of Plot No. LW 150, (b) an order restraining the Defendants from constructing a fence in front of the Claimant's shop, (c) damages for trespass to land, and (d) costs of the action.

The application is supported by a sworn statement by the Claimant and the substantive part thereof reads as follows:

> *"**3.** **THAT** in 2003, I entered into a tenancy agreement with Blantyre City Counsel whereby, at my own costs and on the Council's request, I renovated a toilet at Kanjedza to be used for commercial purposes.*
>
> ***4.** **THAT** it was a term of the contract that the Council shall refund me all costs I incurred in renovating the toilet.*
>
> ***5.** **THAT** when I finished renovating the building, the Council failed to maintain the sewage system on the ground that it was too expensive. The Council then asked me to find another way of utilizing the building.*
>
> ***6.** **THAT** I started using the building as a Mini shop called Mkama Mini Shop with the Council's authority but the Council failed to refund my expenses pegged at about K800, 000. As a tenant, I was supposed to pay rentals per month but I didn't as the Council owed me money for the renovation.*
>
> ***7.** **THAT** in 2008, I applied to the Council to own the building as I had restructured it or in other words to be offered the land for lease, having been on the land for 5 years.*
>
> ***8.** **THAT** after the application, the Council sent land surveyors who surveyed the land. After the survey, they sent me a statement to pay City Rates. Since then, I have been paying city rates up to now. I now exhibit copies of statements and receipts as **ANM 1**.*
>
> ***9.** **THAT** in November, 2017, the Head Teacher for Kanjedza Primary School, together with members of Kanjedza School Committee and the 2nd defendant approached me and asked me to verify with them the boundary between my shop and the School land as the school was to be fenced.*
>
> ***10.** **THAT** I, the 2nd defendant, the Head Teacher for Kanjedza Primary School and all members of Kanjedza School Committee verified the boundary between my plot and the School land.*
>
> ***11.** **THAT** the 2nd defendant dug a foundation on the boundary for the construction of the school fence that passed behind my shop.*
>
> ***12.** **THAT** to my surprise, on or about the 11th January, 2018, the 1st defendant came and told me that I was occupying school premises and he agreed with the 2nd defendant to ignore the foundation that the 2nd defendant dug on the previously agreed boundary and dig another foundation in front of my shop that would put my min shop into the school fence.*
>
> ***13.** **THAT** the construction of a fence in front of my shop is detrimental to my business and my purpose of owning and occupying this land as it means the shop would be closed from the public and my business would be totally killed.*

14. ***THAT*** *the 2nd defendant has now started digging the second foundation for the construction of the fence in front of my plot with an intention of putting my shop inside the school fence.*

15. ***THAT*** *I entirely rely on the Mini shop as my sole source of income, hence closing it interferes with my right to economic activity. I and my whole family (wife, children and dependents) will suffer.*

16. ***THAT*** *if an injunction is not granted, I will suffer irreparable damage, being my right to economic activity and it will be difficult to assess the monetary loss I will suffer.*

17. ***THAT*** *the defendants are not even owners of the adjacent land to my shop. They stand to lose nothing if the injunction is granted. It could be that they are trying to reduce their costs of constructing the fence behind my shop at my expense.*

18. ***THAT*** *clearly, the defendants are trying to illegally combine two different plots into one. A small portion labeled SD 4212/ LW 150 for me and a large chunk labeled SD/4375 for the school. I now exhibit a copy of the map for the land as* ***ANM 2***

19. ***THAT*** *it is just to grant an injunction in the circumstances as the defendants suffer no loss for not including my shop in the school's fence they are constructing, thereby sticking to the earlier boundary agreed upon by myself, the Head Teacher of the School and the School Committee."*

The Defendants are opposed to the continuation of the interlocutory injunction and two sworn statements by the 1st Defendant and Ruth Dilla respectively were filed with the Court.

The common thread running through the two sworn statements is that the Claimant does not have any proprietary rights in the land in question. The relevant part of the sworn statement by the 1st Defendant reads as follows:

"2.2 ***NO EVIDENCE OF AGREEMENT BETWEEN THE APPLICANT AND THE CITY COUNCIL***

2.2.1 ***THAT*** *I refer to paragraph 3 of the Applicant's sworn statement in support of the application for interlocutory injunction and deny the contents therein and state that there is there was no agreement entered between the Blantyre City Council and the Applicant to renovate the toilet at Kanjedza Primary School. I have verified with the city council and no such agreement exists.*

2.2.2 ***THAT*** *it is not surprising that the Applicant has not even attempted to produce evidence of such agreement.*

2.3 ***THAT*** *I refer to paragraph 4 of the Applicant's sworn statement in support of the application for an interlocutory injunction and deny the contents therein and state that there is no evidence of existence of any contract between the Applicant and Blantyre City Council nor has the applicant shown that Blantyre City Council had given consent to use the land in question.*

2.4 ***THAT*** *I am aware that when land is allocated by the City Council a lease document with properly surveyed outline is given. My search at the City Council shows that the Applicant does not have any lease in respect of the land in issue.*

2.5 ***THAT*** *I refer to paragraph 5 of the Applicant's sworn statement in support of application for an interlocutory injunction and deny the contents therein and state that the land and buildings in question belong to government hence there was no authority given to the Applicant to start using the said land and buildings. Government decision to allocate land to the Applicant would have been in writing and there would have been payment for the same.*

2.6 ***THAT*** *I deny the contents of paragraphs 6 and 7 of the Applicant's sworn statement and state that the mandate to promote infrastructural development through formulation, execution of district development plans within its jurisdiction and that the land in issue belongs to Blantyre city which council has resolved to utilize the same.*

2.7 ***THAT*** *I refer to paragraph 2.6 above, and state that there is no evidence shown by the Applicant that he applied and was offered a lease for the land in question, therefore the Applicant is illegally occupying and using the land being LW 150 by way of encroachment.*

2.8 ***THAT*** *the contents of paragraph 8 and 9 of the Applicant's sworn statement are denied and considering that the Applicant has had no license to occupy or use the land in question he is breaking the law by his encroachment on to the school land.*

2.9 ***THAT*** *I refer to paragraph 10 of the Applicant's sworn statement AND STATE THAT THR Head Teacher of Kanjedza Primary School has no authority to carry out or conduct surveys in Malawi by law hence the Applicant cannot assert that the Headmaster surveyed the land. There is simply no evidence of survey of the land in issue.*

2.10 ***THAT*** *I the contents of paragraphs 11 and 12 of the Applicant's sworn statement are denied and the Defendants restate the contents of paragraph 10 above. It would have been helpful if the Applicant produced sketch maps from either Lands Department or City Council to prove ownership and the act of encroachment by the school.*

2.11 ***THAT*** *we have noted the contents of paragraph 13 of the Applicant's sworn statement and state that the remedy being sought is equitable in nature and the Applicant was supposed to approach the Court with clean hands as such the Applicant is not entitled to the remedy being sought due to the fact that he has come to court with unclean hands given his act of encroachment onto school land*

2.12 ***THAT*** *we repeat the contents of paragraph 2.12 above, and state that the Applicant's hands are unclean due to the fact that he has broken the law by encroaching on government's/schools land.*

2.13 ***THAT*** *I refer to paragraph 14 of the Applicant's sworn statement and state that we are not aware of the contents therein. If the same were true, the Applicant must show that the same is an act of encroachment.*

2.14 ***THAT*** *the damages as anticipated by the Applicant in paragraph 15 of his sworn statement are quantifiable and the same cannot halt the proper management development of the school by the government given that he has not shown any ownership to any land in issue as a subject of encroachment.*

2.15 ***THAT*** *the Applicant has not shown that he has any right which he seeks to protect by obtaining the injunction. He has no ownership of the land threatened by perceived encroachment.*

2.16 ***THAT*** *the Applicant's right to property has not been affected as the land in question does not belong to him and has not been interfered with but rather it is the Applicant who has been interfering with the property of the government or school.*

2.17 ***THAT*** *I am aware that an application for an injunction is not action on its own but merely an interim remedy and the Applicant's application is misconceived as there is no action pending to be determined by the Court.*

2.18 ***THAT*** *it is just, fair and equitable that the application for an injunction in this matter be dismissed as the same is an abuse of the Court process."*

Ms. Ruth Dilla is employed by Blantyre City Council as an Assistant Legal Officer. Her sworn statement deals with the issue of ownership of the land in question and it states as follows:

"3. ***THAT*** *the Claimant does not have any proprietary rights in the land in question and that there is no agreement between himself and Blantyre City Council to occupy and use the land in question.*

4. ***THAT*** *I am aware that the plot in question is plot number 130 title number KJ 21/1 not Plot Number LW 150 as alleged by the Claimant. I now produce a copy of the Register form the lands registry marked as "RD1"*

5. ***THAT*** *I conducted a search at the land Registry and I confirm that the plot in question indeed belongs to Blantyre City Council and that the Claimant does not have any lease in respect of the land in issue. I now produce a copy of the search report marked as "RD2"*

6. ***THAT*** *the Claimant is merely is illegally occupying the land by way of encroaching on the school's property. I now produce a copy of the Register form the lands registry marked as "RD3"*

7. ***THAT*** *further to paragraph 6 above, the land in question is part of Kanjedza Primary School a property of Malawi Government."*

In response to the Defendants' sworn statements in opposition, the Claimant filed another sworn statement. There is attached to the said sworn statement a copy of a Tenancy Agreement between Blantyre City Assembly and the Claimant dated 13th February 2004 (Tenancy Agreement) and a copy of a letter by Blantyre City Assembly dated 24th January 2007 addressed to the Claimant (Letter).

The Tenancy Agreement provides, among other things, that (a) it is for a period of one year, and (b) the building on the land in question (otherwise known as "Kanjedza Public Inconvenience") belongs to Blantyre City Assembly.

The Letter is headed "**APPLICATION FOR CHANGE OF BUSINESS FROM COMMERCIAL TOILET TO MINI-SHOP**" and the body of the letter is couched in the following terms:

> *"Please refer to your letter dated 20th December, 2006 regarding the above-captioned subject.*
>
> *After discussions between ourselves and our colleagues in the Directorate of Health, we have together resolved that permission be granted to you to change use of the building at Kanjedza Primary School premises from toilet to mini-shop until such time when the Assembly will be able to rehabilitate the sewer line or construct a Septic Tank for the toilet.*
>
> *However you are not allowed to operate a bottle store at the premises. Please be advised to obtain a business licence for the Mini-shop.*

We hope you will find the fore-going to be in order." – Emphasis by underlining supplied

The main issue for determination is whether this Court should order continuation of the order of interlocutory injunction, as was argued by the Claimant through Counsel Kapoto, or discharge the interlocutory injunction, as was argued by Counsel Chalamanda.

An interlocutory injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined: see Order 29, rule 1(2) of the Rules of Supreme Court, **Series 5 Software Ltd v. Clarke & Others [1996] 1 ALL ER 853** and **Ian Kanyuka v. Thom Chumia & Others, PR Civil Cause No. 58 of 2003.** In the latter case, Justice Tembo, as he then was, observed as follows:

"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. The injunction will almost always be negative in form, thus to restrain the defendant from doing some act. The principles to be applied in applications for injunction have been authoritatively explained by Lord Diplock in ***American Cyanamid Co. v. Ethicon Limited [1975] A.C. 396****".*

Lord Diplock in **American Cyanamid Co. v. Ethicon Limited [1975] A.C. 396** laid down the following procedures as appropriate in principle:

1. Provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a *prima facie* case

2. The court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory injunction

3. As regards the balance of convenience, the court should first consider whether, if the plaintiff succeeds, he would be adequately compensated by damages for the loss sustained between the application and the trial, in which case no interlocutory injunction should normally be granted

4. If damages would not provide an adequate remedy, the court should then consider whether if the plaintiff fails, the defendant would be adequately compensated under the plaintiff's undertaking in damages, in which case

there would be no reason upon this ground to refuse an interlocutory injunction

5. Then one goes to consider all other matters relevant to the balance of convenience, an important factor in the balance, should this otherwise be even, being preservation of the status quo

6. Finally, and apparently only when the balance still appears even, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence.

In any application for an interlocutory injunction, the first issue before the Court has to be *"Is there a serious issue to be tried?"*. Indeed this must be so because it would be quite wrong that a party should obtain relief on the basis of a claim which was groundless. If the answer to the question whether there is a serious issue to be tried is "no", the application fails in *limine*: see **C.B.S. Songs v. Amstrad [1988] AC 1013**.

Counsel Kapoto submitted that main issue for determination of the Court in the present case relates to the ownership of the land in question. It may be convenient to set in full the relevant part of the Claimant's submissions on this point:

> *"4.1 From the sworn statement in support, the applicant has been on the plot since 2003. He has been doing his business on the land without any problem.*
>
> *4.2 The applicant has been paying City Rates for the plot. It is trite that city rates are paid by owners or lease holders of a piece of land. The interest of the applicant on the land cannot be over emphasized.*
>
> *4.3 The School committee and the Head teacher for Kanjedza Primary School are aware that the claimant is the owner of the land in question. That is why, before constructing the fence, they had to consult the claimant on the boundary. This shows that both interested parties agree that the claimant owns plot number LW150 where he does his business.*
>
> *4.4 Whether the defendants can dispute the boundary that was agreed upon by the school committee, the school authorities and the claimant and claim that the plot doesn't belong to the claimant remains to be resolved."*

On his part, Counsel Chalamanda contended that that there is no serious issue to go to trial. Counsel Chalamanda invited the Court to note that the land in question belongs to Blantyre City Assembly and not the Claimant.

I have considered this matter and I fully agree with Counsel Chalamanda that the Claimant has failed to prove ownership of the land in question. The Claimant has banked his hopes on his payment of city rates from 9th July 2012 without producing any title document. According to the Claimant, the land in question was surveyed soon after he made an application to Blantyre City Assembly in 2008 *"to own the building as I had restructured it or in other words to be offered the land for lease, having been on the land for 5 years"*.

I would have thought that the land in question was surveyed so that it could be properly demarcated so that that part of the land on which Kanjedza Public Inconvenience was situated could be allocated to the Claimant. I honestly do not understand how the Claimant expected the allocation to done verbally. I am, therefore, greatly surprised that the Claimant proceeded to pay city rates without ascertaining that the lease was indeed in his name.

Further, and perhaps more importantly, the Claimant has not bothered to give an explanation as why he does not have title documents, more than 5 years since he started paying city rates. The fact of the matter is that the Claimant does not have an explanation. He was never issued with title documents. This is borne out by his averment in the Summons that he *"is the de facto owner of Plot number LW 150"*.

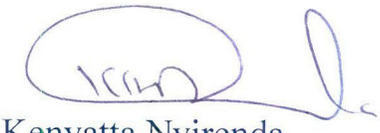
In view of the foregoing and by reason thereof, it will be foolhardy for this Court to assume the Claimant's ownership of the land in question when he has no title document whatsoever in support of his contention. Actually, the two main documents adduced by the Claimant, that is, the Tenancy Agreement and the Letter provide in clear terms that the building on the land in question (that is, Kanjedza Public Inconvenience) and the land in question belongs to Blantyre City Assembly. Clause 3 of the Tenancy Agreement states that *"it is expressly agreed as follows .... that the structure shall remain the Assembly's property"*. The letter also expressly provides that Kanjedza Public Inconvenience is on "*Kanjedza Primary School premises"*.

Having found and determined that there is no triable issue with regard to the ownership of the land in question, the application has to be dismissed in *limine*. It has to be borne in mind that the question whether or not there is a serious question to be tried is a threshold requirement: only an affirmative answer to the question

would lead to a consideration of the issues pertaining to damages and balance of justice.

All in all, it would be inappropriate to order continued application of the interlocutory injunction. The interlocutory injunction is, accordingly, dismissed. Costs will be in the cause.

Pronounced in Chambers this 21st day of March 2018 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE