

REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 378 OF 2021
(Before Honourable Justice Mambulasa)

BETWEEN:

MIKE NKHOMA.....CLAIMANT

-AND-

SARAH MTANGA NKHOMA.....DEFENDANT

CORAM: HON. JUSTICE MANDALA MAMBULASA

Mr. Masurool Daud, Advocate for the Claimant

Mr. Aiman Mtanga Malijani, Advocate for the Defendant

Mr. Obet Chitatu, Court Clerk

Mrs. Annie Libukama, Court Marshal

RULING

MAMBULASA, J

Introduction

- [1] On 6th October, 2021 the Claimant filed a without-notice application for an interlocutory order of injunction restraining the Defendant, or any member of her family, from being or remaining or entering upon property situated at Chirimba in Blantyre known as Title Number: Michiru 65/104 until the final determination of the matter or a further order of the Court. The application was supported by a sworn statement made by the Claimant himself. It was taken out under Order 10, rules 3 and 27 of the Courts (High Court) (Civil Procedure) Rules, 2017.
- [2] When the Court considered the application, it directed that it should come on a with-notice basis to the Defendant. The Claimant duly complied with the direction of the Court.
- [3] In that regard, the with-notice application was eventually heard on 26th October, 2021. This is now the Court's determination on the application. The delay in rendering the ruling is regretted but it is due to heavy workload that the Court has at its hands.

The Claimant's Case

- [4] The Claimant and the Defendant started staying together in the year 2007. In the year 2012, they officially married at Chirimba C.C.A.P in Blantyre. In the year 2008, they were blessed with a son, Christopher. In the same year, the Claimant claims that he bought a piece of land at Mwachande Village in

Blantyre from a certain Mr. Chidowora at the price of MK300,000.00 (Three Hundred Thousand Malawi Kwacha). Ms. Lone Mtanga was his witness for the transaction.

- [5] In the year 2013, the Claimant returned to South Africa where he had been working before. The Defendant would join him there and stay for months and then return to Malawi. He states that while living in South Africa, he managed to build a house on the land that he purchased in Blantyre. The Claimant used to send money through Mr. Tikambenji Mtawali who would then give it to Matilda Mzomera Ngwira and also the Defendant.
- [6] In or around the years 2013 or 2014, the Claimant started the process of registering the land he purchased from Mr. Chidowora. Matilda Mzomera Ngwira had some papers that were then surrendered to the Defendant to continue with the process.
- [7] In the year 2018, the Defendant commenced divorce proceedings against the Claimant. There is exhibited to the Claimant's sworn statement a copy of the notice of application for divorce that was filed in the First Grade Magistrate Court at Blantyre. The Claimant allegedly refused to accept service of the court process. He apparently inquired from the Defendant why she was divorcing him and he claims that he never received any answer to his inquiry. The Claimant also exhibited a Consent Order for Divorce that had been sent to him by the Defendant for his execution. The said Consent Order for Divorce was never executed by the parties herein.

- [8] The Claimant alleges that the Defendant never wanted to stay with him as she was married to another man.
- [9] When the Claimant followed up on the registration of his land, he was surprised to learn that it had indeed been registered, but in the Defendant's name. He then instructed Matilda Mzomera Ngwira to put a caution on the title at Lands Registry as he was not sure of the intentions of the Defendant. The Caution has been exhibited to his sworn statement in support of the application. The Claimant alleged that the Defendant dubiously registered the land under her name without his consent and in bad faith and with a hidden agenda.
- [10] The Claimant states that his right to property has been unlawfully deprived, hence the present application.

The Defendant's Case

- [11] The Defendant vehemently opposed the Claimant's application. She filed a Sworn Statement in Opposition to the application for an interlocutory order of injunction.
- [12] She states that the Claimant has suppressed several material facts. The Defendant states that throughout the period of their cohabitation, the Claimant lived and did his *ziboliboli* business in South Africa. She says that she lived in Malawi and was doing a clothing business such that every other month, she would travel between Malawi and South Africa to buy clothes

for sale in Malawi. Whenever she was in South Africa, she was staying with the Claimant.

[13] On 3rd April, 2012 the parties herein had their second born child, Christian.

[14] On 23rd December, 2012 the Claimant came to Malawi to bless their marriage, which they did. On 2nd January, 2013 the Claimant went back to South Africa.

[15] The Defendant states that they returned to Malawi in 2009 and together they bought the land in issue. She alleges that the money for purchasing the land was contributed by both of them, each from their respective businesses. The Defendant avers that while at the time of the purchase of the land, they had the full sum of MK300,000.00 (Three Hundred Thousand Malawi Kwacha), they only paid half of the purchase price. The Claimant took the other half and used it for buying a minibus from Dubai. It was only in the year 2010 that the Defendant finished paying the balance of MK150,000.00 (One Hundred Fifty Thousand Malawi Kwacha) for the land when the Claimant was already back in South Africa.

[16] The Defendant states that she also contributed funds to building the house. She said she would get money from the Claimant when she visited him in South Africa and would top up a sum of equal measure from her business to ensure that there was progress on the project. The Defendant claims that she would then buy building materials and supervise the whole construction, roofing, wiring and part of plumbing. She moved into the house when it was barely habitable.

[17] On the marriage, the Defendant alleges that when the Claimant went back to South Africa on 2nd January, 2013 after the blessing of their marriage, she noticed a complete change of his attitude towards her. For instance, during the month-end of January of the same year, the Defendant requested the Claimant if she could visit him as she usually did. The Claimant refused stating that there was no need for them to meet so soon after the blessing of their marriage. During the month-end of February of the same year, the Defendant made a similar request. The Claimant also refused advising that she was going to tell her at an appropriate time when she could visit him.

[18] On 13th March, 2013 the Claimant allegedly sent the Defendant a telephone message. It was printed out and exhibited to the Defendant's sworn statement and it read as follows:

Since I met you, we have been stressing each other, nde ndimafuna ndikumasule kuti you can go ahead and get married.

The Defendant claims that she initially thought that the Claimant was joking. When she confronted him, the Claimant emphatically reaffirmed that it was not a joke. Immediately after that, the Claimant changed his telephone number and the Defendant was never able to reach him by telephone again.

[19] Feeling abandoned with two children, in June, 2013 the Defendant decided to follow the Claimant to South Africa. She arrived at Zulu Nyala Heritage Safari Lodge where the Claimant was working and living. She says that she arrived there around 15:00 hours. The lodge had a requirement that a guest to any worker should have a gate pass that is given when the concerned

worker authorizes entry of the guest. In spite of being notified of the Defendant's presence at the gate, the Claimant refused to authorize her entry. The Defendant claims that she was allowed entry after 22:00hours.

[20] The Defendant states that when she entered the Claimant's house, she sensed that there was another woman who was living there with him. Later on, she learnt that the woman was at the house when she had arrived at 15:00 hours. The woman was then moved to some temporary place within the compound of the lodge in between the times she was kept waiting at the gate. That same night, the Claimant told the Defendant bluntly that he had just accommodated her for the night out of sympathy and that the next day, she was to find her way out as he no longer wanted her for a wife. The Defendant says that she then had no option and left South Africa for Malawi the next day.

[21] When the Defendant returned to Malawi, she contacted the Claimant to find out what arrangements he had made for upkeep and school fees for the children. The Claimant told him that if she had failed to take care of the children, she should give them to his mother. The Defendant says that she found the Claimant's response demeaning.

[22] In the year 2016, so the Defendant avers, she had a telephone conversation at the instance of the Claimant who categorically and voluntarily handed over the house to her, and gave her a go-ahead to process title in her name. Apparently, the Claimant went further and said that the Defendant could even sell the house if she so wanted and use the proceeds thereof for the

maintenance of their children. She printed out the conversation and exhibited it to her sworn statement. The relevant part reads as follows:

5/5/18, 20:47 - Mike Nkhoma: And this is what I have decided...

5/5/18, 20:53 - Mike Nkhoma: I have left all to the kids for the sake of you to take care of them till they grow and school and the rest

5/5/18, 20:59 - Mike Nkhoma: In kids name and all that have decided to make piece of me and you from now on to move on and this is from the bottom of my heart...

5/5/18, 21:00 - Mike Nkhoma: The house will either be rented or sold out its own your case..you 're the mother and you know what is the best of their well being

5/5/18, 21:05 - Mike Nkhoma: You can move on and no need for any signature..this is true from me now no fight or argument...all requirements for kids has to come from the property I left for them to grow....

[23] During the same time, the Defendant received a telephone call from Matilda Mzomera Ngwira that they should meet to give her papers which the Claimant had advised Matilda Mzomera Ngwira to handover to her. The papers she received were a sketch plan for the land and some forms on which the Claimant had started the process of lease for the land.

[24] The Defendant took the papers from the Claimant's sister and processed lease of the land into her name. She exhibited a copy of the lease and a certificate of lease to her sworn statement. The Defendant states that she just discovered through the Claimant's court papers that he, through his sister, Matilda Mzomera Ngwira, registered a Caution against the land. She says she did not know anything about this Caution until then.

[25] In the year 2014, the Defendant's church, for the purposes of her reunion to holy sacrament, called the Claimant to ask him if he was still married to her. The Claimant categorically stated that he was not interested in the marriage and that she could go ahead and remarry if she wanted. The Defendant filed for divorce at Blantyre Magistrate's Court. The Defendant proposed to proceed by way of a Consent Order which was sent to the Claimant in South Africa for his execution. The Claimant refused to execute the same.

[26] In the year 2018 the Defendant applied for divorce and the same was granted. She exhibited a Certificate of Divorce to her sworn statement in opposition.

[27] The Defendant remarried in 2019. She avers that when the Claimant heard that she had remarried, he became very agitated and started claiming custody of the children and the house.

[28] In February 2021, the Claimant started sending people to view the house with a view to selling it off.

The Claimant's Response

[29] The Claimant swore a statement in response in which he stated that the Defendant never contributed or invested any money on the purchase of the land or building of the house. He also avers that it is a total lie that the Defendant contributed any money towards the land and the house in equal share as her business was just making losses until it was wound up.

[30] The Claimant also denies ever uttering any word telling the Defendant to register the house in her name. He disowned the alleged WhatsApp conversation that was exhibited to the Defendant's sworn statement. In fact, the Claimant exhibited an e-mail that he allegedly sent to the Defendant. The relevant part reads:

That house is mine, and if I remember quite frankly, we were not married in community of property...

My last words to you

We sell that home, we go 50/50 by doing that I will forget that there was a person by the name Sarah Mtanga.

[31] The Claimant further denies ever mistreating the Defendant. He says he bought her a motor vehicle to ease her mobility for various activities. There is an exhibit of a motor vehicle to that effect and alleged proof of payment for the purchase of the same. The Claimant avers that if the Defendant has remarried, it is out of her own will and wish.

[32] The Claimant maintains his prayer for an interlocutory order of injunction so that the property should not be disposed-off until the final determination of the matter by the Court.

Issue for Determination

[33] The issue for determination before this Court is:

Whether or not it should grant the interlocutory order of injunction being sought by the Claimant in this matter?

The Law

[34] Order 10, rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides as follows:

The Court may, on application, grant an injunction by an interlocutory order when it appears to the Court-

- (a) there is a serious question to be tried;
- (b) damages may not be an adequate remedy; and
- (c) it shall be just to do so,

and the order may be made unconditionally or on such terms or conditions as the Court considers just.

[35] Order 10, rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017 is couched in the following terms:

A party may apply for an interlocutory order at any stage, namely, before a proceeding has started, during a proceeding, or after a proceeding has been dealt with, and whether or not the party mentioned the particular relief being sought in his summons or counterclaim.

[36] Order 10, rule 8 (1) of the Courts (High Court) (Civil procedure) Rules, 2017 states as follows:

A person may apply for an interlocutory order before a proceeding has started by filing an application in a proceeding and the application shall-

- (a) set out the substance of the claim;
- (b) have a brief statement of the evidence on which the applicant will rely on;
- (c) set out the reasons why it is appropriate that the order be made before a proceeding has started; and
- (d) have with it a sworn statement in support of the application.

Analysis and Application of the Law to the Facts

[37] Ordinarily, in any proceeding in which a claimant is seeking an interim relief, there must first be an action or a lawsuit. That is because an interim relief cannot stand on its own without a main action or lawsuit. This proposition is a general rule. Under our civil procedure law and practice, it has an exception.

[38] The exception is specifically provided by Order 10, rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017 which is to the effect that a party may apply for an interlocutory order at any stage, including before a proceeding has started. This Court understands the word, “proceeding” under this specific rule to mean an action or lawsuit, as the case may be.

[39] Order 10, rule 8 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 imposes a mandatory obligation in a situation where a party decides to apply for an interlocutory order before a proceeding has started. Such a party is required to set out the substance of the claim; have a brief statement of the evidence on which the applicant will rely on; set out the reasons why it is appropriate that the order be made before a proceeding has started; and have with it a sworn statement in support of the application.

[40] In terms of Order 10, rule 8 (2) of the Courts (High Court) (Civil Procedure) Rules, 2017 the Court may make the order if it is satisfied that (a) the applicant has a serious question to be tried and, if the evidence brought by the applicant remains as it is, the applicant is likely to succeed; and (b) the balance of convenience favours the making of the order.

[41] By Order 10, rule 8 (3) of the Courts (High Court) (Civil Procedure) Rules, 2017 when making the order, the Court may also order that the applicant file an application by the time stated in the order. The Court poses here and wonders what other “application” this is that this particular sub-rule is referring to. It appears to this Court that the draftspersons had in mind documents by which civil actions or lawsuits are commenced when they referred to “an application” in that sub-rule. At least, that is how this Court has understood and applied this sub-rule before.¹ If that be correct, then, there does not appear to be any good reason why the application of this sub-rule should be limited to proceedings commenced by way of summons. That is so because the Courts (High Court) (Civil Procedure) Rules, 2017 themselves recognize other modes of commencement of actions or lawsuits. For instance, Order 1, rule 3 (2) is clear that other rules of practice and procedure shall so apply as long as it is so provided by an Act or any other written law. Further, under Order 19, rule 3 (2) a referral by the President under section 89 (1) (h) of the Republican Constitution is commenced by a notice of referral. Furthermore, under Order 19, rule 13, an election matter shall commence in the manner specified under the Parliamentary and

¹ *Centre for Environmental Policy (CEPA) et al -vs- Southern Region Water Board* Miscellaneous Cause No. 9 of 2022 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

Presidential Elections Act, the Local Government Elections Act, or in any other event, by an application. These are just some of the modes of commencement of proceedings that the Court could highlight from the Courts (High Court) (Civil Procedure) Rules, 2017.

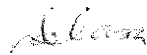
[42] In the instant case, the Claimant never complied with the specific requirements of Order 10, rule 8 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017. Further, even between the time that the present application was heard until now, the Claimant has not filed any documents by which proceedings, in the sense of an action or lawsuit, are commenced. In such a situation, where there are no documents by which proceedings are initiated in a court of law and Order 10, rule 8 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 has not been complied with, the general rule is that an application for an interlocutory order cannot be granted to any such party. More so, in this particular case, the Court did not find any material placed before it that would have made it to depart from this general rule.

[43] This Court is acutely aware that failure to comply with the Courts (High Court) (Civil Procedure) Rules, 2017 or a direction of the Court is an irregularity and that an irregularity in a proceeding shall not render a proceeding a nullity. In the view of this Court, the irregularity in this case is so grave that it goes to the very root and substance of the application. The interlocutory order of injunction would not have anything to stand on if it was to be granted. For this reason, the Court is disinclined to grant the interlocutory order of injunction sought by the Claimant.

[44] Furthermore, even if it was not for the failure to comply with Order 10, rule 8 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 granting an interlocutory order of injunction would not serve any useful purpose in this case. As correctly argued by Advocate Mr. Malijani, the Claimant herein instructed Matilda Mzomera Ngwira to register a caution against the land in issue. The effect is that the Defendant is constrained from disposing of the land in any manner. In terms of section 127(2) of the Registered Land Act², so long as a caution remains registered, no disposition which is inconsistent with it shall be registered except with the consent of the cautioner or by order of the court. So, as matters stand now, the Claimant's fear that the property may be disposed of is legally unfounded.

[45] In view of the foregoing reasons, the Court declines to grant the interlocutory order of injunction sought by the Claimant. The application is therefore dismissed with costs to the Defendant.

[46] Made in Chambers this 22nd day of July, 2022 at Blantyre in Malawi.



M. D. MAMBULASA
JUDGE

² Cap. 58:01 of the Laws of Malawi.

