



JUDICIARY
 IN THE HIGH COURT OF MALAWI
 LILONGWE DISTRICT REGISTRY
 CIVIL DIVISION
CIVIL CAUSE NO. 79 OF 2023
 (Before Honourable Justice Pemba)

BETWEEN

REUBEN J. MAIGWACLAIMANT

AND

THE REGISTERED TRUSTEES OF TAMA FARMERS TRUST.....1ST DEFENDANT
 COUNCILLOR ABIEL KALIMA BANDA.....2ND DEFENDANT
 THE REGISTERED TRUSTEES OF ARET BOARD3RD DEFENDANT

CORAM: HON. JUSTICE HOWARD PEMBA
 Mr Chibwana, Counsel for the Claimant
 Mr Kaonga, Counsel for the 1st and 2nd Defendants
 Mr Songeya, Counsel for the 3rd Defendant
 Mrs. Mwase, Court Clerk

RULING

Brief background

1. This is the Court’s ruling on an *inter partes* application on the part of the Claimant for a continuation of an order of interlocutory injunction that was granted in his favour dated 28th April 2023. The application was made pursuant to Order 10 rule 27 of the Courts (High Court) (Civil Procedure) Rules 2017.
2. The brief facts are that the Claimant has once served as the President of the 1st defendant (TAMA) which holds chairmanship in the 3rd defendant (ARET). On or around 30th March 2017, the Claimant was nominated by the 1st defendant as Chairman of the 3rd defendant. However, through a letter dated 20th March 2023,

the Claimant was relieved of his duties as 3rd defendant's chairman purportedly due to his ill health. In his place, the 1st defendant's Council appointed the 2nd Defendant (Councillor Abiel Kalima Banda) to be the caretaker Chairman of the 3rd defendant's Board until when the elective meeting will be held. This did not go well with the Claimant whereupon on 12th April 2023, he applied for an *ex parte* interlocutory injunction which was granted for 14 days pending this *inter partes* application.

3. The injunction essentially restrains the 1st and 3rd Defendants from allowing, permitting or recognizing the 2nd Defendant as interim Board Chair of the 3rd defendant and the 2nd Defendant from attending, participating or presiding over Board meetings or acting or doing anything as interim Board chair for the 3rd defendant until the determination of the matter or until a further order is made by this Court.

The Claimant's argument

4. On 29th May 2023, the Claimant then filed the present application for the continuation of the said order of an interlocutory injunction. The application was heard on 20th June 2023. In support of it, there were filed three sworn statements by the Claimant and skeleton arguments which were all adopted by Counsel for the Claimant in support of his application.
5. From the look of all documentation filed in support of the application, it is the contention by the Claimant that the decision by the 1st Defendant to relieve him of duties as the 3rd defendant's Board chairmanship was made without according him the opportunity to be heard. The Claimant states that nobody from 1st defendant or its agents discussed his health with him and that he did not at any time complain or show any signs of ill health.
6. Thus, he argues that his removal from the position of the 3rd defendant's Board chair is unfair, arbitrary, unreasonable and contrary to natural justice. Hence, his application for an interlocutory order of an injunction restraining the 1st and

3rd Defendants from, among others, removing him from the said position and recognizing the 2nd Defendant as interim Board Chair of the 3rd defendant until the determination of the matter by the court or a further order of the court.

The Defendants' argument

7. The application is strongly contested by all the Defendants and there are two sworn statements in opposition one sworn by the 2nd defendant and a supplementary one sworn by Counsel Kaonga on behalf of the 1st and 2nd Defendants. There are also filed skeleton arguments in opposition by Counsel for the 3rd defendant.
8. The basis of the Defendants' opposition to the continuation of the interlocutory injunction herein is basically that the Claimant's position is that of a Trustee of the 3rd defendant and by the Constitution of the 3rd defendant, all disputes with regard to Trustees of the 3rd defendant are supposed to be resolved by way of arbitration. Hence, it is argued, the Claimant's application for an interlocutory order of an injunction and the substantive action herein are premature. There is a copy of the said constitution (also referred to as the Trust Deed) attached to the supplementary sworn statement in opposition by counsel for the 1st and 2nd defendants.
9. The Defendants further argue that the Claimant suppressed material facts and if these facts were disclosed to this Court, the injunction would not have been granted. The suppressed facts are that he has been sick for a number of years, that the matter would have been resolved by arbitration and that any Trustee of the 3rd defendant just as he is can be removed from office by the responsible appointing body.
10. The Defendants also contend that there are no serious triable issues in the present case. This is premised from the fact that the Claimant has no right to be in the Board of the 3rd defendant. He serves as chair of the 3rd defendant at the

pleasure of the 1st defendant. It is the 1st defendant that has the right of occupancy of the trusteeship position and not the Claimant. Thus, he cannot claim a right where there is none.

11. The Defendants further contend that there is evidence that the Claimant was actually called to attend a virtual meeting that was held and discussed his ill health but he did not attend the meeting. Therefore, he denied himself the opportunity to be heard which he is now claiming. All these arguments form the Defendants' basis for the prayer that the order of an interlocutory injunction herein should be discharged with costs.

Issue(s) for determination

12. Reaching this far, this Court is tasked to determine on whether the *ex parte* order of an interlocutory injunction that was granted in favour of the Claimant should be discharged or be allowed to continue until the matter herein is resolved by this Court.

The applicable law

13. Applications for an interlocutory order of an injunction are based on Order 10 rules 27 of the Courts (High Court) (Civil Procedure) Rules 2017. The relevant parts of it provide as follows:

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

- (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.

14. Order 10 rules 27 actually appears to have codified the common law principle applicable in an application for an interim relief in a form of an interlocutory injunction. This was in fact articulated by Lord Diplock in the case of *American Cyanamid vs Ethcon Limited* [1975] 1 All E.R. 504 when he stated as follows:

"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial". (See also Mkwamba vs Indefund Ltd [1990] 13 MLR 244 (HC), Finance Bank of Malawi Ltd vs Benson Tembo [2007] MLR 99 (SCA)).

15. This principle was discussed generally under Order 29 of the obsolete Rules of the Supreme Court of England. According to Order 29 of these Rules, an injunction would be granted on fulfillment of the following requirements:

- a. *The applicant must establish a good and arguable claim to the right he seeks to protect*
- b. *This is not the time to decide conclusively on the rights of the parties on affidavit evidence. It is enough for the applicant to show that there is a serious question to be tried*
- c. *If damages would be an adequate remedy, then the court must not grant an order of injunction*
- d. *the grant or refusal of an injunction is a matter for exercise of the court's discretion on the balance of convenience*

16. It is trite that 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. This was also clearly illustrated by Tambala J, in the case of *Mangulama and four others vs Dematt, civil cause No. 893 of 1999*, when he said that *'applications for interlocutory injunctions are not occasions for demonstrating that the parties are clearly wrong or have no credible evidence...The usual purpose of an order of interim injunction is to preserve the status quo of the parties until their rights have been determined'*.

17. In *R vs Secretary of state for Transport ex parte Factortame Ltd (2) [1991] 1AC 603*, the court actually emphasized that in an application for an interlocutory injunction, it is enough if the party seeking it can show that there is a serious case to be tried. If he can establish that, then he has crossed the threshold; and the court can then address itself to the question of whether it is just or convenient to grant an injunction.

18. According to the *American Cyanamid Co vs Ethicon Ltd* (supra) and approved by the Supreme Court of Appeal in *Kandoje vs Kandoje* [1999] MLR 107, the following have been summarized as factors to guide the Court in dealing with an application for the interim relief of an injunction:

There must be a serious question to be tried. The material facts available should disclose that the Applicant has a real prospect of succeeding in his claim for a permanent injunction.

Damages must not be an adequate remedy. If damages would be adequate remedy, no interlocutory injunction should normally be granted, however strong the Applicant's claim appears at that stage.

The Applicant must make an undertaking to pay damages and he must be in a financial position to pay them.

The Court must be satisfied that the balance of convenience lies in favour of granting the injunction. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.

19. The law in Malawi is that mandatory injunctions should only be granted where the case for the Claimant is unusually strong and clear (See *Finance Bank of Malawi Ltd vs Benson Tembo* [2007] MLR 99 (SCA)).

Reasoned analysis

20. In the present case, an interlocutory injunction was granted in favour of the Claimant. This injunction restrains the 1st and 3rd Defendants from allowing, permitting or recognizing the 2nd Defendant as interim Board Chair of the 3rd defendant; and further restrains the 2nd Defendant from attending, participating or presiding over Board meetings or acting or doing anything as interim Board chair for the 3rd defendant until the determination of the matter or until a further order is made by this Court. The injunction was granted after hearing only the Claimant's side pending the present application.

21. Now, having heard the arguments from the Defendants as well and having read the Sworn Statements, supplementary sworn statements as well as the skeleton arguments both in support as well as in opposition to the application herein, this Court is persuaded and convinced by the Defendants' arguments that the interlocutory injunction herein would not have been granted if all the material facts were disclosed to this Court by the Claimant.
22. The law is that where there is suppression of material facts by the Claimant, the court has powers to discharge the injunction on the defendant's prayer for a discharge (see the case of *Maureen Kachingwe vs Pasauko Poverty White*, land cause No 40 of 2022 (Principal Registry) wherein the court applied the case of *R vs Kensington Income Tax Commissioners, ex parte Princes Edmond de Polignac* [1017] KB 486 and eventually stated as follows:

"It is perfectly well settled that a person who makes an ex parte application to the court, that is to say, in the absence of the person who will be affected by that which the court is asked to do, is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him".

23. In the present case, the Claimant did not make full and frank disclosure of how he is appointed to the chairmanship position of the 3rd defendant and how he can be removed from that position. These facts clearly show that he is not properly appointed as such but he is just a nominee by the 1st defendant by virtue of the 1st defendant holding the chairmanship of the 3rd defendant. The facts show that it is the 1st defendant that appoints members of the Board as Trustees of the 3rd defendant including its chairmanship position.
24. This indeed shows that occupants of these positions including the chairman do not occupy them in their personal capacity but merely as representatives of the 1st defendant and that the 1st defendant has the discretion to remove them. This

essentially is true that the Claimant has no right to be in the Board of the 3rd defendant. He serves as chairman of the 3rd defendant at the pleasure of the 1st defendant. It is the 1st defendant that has the right of occupancy of this position and not the Claimant. Thus, he cannot claim a right indeed where he does not have any.

25. Secondly, the Claimant did not disclose that he still struggles with his health and the challenges he faces when executing his duties as chairman for the 3rd defendant. Even though he seems to deny the allegations about his ill-health, there have been some admissions in his own supplementary sworn statement that there were times when he failed to properly execute his duties due to the same health problems. These admissions surely corroborate the facts that have been glaringly outlined in the sworn statement by the 2nd defendant. I strongly believe that the 2nd defendant cannot just from nowhere falsely fabricate all such stories about the Claimant's health as outlined under paragraph 'l' of his sworn statement. If these facts were fully disclosed to this Court, the order of an interlocutory injunction that was in favour of the Claimant would not have been granted in the first place.

26. Thirdly, this Court is convinced on the balance of probabilities that the Claimant has indeed no serious triable issues. The Claimant has actually failed to convincingly demonstrate to this Court that he has strong and clear case. This is premised from the revelations that under the 3rd defendant's Trust Deed, particularly Clause 8.12, the 1st defendant, being the responsible appointing authority, has the discretion to remove him as a Trustee and chairperson for the 3rd defendant without even giving reasons for so doing. This means that the 1st defendant indeed acted within its mandate in accordance with the 3rd defendant's Trust Deed to remove a Trustee it nominated and there is no serious issue at all here for trial.

27. Though it is not obliged to give reasons, a reason for the removal of the Claimant in the present case was given by the 1st defendant and before he was removed, a meeting to hear or discuss his capability was called for and the Claimant was served with the notice of it but did not attend. Therefore, his argument that he was not heard cannot hold any water at all as he denied himself an opportunity to be heard when he failed to attend the said meeting. The argument that the meeting was supposed to be physical as the Constitution does not talk about virtual meeting can as well not hold water especially this time around when it is common knowledge that virtual meetings are the order of the day and are more cost effective than physical meetings. If he was against it, he would have objected to it but there is nothing to that effect.

28. Further to that, **Clause 16** of the same Trust Deed is to the effect that *'in case there is any dispute touching on or concerning the Trust or its construction or effect as to the rights, duties or liabilities of the Trustees... the same shall be referred to a single arbitrator to be agreed upon by the parties hereto or, in default of such agreement, to be appointed by the Chairman for the time being of the Malawi Law Society ...'*.

29. The Claimant wants to convince this Court that **Clause 16** does not apply to him. However, he does not dispute that he is a Trustee of the 3rd defendant and he is seeking enforcement of his right in his capacity as such and as chairman of the Trust. Therefore, it is not a correct interpretation of the Trust Deed to say that **Clause 16** does not apply to him. This Court's finding is that it actually applies to him as well. For that reason, this matter would not have been found in this court now before being referred for arbitration. It is surely premature and if this was revealed before this Court, the injunction would not have been granted.

30. In his argument, the Claimant says alternatively if the Court is of the view that the matter should be referred for arbitration, the Court should order that the injunction should still subsist pending the arbitration. This argument is without any basis at all. The Claimant indeed wants to have the cake and eat it at the same time. That cannot happen. He was supposed to take the matter for

arbitration before coming with it here. His coming to this Court is premature and there is no way the injunction can be allowed to stand.

31. Furthermore, from the look of the interim relief sought by the Claimant, it is exactly the same relief sought in the substantive matter. The Claimant in the present case is actually inviting this Court to essentially decide and determine the main claim by an interim procedure which in most cases courts have refused to grant. I have in mind the case of *Chirwa vs Kaunda t/a Chika Building contractors* [1993] 16(2)MLR 502, in which the Court refused to grant an interlocutory injunction where the effect of it would be to grant the Claimant the full right sought in the main case.

32. The position of the law is that an interim relief mainly seeks to protect a right whilst the matter is still before the court and not to enforce a right which is the subject of the main case. I have highly regarded the *Chirwa vs Kaunda* case as similar and applicable to the facts in the present case. This Court cannot grant an order for an interlocutory injunction as doing so would effectively give the Claimant the full right sought in the main action and there will be no further purpose in the prosecution of the case once the Claimant gets this order of an injunction.

Conclusion

33. On account of the reasons above, I am of the strong view that the balance of convenience lies in not granting the order of the interlocutory injunction. Thus, the *ex parte* order of interlocutory injunction that was granted on 28th April 2023 in favour of the Claimant is hereby discharged for reasons contained herein.

34. Each party to bear their own costs.

Made in chambers, this 10th July 2023 at the High Court, Lilongwe Registry.

Howard Pemba
JUDGE