



IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA CIVIL APPEAL NO. 70 OF 2017

(Being High Court of Malawi - Civil Cause No. 342 of 2017)

BETWEEN

LINDA LIMBE.....APPELLANT

AND

DEVELOPMENT AID FROM PEOPLE TO PEOPLE RESPONDENT

CORAM: Justice Anthony Kamanga, SC, JA
Msuku of Counsel for the Appellant
Chayekha of Counsel for the Respondent
Mrs. Chimtande Recording Officer

RULING

Justice Anthony Kamanga, SC, JA

1. Background

1.1 On 15th November, 2017, the Appellant filed *ex-parte* summons for an application for a stay of an order of the High Court (Principal Registry) in Civil Cause No. 342 of 2017 made on 14th November, 2017, granting the Respondent a mandatory injunction evicting the Appellant from a house in Nyambadwe in the City of Blantyre.

1.2 In view of the urgency of the matter, in my absence as motion judge at the time, the application was heard by Justice Chipeta, JA. During the hearing of the application before Justice Chipeta, JA an issue arose as to whether the application for stay was being made, pending the hearing and determination of an envisaged appeal against the order of the court below; this issue arose because the application did not indicate that it was being made pending an appeal against the order of the court below. Counsel for the Appellant confirmed that a notice of appeal against the order of the court below had indeed been prepared, and undertook to file a copy thereof with the Court. A copy of the notice of appeal was indeed filed on 15th November, 2017, and the consideration of the application, therefore, proceeded on the basis that the stay of the order of the court below is being sought, pending the hearing and determination of appeal against the order. Justice Chipeta JA granted an interim order of stay, pending the hearing of an *inter-partes* application for an order of stay.

1.3 Consequently, the Appellant, on 17th November, 2017, filed the present *inter-partes* application for a stay of the order of the court below granting the Respondent a mandatory injunction evicting the Appellant from certain a house in Nyambadwe in the City of Blantyre.

1.3.1 The application, however, still does not indicate that it is being made pending the hearing and determination of an appeal against the order of the court below. While it is accepted that a notice of appeal was, indeed, separately filed in this matter on 15th November, 2017, Counsel for the Appellant should formally have amended the application to reflect the fact that the application for a stay of the order of the court below is being sought, pending the hearing and determination of the appeal against the order of the court below. Furthermore, the fact that the order of the court below is being appealed against, and perhaps also the prospects of success of the appeal, should have been reflected in the in the sworn statement filed in support of the application for the stay.

2. Background

2.1 This is a sad case of a good friendship gone sour. Linda Limbe, the Appellant, and Petra Strakova, an employee of the Respondent, were good friends, but they no longer are friends. Sometime in July, 2016, the Appellant moved into a house in Nyambadwe occupied by Petra Stravoka under an arrangement which, among other things, entailed the Appellant paying half of the monthly rent payable for the occupation of house, and in circumstances which will become clearer hereinafter.

2.2 On 4th September, 2017, Petra Strakova wrote the Appellant a note requesting her to vacate the house by 30th September, 2017. The note was in the following terms-

"I would like to notify you that you should vacate the house by 30th September, 2017. So the month of September serves as your notice. I apologize for the inconvenience that this notice might cause."

2.3 On 5th September, 2017, the Appellant responded to Petra Strakova's note as follows-

".....Thank you for your letter. It is very unfortunate that it has come this far. I would however like to take you to the beginning. Remember you offered me to share the house with you last year in September. When I mentioned that I was considering sharing, I liked the idea so much but I hesitated because I wasn't sure it would work being my first time ever and since the house needed a lot of work on it. However, as time passed and watching the bond between our children I made up my mind and gave notice to my previous landlord and took all the cleaning and rehabilitation work at this house which cost me but, for me comfort comes first.

As you are aware you have the bigger share of the house yet we share 50/50 on costs, which has not been a problem with me. I have approached you twice on attitudes issues and you said on both times that you didn't have a problem. I decided to believe you and just kept to myself, but still I altered my lifestyle, trying to see how I could make this work. I am not being kept in your house, I am a partner sharing the house with you, I pay for my bills so it is only proper to speak to each other with respect as grown-ups and mothers I come to talk to you whenever I have a concern just because I respect you. I would appreciate if you could do the same. You are great with my kids and I don't want to tarnish that. Likewise I care so much for Natash, I want her to be able to come and visit me when I move out just like she used to.

I appreciate you opening up in your letter thank you; however, time is not practical, I have lived in Nyambadwe for 12 years because it is convenient when it comes to school errands especially when I 'm not around I would like to go on this like responsible grown-ups..."

2.4 On 12th September, 2017, Petra Strakova responded to the Appellant's letter of 5th September, 2017 as follows-

"In response to your letter I have reconsidered the period of notice and give you till the end of October. There is a saying we meet to part and we part to me so the move shouldn't be [taken] in a negative way, but that is the best for both of us. Regarding the children I have never mentioned anything about them not meeting so you don't need to worry about it. If Natasha wishes to visit you

I have no problem neither the other way around; after all they are in the same class. Thank you for the cooperation....”.

2.5 Despite the notice given to her to vacate the house by end of October, 2017, the Appellant on 2nd October, 2017 paid into Petra Strakova’s account at Standard Bank an amount representing three months’ rent (K525,000). Petra Strakova apparently accepted only one months’ rent and redeposited two months’ rent to the Appellant’s account.

2.6 This matter took a new twist when the Appellant engaged her current legal practitioners who, on 19th October, 2017 wrote a letter to Petra Strakova claiming, among other things, that the Appellant was a co-tenant; that the Appellant had been enticed to give up her own house; and that Appellant had invested in the house in the believe that she would stay in the house much longer. In the letter, the Appellant’s legal practitioners indicated that the Appellant is willing to move out of the house only after she finds a befitting house. Furthermore, the letter contains a demand for a refund for renovation expenses incurred by the Appellant on the house.

2.7 Petra Strakova apparently did not respond the letter from the Appellant’s legal practitioners, and the relationship between the Appellant and Petra Strakova further deteriorated.

3. Interlocutory order in the subordinate court

3.1 The Appellant, on 3rd November, 2017, sought and obtained an interlocutory order in the Senior Resident Magistrate Court, Blantyre pursuant to Order XII r 7 of the Subordinate Court Rules. In terms of the interlocutory order, Petra Strakova, and/or her agents or servants or whosoever, were immediately prevented or stopped from evicting the Appellant from the shared house in Nyambadwe; the notice to vacate the house was extended to allow the Appellant to find another house; the Appellant was to continue to have access to the house until the matter was heard *inter-partes*; and the Appellant was required to file an *inter-partes* application within 21 days to enable the court to re-examine the matter.

3.2 The interlocutory order was served on Petra Strakova on 5th November, 2017.

4. Proceedings in the High Court (Principal Registry)

4.1 The Respondent (who is the employer of Petra Strakova, and claims to be the tenant of the house in Nyambadwe which is occupied by the Petra Strakova and Appellant), on learning of the disputes between its employee Petra Strakova and the Appellant, by summons filed on 2nd November, 2017 and issued on 6th November, 2017, commenced proceedings in the court below for an order of injunction requiring the Appellant to vacate the house in Nyambadwe, and restraining the Appellant from threatening or harming Petra Strakova. The summons were served on the Appellant 8th November, 2017. In accordance with the summons, the Appellant had 28 days within which “to either satisfy the claim or file ... a defence and list of documents”.

4.2 The Respondent also, on 6th November, 2017, by *ex parte* summons applied for an order of mandatory injunction compelling the Appellant to vacate the house in Nyambadwe; the court below directed that the application should be made *inter-partes*. The *inter-partes* application was filed on 8th November, 2017; the application was set down for hearing and heard on 14th November, 2017; and the application was granted.

4.3 The order of the court below, dated 14th November, 2017, compelling the Appellant to vacate the house, indicates that despite being served with the *inter-partes* application the Appellant did not attend the hearing and did not file any papers in opposition. The Respondent’s application for an order of mandatory injunction was, therefore, not contested by the Appellant.

5. Appellant’s appeal against the order of mandatory injunction of the court below

5.1 As indicated in paragraph 1.2, on 15th November, 2017, the Appellant filed a notice of appeal against the order of mandatory injunction of the court below. The grounds of appeal, as set out in the notice of appeal, are as follows-

“(a) The learned Judge erred in law and in fact in not considering the damage the Appellant would suffer as compared to that of the Respondent;

(b) *The learned Judge erred in law and in fact in not considering the fact that the order of injunction was granted without consideration of the merits;*

(c) *The learned Judge erred in law in not recognizing an order of another court in force at the time he made his order of injunction;*

(d) *The learned Judge erred in law in not considering the conduct of the Respondents which was tantamount to abuse of court process and them not having clean hands;*

(e) *The order of the learned Judge was against applicable principles of law on the facts of the case... ”.*

6. *The Appellant’s application for a stay of the order of mandatory injunction of the court below*

6.1 On 14th November, 2017, the Appellant made an application in the court below for a stay of the order of mandatory injunction of the court below. The application was heard and dismissed by the court below on 14th November, 2017.

6.2 The Appellant now comes to this Court for a stay of the order of mandatory injunction of the court below. The arguments and submissions of the Appellant in support of the application for a stay of order of the court below, as reflected in the sworn statement in support of the application, are as follows –

“Damage to the Appellant, if the ruling is not stayed

15. *That ...the Appellant ... surrendered her house at the instigation of the Respondent... currently she has no other house where she can reside.*

16. *That ... following the order of the court below, on the night of 14th November, 2017 the Appellant and her child were locked out and they had to spend the night in the car. The safety and well-being of the Appellant has been shattered.*

18. *That on the other hand there is no damage whatsoever on the Respondents...*

Bad faith and abuse of process on the part of the Respondents

19. *That from the conduct of the [Respondent] and [its] employee, it is clear that they are acting in bad faith and in abuse of the court process.*

20. *That... the Respondent commenced the matter within and made the application for an injunction fully knowing that there are other proceedings and an order issued in the magistrate’s court.*

21. *That ... from the conduct of the Respondent and [its] employee it is apparent that they are acting in unison to frustrate the Appellant’s case.*

Scandal to the judicial system

22. *That ... there are ... two orders conflicting orders issued by different courts. The order of the High Court ... was issued with the full knowledge on the part of the Respondent of another order already in existence...*

23. *That ... the effect of the order issued by the High Court is to finally dispose of the matter herein since the order of eviction is what the [Respondent is] finally seeking in the main action. The effect of the said order is therefore to render all proceedings nugatory.... ”.*

7. *Respondent’s sworn statement in opposition to the application for stay*

7.1 There was filed, on behalf of the Respondent, on 23rd November, 2017, a sworn statement in opposition by Counsel for the Respondent. The sworn statement in opposition is based on information which Counsel for the

Respondent received from Petra Strakova, the Respondent's employee who is sharing the occupation of house in Nyambadwe with the Appellant. In so far as it is relevant to the application for a stay of the order of mandatory injunction of the court below, the sworn statement reads as follows-

"Background to dealings between the Parties

4. That... the Respondent's employee started staying in the house in July, 2016 and from the beginning it has been the Respondent who has been renting and paying for the house.
5. That ... the Respondent's employee did not at any time request the Appellant to move into the house [and] to be sharing costs but made a suggestion to her friends including the Appellant to join her and to be paying her rentals for occupying the part of the house she was not occupying.
6. That ... the Appellant on her own and for her own reasons took the offer and has been paying rentals to her as the landlord.
7. That ... at the very inception the Respondent's employee made it clear that the house is rented by the Respondent and that is why the Appellant never bothered to see the tenancy agreement for the house which should have been the case had it been that the arrangement was that they were sharing the rentals as co-tenants.
8. That ... at the time the ... Respondent's employee was taking possession of the house in July 2016, the house had just been redecorated and when the Appellant was joining her in or about September, 2016 there was no need for renovating the house.
9. That ... the part [of the house] the Appellant is staying [in] was not being used hence it remained in perfect condition, and the Appellant changed the colours of the doors to her preferred colour at her own volition and also put a wardrobe in her bedroom at her own volition, but the cost of the same cannot justify her continued staying in the house...
10. That ... there was no indication whatsoever that the Appellant would stay long since there was not fixed tenancy for the Appellant and in fact the Appellant's alleged garden is very small probably 2 by 3 metres.

Dispute between the Appellant and ... Petra Strakova

11. That ... the Respondent had never been aware that the Appellant was [subletting] the other part of the house so when it needed it for its other employee [the Respondent]... informed Petra Strakova and as a result Petra Strakova gave notice to the Appellant to vacate the house by 30th September, 2017 which notice was extended to end of October, 2017 when the Appellant requested for more time.....
12. That ... when the Appellant got the notice she ...resisted to go out of the house ...which prompted the Respondent to file an ex parte order for an injunction on 2nd November, 2017 upon which the court [ordered] the application should be brought [inter-partes]

The within proceedings

13. That ... the Respondent commenced court action on 2nd December, 2017 and this was before the Appellant commenced her action in the lower court which ... was commenced on 3rd November, 2017 and the order was only served on the Respondent's employee Petra Strakova on 5th November, 2017 which was a Sunday.
14. That the above information could easily be found by the Appellant or indeed her Counsel, but the Appellant deliberately chose to represent to the Court that the Respondent reacted to the service of the order [of the lower court] by commencing the action herein in a bid to misled the court into granting the order of stay herein

15. That in reference to paragraph 10 of the Appellant's sworn statement in support of the application, it is clear that the Appellant through Counsel has decided to tell a lie that the order was served on 3rd November, 2017 when in actual fact the order itself (exhibit LL5) shows that it was served on 5th November, 2017.

Application for injunction and the hearing thereof

16. That it is not correct that the Respondent commenced this action on 8th November, 2017. The action was commenced on 2nd November, 2017 and ex-parte application for [an] injunction was filed the same day only that the court ordered that it be brought inter-partes on 14th November, 2017.

17. That ... the action by the Respondent was filed earlier than the Appellant's action against Petra Strakova.

18.

19. That at the hearing of the application for the injunction there was no sworn statement filed by the Appellant on the court file or indeed served on the Respondent, and there was no appearance by the Appellant hence there was no opposition and the court granted the order upon realizing the strength of the Respondent's case.

Damage to the Appellant, if the ruling is not stayed

20. That ... the Appellant has a house in Chitawira ... so the Appellant has somewhere to stay if she leaves the house.

21. That ... it is a ... lie that the Appellant and her child were locked out of the house and slept in the car because the Appellant has her own key....

22. That ... the Appellant could also not be locked out of the gate because the Appellant has her own guard...

23. That ... upon being served with the mandatory order of injunction, the Appellant came to the house and took her son and went away and never returned that day until late the following day...

24. That ... the Appellant [is] telling lies to the Court only to continue staying in house at any cost despite being given sufficient notice and at the ransom of the Respondent who needs the part of the house for its other employee... and without paying..

Bad faith and abuse of process on the part of the Respondent

28. That the Respondent commenced the action before its employee being served the lower court order, hence there is no abuse of court process.

29. That the Respondent as owner (tenant) of the house would like to enjoy its rights hence must not be blocked by the Appellant who was given adequate notice.

Scandal to justice system

30. That the parties to the two actions, in the lower court and in the High Court are different the Respondent went to court before the Appellant.

31. That there are no issues between the Respondent and the Appellant and the Appellant may proceed against the Respondent's employee if there are issue between them.

32. That as at the time of swearing this sworn statement no appeal has been filed and served on the Respondent, hence it is clear that the Appellant merely wants to buy time by applying for a stay of the order.

WHEREFORE [the Respondent] pray[s] that the [interim] order of stay ... be vacated, the same having been granted based on falsehood and there being no justification for its continuity... ”.

8. Consideration of application for stay of the order of mandatory injunction pending the hearing and determination of appeal

8.1. Leave to appeal against the order of mandatory injunction of the court below

8.1.1 In accordance with paragraph (c) of the second proviso to section 21 of the Supreme Court of Appeal Act, the Appellant requires leave of the court below or this Court to appeal against the order of mandatory injunction of the court below.

8.1.2 In this matter, the Appellant has filed a notice of appeal. While ordinarily, a notice of appeal should be filed after the grant of leave, the proviso to Order III r 3 (2) of the Supreme Court of Appeal Rules does not prohibit the filing of a notice of appeal before the granting of leave to appeal (See: *The Registered Trustees of Thandizane Carpenters Shop v Foletsani Tchawango* MSCA Civil Appeal No 2 of 2012.). It is, therefore, permissible to file a notice of appeal before obtaining leave to appeal; the proviso to Order III r 3 (2) of the Supreme Court of Appeal Rules expressly provides that “... nothing in this subrule shall be deemed to prohibit an appellant from filing a notice of appeal prior to the hearing of the application for leave to appeal.”.

8.1.2 However, it is pertinent to observe that not only is there nothing in documents filed by the Appellant to indicate that leave to appeal has been sought and obtained; and there is no indication whatsoever that there is pending any such application either before the court below or this Court. The application herein for a stay of the order of mandatory injunction of the court below is premised on the fact that an appeal has been filed against the order of the court below, and presumably also, based on the grounds of appeal that have been filed by the Appellant, the good prospects of success of the appeal. If, as it must, this Court is required to inquire into the prospects of the success of the appeal for purposes of determining whether to judiciously exercise its discretion to grant or to refuse to grant the sought stay of the order of mandatory injunction, then whether there is in fact a valid appeal filed in the Supreme Court of Appeal is material. If there is no valid appeal filed because leave to appeal has not been sought and obtained, then it cannot seriously be contended that there is before this Court a proper application for a stay of the order of mandatory injunction pending the hearing and determination of an appeal.

8.1.3 After carefully considering the issue whether this is a proper case to grant a stay of the order of mandatory injunction of the court below, pending the hearing and determination of the appeal, I am not inclined to grant the application for the reasons set out under paragraphs 8.1.1 and 8.1.2, namely, the Appellant’s failure to seek and obtain, from the court below or this Court, leave to appeal against the order of the court below, as required by and in accordance with paragraph (c) of the second proviso to section 21 of the Supreme Court of Appeal Act.

8.2 In any event, on the facts of this case, I would still have refused to grant the application for a stay of the order of mandatory injunction of the court below, pending the hearing and determination of the appeal, for the reasons set out below.

8.2.1 I have carefully considered the arguments and submissions on behalf of both parties, as well as the case authorities referred to by both Counsel in their skeleton arguments and cited in the course of their submissions. I am most grateful to both Counsel.

8.2.2 I bear in mind that the grant or refusal to grant the stay of the order of mandatory injunction is at the discretion of the Court. I also bear in mind that my duty at this stage is not to determine the merits of the appeal. However, I need to be satisfied that the arguments and submissions, and the issues raised, for or against the granting of a stay of the order of mandatory injunction are sufficient to justify the exercise of my discretion one way or another (See: *Attorney General v Sunrise Pharmaceuticals and Chombe Foods Products (supra)*).

8.3 The cardinal principle in determining whether to grant or refuse to grant a stay of execution of a judgment, pending the hearing and determination of an appeal, is and has always been that a successful litigant should not be deprived of the fruits of litigation, unless there are sufficient reasons for doing so. In my considered view that cardinal principle applies equally to a stay of the execution of an order.

8.3.1 For a long time, until the decision of the Supreme Court of Appeal in *Mike Appel & Gatto Ltd v Saulos Chilima* MSCA Civil Appeal No 20 of 2013, our courts were guided by the following principles: that the court does not make it a practice to deprive a successful litigant of the fruits of litigation; that the court will consider whether there are special circumstances which mitigate in favour of granting the order of stay of execution of judgment, and the onus is on the applicant to prove or show such special circumstances; that the court would likely grant a stay of execution of judgment where the appeal would be otherwise rendered nugatory, or the appellant would suffer loss which would not be compensated in damages; that where an appeal is against an award of damages, stay of execution of a judgment would normally be granted if the applicant satisfies the court that if the damages were paid, there will be no reasonable prospect of recovering the damages in the event of the appeal succeeding; and that whether or not an appeal has a good chance of success is not a ground upon which a court will order a stay of execution of a judgment.

8.4 In *Mike Appel & Gatto Ltd v Saulos Chilima* the Supreme Court of Appeal, while accepting these principles, noted that there was no reason why the discretion of the court should be fettered by the straight jacketed application of special circumstances, and the Court advocated the approach adopted in the English cases of *Hammond Suddards Solicitors v Agrichem International Holdings* 2002 EWCA Civ. 2065 and *Moat Housing Group-South Ltd v Harris* The Times January, 13 2005 CA.

8.4.1 In *Hammond Suddards Solicitors v Agrichem International Holdings* it was held that “the court has discretion whether or not to grant a stay”; that “whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or the other or to both parties if it grants or refuses a stay. In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any moneys paid to the respondent....”.

8.4.2 In *Moat Housing Group-South Ltd v Harris* it was held that in determining whether to grant a stay of execution of judgment, regard must be had, among other things, to the potential prejudice to the parties; the paramount consideration in granting or refusing to grant a stay of execution of judgment is the potential prejudice to either or both of the parties, and the risk of injustice to one or both of the parties.

8.5 In my view, the issue which arises in this application is, therefore, what is the risk of injustice to one or the other party in these proceedings if a stay of the order of mandatory injunction of the court below is granted or refused, pending the hearing and determination of the appeal; alternatively, what is the potential prejudice or risk of injustice to either of the parties if a stay of the order of mandatory injunction of the court below is granted or refused, pending the hearing and determination of the appeal.

8.6 The Appellant’s application for stay of the order of mandatory injunction of the court below pending the hearing and determination of the appeal filed in relation thereto, is premised on three principal heads, namely, “*damage to the Appellant*”, “*bad faith and abuse of process on the part of the Respondent*”, and “*scandal to [the] justice system*”.

8.6.1 *Damage to the Appellant*

8.6.1.1 With respect to “*damage to the Appellant*”, it is argued and submitted, on behalf of the Appellant, that the Appellant surrendered her own house at the instigation of the Respondent’s employee and she has no other house to stay; and that, at the time of the filing of this application, the Appellant and her child have been rendered destitute, and that the safety and well-being of the Appellant and her child has been shattered. In response it is, in effect, argued and submitted on behalf of the Respondent that the Appellant has a house in Chitawira and, therefore, has somewhere to stay if she leaves the house in Nyambadwe; and further that the Appellant is determined to continue staying in house at any cost despite being given sufficient notice to vacate the part of the house which the Respondent needs to accommodate another of its employees.

8.6.1.2 It is pertinent to observe that the Appellant has not refuted the Respondent assertion that she in fact has a house in Chitawira and, therefore, does have an alternative house to move to if she vacates the house in Nyambadwe. It is also pertinent to observe that if the Appellant were to suffer any damage on account of the order of mandatory injunction of the court below having been wrongfully granted, she would be able claim damages from the Respondent in the main action in the court below.

8.6.2 Bad faith and abuse of process on the part of the Respondent

8.6.2.1 With respect to “*bad faith and abuse of process on the part of the Respondent*”, it is in effect, argued and submitted, on behalf of the Appellant, that from their conduct in this matter, the Respondent and its employee, Petra Strakova, are acting in bad faith and in abuse of the court process. In this regard, it is argued and submitted that the Respondent commenced proceedings against the Appellant, including obtaining the order of mandatory injunction in the court below, with the full knowledge of the proceedings and order issued in the Magistrate’s court; and that from their conduct the Respondent and its employee, Petra Strakova, were acting in unison to frustrate the Appellant’s case in the Magistrate’s court.

8.6.2.2 In response to the Appellant’s arguments and submissions it is, in effect, argued and submitted, on behalf of the Respondent, that the Respondent commenced the proceedings in the court below earlier than the Appellant commenced proceedings in the Magistrate’s court, and before its employee Petra Strakova was served with the interlocutory order of the Magistrate’s court and, consequently, there is no abuse of court process; and that the Respondent as lawful tenant of the house would like to enjoy its rights and must not be prevented from doing so by the Appellant who was given adequate notice to vacate the house.

8.6.2.3 The issue when exactly each of the parties commenced proceedings in relation to the house in Nyambadwe and, therefore, whether the interlocutory order of the Magistrate’s court triumphs the order of mandatory injunction of the court below, or vice versa, is crucial in the final resolution or determination of this matter, and is being contested by both parties. That is a substantive issue which will no doubt be settled during the hearing and determination of the appeal.

8.6.2.4 It is, nevertheless, appropriate to observe that in relation to the proceedings in the court below, the Respondent filed summons on 2nd November, 2017 for an order of injunction requiring the Appellant to vacate the house in Nyambadwe, and restraining the Appellant from threatening or harming Petra Strakova, the Respondent’s employee. The summons were issued on 6th November, 2017 served on the Appellant 8th November, 2017. It is pertinent to observe that, in accordance with the Summons, the Appellant had 28 days within which “*to either satisfy the claim or file ... a defence and list of documents*”. However, there is no indication in the documents filed by the Appellant that the Appellant responded to the summons in the main action in the court below, or has taken any steps challenge the proceedings in the main action in court below.

8.6.2.5 In relation to the proceedings in the Magistrate’s court, the Appellant, on 3rd November, 2017, sought and obtained an interlocutory order. The interlocutory order was served on Petra Strakova on 5th November, 2017. In terms of the interlocutory order, Petra Strakova and or her agents or servants or whosoever were immediately prevented or stopped from evicting the Appellant from the shared house in Nyambadwe; the notice to vacate the house given to Appellant by Petra Strakova was extended to allow the Appellant to find another house; the Appellant was to continue to have access to the house until the matter was heard *inter-partes*; and the Appellant was required to file an *inter-partes* application within 21 days to enable the court to re-examine the matter.

8.6.2.5 It is pertinent to observe that there is no indication in the documents filed by the Appellant that the *inter-partes* application has been filed as required by the interlocutory order of the Magistrate; or that any further steps have been taken to pursue the proceedings in the Magistrate’s court. The interlocutory order was for a period of 21 days and, if no further action has taken to pursue the proceedings in the lower, it is doubtful whether the order is still effective.

8.6.2.6 In relation to the application for the order of mandatory injunction in the court below, the Respondent, on 6th November, 2017, after the filing of the summons in the court below, but before the expiry of the statutory 28 days within which the Appellant could “*to either satisfy the claim or file ... a defence and list of documents*”, by *ex parte* summons applied for an order of mandatory injunction, and the court below ordered that the application should be

made *inter-partes*. The *inter-partes* application was filed on 8th November, 2017; the application was set down for hearing and heard on 14th November, 2017; and the application was granted.

8.6.2.7 It is pertinent to observe that at the time that the order of mandatory injunction was granted by the court below, there was subsisting the interlocutory order of the subordinate court. The Respondent's summons in the court below strongly suggests that Petra Strakova, who was a party to the proceedings in the Magistrate's court, appraised the Respondent of the challenges she was having in relation to the request for the Appellant to vacate the house in Nyambadwe. Indeed, the Respondent's application for the order of mandatory injunction in the court below was supported by a sworn statement of its employee, Petra Strakova. Petra Strakova was served with the interlocutory order on 5th November, 2017. It is, therefore, most improbable that the Respondent was unaware of the proceedings in the Magistrate's court and the interlocutory order of the Magistrate's court during the processing of the application for the order of mandatory injunction on 6th, 8th and 14th November, 2017. Surprisingly, the Respondent did not disclose this fact to the court below during the hearing of the application for the order of mandatory injunction. Ordinarily, the Respondent should have applied to join the proceedings in the Magistrate's court as tenant of the house, or as an interested party, to have the interlocutory order vacated.

8.6.2.8 Furthermore, it seems to me that the Respondent's application in the court below for the order of mandatory injunction, when summons the eviction of the Appellant from the house in Nyambadwe had been filed in the same court, and before the expiry of the statutory 28 days within which the Appellant could respond to the summons was, perhaps, most unusual. However, having particular regard to the fact that the Respondent apparently desperately needed the part of the house occupied by the Appellant to accommodate another of its employees, I certainly do not share the view expressed by the Appellant that the Respondent's application for the order of mandatory injunction, despite the knowledge (actual or presumed) of the proceedings in Magistrate's or the interlocutory order of the Magistrate's court, amounted to an abuse of process or was intended to frustrate the proceedings in the Magistrate's court.

8.6.3 *Scandal to the justice system*

8.6.3.1 With respect to "scandal to [the] justice system", it is, in effect, submitted on behalf of the Appellant, that there are two conflicting orders issued by different courts; that the order of the court below was issued or obtained with the full knowledge on the part of the Respondent of another order already in existence the interlocutory order of the Magistrate's court. It is further argued and submitted that the effect of the order of mandatory injunction issued by the court below is to "finally dispose of the matter herein since the order of eviction is what the Respondent was finally seeking in the main action"; and that "the effect of the ...order is, therefore, to render all further proceedings nugatory.". In response it is, in effect, submitted on behalf of the Respondent, that the parties to the two actions, in the lower court and in the High Court are different; that the Respondent went to court before the Appellant; and that there are no issues between the Respondent and the Appellant and the Appellant may proceed against the Respondent's employee if there are issue between them.

8.6.3.2 While the Respondent is correct that the parties to the two actions, in the Magistrate's court and in the court below are different, and that the Respondent went to court before the Appellant, it is also true that the when the order of mandatory injunction was granted by the court below, there was subsisting the interlocutory order of the Magistrate's court. That interlocutory order was not challenged by the Respondent, as tenant of the house. The Respondent did not see it fit to apply to be a party to the proceedings in the subordinate court to make appropriate representations that it was the lawful tenant of the house. The Respondent's rights as tenant were adversely affected by the interlocutory order, and any reasonable person in the position of the Respondent would have taken issue with the interlocutory order of the Magistrate's court.

8.6.3.3 In relation to the Appellant's arguments and submissions, as already indicated in paragraph 8.6.2.5 the interlocutory order was for a period of 21 days and, if no further action has taken to pursue the proceedings in the lower, it is doubtful whether the order is still effective and, as indicated in 8.6.2.8, the application in the court below for an order of mandatory injunction when summons the eviction of the Appellant from the house in Nyambadwe had been filed in the same court, and before the expiry of the statutory 28 days within which the Appellant could respond to the summons was, perhaps, most unusual; but, having particular regard to the fact that the Respondent apparently desperately needed the part of the house occupied by the Appellant to accommodate another of its employees, and despite the Respondent's knowledge (actual or presumed) of the proceedings in Magistrate's or the interlocutory order

of the Magistrate's court, the application for the order of mandatory did not amount to an abuse of process or was intended to frustrate the proceedings in the Magistrate's court.

8.6.3.4 I do not share the view expressed by the Appellant that the effect of the order of mandatory injunction issued by the court below was to "finally dispose of the matter in the court below; that an order of eviction is what the Respondent was finally seeking in the main action" in the court below; and that the effect of the mandatory order was to render all [further] proceedings nugatory". It is clear from the order of the court below that the main action in the court below has not terminated; the main action will continue. Indeed, the Respondent has undertaken to pay the Appellant any damages that may be awarded should it be found that the order of mandatory injunction should not have been granted.

8.7 Prospects of success of the appeal

8.7.1 The grounds of appeal on which the Appellant seeks fault the order of the court below are: failure by the Judge in the court below to consider the damage the Appellant would suffer as compared to that of the Respondent; failure by the Judge in the court below to consider the fact that the order of mandatory injunction was granted without consideration of the merits; failure by the Judge in the court below to recognize that an order of another court in force at the time that the order of mandatory injunction was made; failure by the Judge in the court below to consider the conduct of the Respondents, which was tantamount to abuse of court process and them not having clean hands; and that the order of the learned Judge was against applicable principles of law on the facts of the case.

8.7.2 As indicated in paragraph 4.3, the order of the court below, dated 14th November, 2017, indicates that despite being served with the *inter-partes* application for the order of mandatory injunction, the Appellant did not attend the hearing and did not file any papers in opposition. The Respondent's application for the order of mandatory injunction was, therefore, not contested by the Appellant. In the sworn statement in support of the application filed in this Court Counsel for the Appellant has attributed the non-attendance to his illness and the omission by his colleague to have the matter adjourned. However, no credible explanation has been given why papers in opposition to the application were not filed in the court below.

8.7.3 It is pertinent to observe that none of the concerns raised in the grounds of appeal were raised or ventilated in the court below. The order of the court below clearly indicates that not only was there no appearance for the Appellant, no papers were filed in opposition to the application for the order for a mandatory injunction, and the *inter-partes* application was not contested by the Appellant. It seems to me that through the appeal the Appellant intends to raise matters or concerns which were not before the court below at the time of the consideration of the application for the order of mandatory injunction. I am of the firm view that concerns raised by the Appellant in the grounds of appeal should have been raised and ventilated in the court below. Indeed, the Appellant had the opportunity and could most certainly also have raised her concerns in the court below in response to the Respondent's summons filed on 2nd November, 2017 and issued on 6th November, 2017 and served on her on 8th November, 2017. The fact that the Appellant herself had commenced proceedings in the Magistrate's court and that there was a subsisting interlocutory order of the Magistrate's court, and the assertion that the conduct of the Respondent which was tantamount to abuse of court process could have been raised in the court below response to the Respondent's summons. Sadly, as with the proceedings in the Magistrate's court, no action appears to have been taken by the Appellant in response to the main action commenced in the court below by the summons filed on 2nd November, 2017 and issued on 6th November, 2017. The Appellant chose not to raise her concerns in the court below in response to the summons in the main action in the court below, but now intends to raise those concerns in the appeal against the order of the court below.

8.7.4 I have serious doubts whether it is appropriate for the Appellant to raise by way of appeal concerns or matters which were not before the court below, but which the Appellant had an opportunity to raise in the court below but did not raise. I also have serious doubts of the prospects of success of the appeal.

9. Conclusion

9.1 In this matter, the Appellant entered into an arrangement with Petra Strakova to occupy part of the house in Nyambadwe; the Appellant did not bother to verify the tenant of the house. The Appellant does not appear to challenge that the Respondent is the lawful tenant of the house in Nyambadwe; and from the correspondence between the Appellant and Petra Stravoka, it would appear that the Appellant's principal concern is the inconvenience being caused to her by the short notice to vacate the house, and that she needed more time to find another house, but the Appellant

does not indicate how much more time she needs to find another house. On the facts of this case, I am not sufficiently persuaded by the arguments and submissions of the Appellant that this is a proper case for granting a stay of the order of the court below, pending the hearing and determination of the Appellant's appeal.

9.2 In view of the preceding observations, and also, having particular regard to the time that it would take to hear and determine the Appellant's appeal, I am of the firm view that this is not a proper case for granting a stay of the order of mandatory injunction of the court below, pending the hearing and determination of the Appellant's appeal. I see no justice, but grave injustice and prejudice, to the Respondent to deprive the Respondent of its rights as lawful tenant of the house. The Appellant would certainly be entitled to be compensated for any damage that she may suffer as a result of the enforcement of the order of mandatory injunction should it turn out that the order of mandatory injunction was wrongfully granted; indeed, the Respondent has so undertaken in the court below.

9.3 I, accordingly, decline to grant the Appellant's application for a stay of the order of mandatory injunction of the court below, pending the hearing and determination of the Appellant's appeal. I dismiss the Appellant's application. The Respondent prayed for costs of this application, and I award the Respondent costs of this application.

Pronounced in Chambers this 9th day of January, 2018 at Blantyre.



Justice Anthony Kamanga, SC

JUSTICE OF APPEAL