**IN THE HIGH COURT OF MALAWI**
**PRINCIPAL REGISTRY**
**Civil Cause No. 466 of 2013**

**BETWEEN**

**MARANATHA INTERNATIONAL ACADEMY LTD APPLICANT**

**AND**

**PETRODA (MALAWI) LTD DEFENDANT**

**CORAM:**

**THE HONOURABLE JUSTICE D MWAUNGULU**

Chidothe, Counsel for the Applicant

Katuya, Counsel for the defendant.

Mwanyongo, Official Court Interpreter

**Mwaungulu, J**

## JUDGMENT

*Background and Principles*

Maranatha International Academy Ltd, a private secondary school in the City of Blantyre, in an action seeking several declaratory orders against Petroda (Malawi) Ltd, an oil supplying company, wants an interim injunction under Order 29 of the Rules of the Supreme Court 1965. The application, the Rules of the Supreme Court 1965, having been repealed and not revived in accordance to section 10 of the General Interpretation Act and now replaced by the Rules of the

Supreme Court 1999, the Civil Procedure Rules 1998, effective on 24 April 1999 as provided in the 2004 amendment of section 29 of the Courts Act, will be determined under Part 53 of the Civil Procedure Rules 1998. Petroda (Malawi) Ltd and Maranatha International Academy Ltd are, respectively, landlord and tenant. On 7 September 2013 this Court granted Maranatha International Academy Ltd an interim injunction without notice in which Petroda (Malawi) Ltd was, until there was an order with notice for an interim injunction, to desist from evicting the applicant from the leased premises at Keza Office Park and/or exercising its right of distress against the applicant and/or use of the premises herein or doing anything with the like effect until the determination of this matter or further order of the court.

Maranatha International Academy Ltd bases the application for an interim injunction on two premises. First, Petroda (Malawi) Ltd, as landlord, on 29 August 2013, through the Sheriff of Malawi, distressed for rent in the sum of MK 117, 196, 088 for 1 March 2013 to 29 August 2013. Petroda Malawi Ltd, despite the letter from Veritas Chambers, at some point lawyers for the defendant, dated 2 September 2013to the applicant and as confirmed by the letter from the Sheriff of Malawi, never distressed for the sum of MK 200, 814, 088, the subject of proceedings in the Commercial Division of this Court and the Supreme Court of Appeal. Secondly, on 2 September 2013, after the Sheriff distressed for rent for the period up to 29 August 2013, the landlord, through Veritas Chamber, wrote the applicant evicting them from the premises. These two aspects are the subject of the action commenced in this Court on 7 September 2013.

In the actual action, Maranatha International Academy Ltd wants the following declaratory orders: a declaration that the Defendant cannot instruct Sheriffs to levy distress on the Applicant's goods; a declaration that the Sheriff of Malawi cannot levy distress on the Applicant and/or their goods without a Warrant of distress issued by the court; a declaration that the Defendants cannot issue a Warrant of Distress by themselves or through their agents; a declaration that the Defendants cannot levy distress on the Applicant's goods without a Warrant of Execution; a declaration that the Warrant of Distress issued by Veritas Chambers on behalf of the Defendant is invalid and of no legal effect; a declaration that the Defendant cannot exercise a right of distress against the Applicant when: there are

legal proceedings for recovery of rent by the Defendant against the Applicant under Commercial Case No. 9 of 2013 on the same alleged rental arrears, the issue of the amount of monthly rentals by the parties is in dispute and awaits the courts determination in Commercial Case No. 9 of 2013; a declaration that the seizure of the Applicant's goods and closure of premises occupied by the Applicant's at Keza Office Park by Sheriffs herein on instruction from the Defendant amounts to trespass and conversion; a declaration that the Defendant can exercise the right of possession, action for unpaid rentals and distress at the same time in respect of the same of alleged rental arrears; a declaration that the Defendant do pay the Applicant damages for trespass and conversion.

The injunction sought, therefore, is interim and pending this Court determining the main action. Such relief is not granted, if there is no serious issue to be tried, where damages are an adequate remedy and, where damages are not and adequate remedy, on the guidelines, which is what they are, in the often cited case in this Court and the Supreme Court of Appeal of *American Cyanamid v Ethicon Ltd* [1975] A.C. 396; [1975] 2 W.L.R. 316.

*Damages an adequate remedy*

The premier question, therefore, is whether damages would be an adequate remedy for the applicant. This consideration involves establishing an injury to some right or damage to the applicant should the injunction be refused. It is in the nature of interim injunctions that they must protect a right or injury to the applicant. Consequently, an injunction will be refused where there is no right to protect or injury or damage to the applicant. I am at pains to understand what, in a landlord and tenant situation, where the tenant refuses to pay rent or neglects or fails to pay rent, what right, in the absence of contractual terms to the contrary, there is for the tenant to protect or injury or damage that the court would ameliorate by granting an injunction (*Joubertina Furnishers (Pty) Limited t/a Carnivals Furnishers v Lilongwe City Mall* (2013) Miscellaneous Civil Cause No. 43 (unreported). Where the tenant has not paid rent, I see no defence to the landlord's right to distrain for rent, evict the tenant or sue for possession of the premises. There is no right to protect; there is no damage or loss to Maranatha

International Academy Ltd that Petroda (Malawi) Ltd will have to salvage even if the applicant won the case.

Moreover, the damage or loss that is considered is one that flows from actions of the defendant should the court refuse the injunction. I do not think that Lord Diplock for once ever suggested that the interim relief will be granted to alleviate losses caused to the applicant by the applicant or losses not caused by the defendant. In this case, losses or damages that the applicant would suffer would not be caused by the defendant; the losses would have been caused by the Maranatha International Academy Ltd failure or neglect to pay rent.

*Parties capacity to pay damages?*

On the reverse question, where damages are an adequate remedy, whether the applicant will be able to compensate the defendant on the usual undertaking as to damages, the Maranatha International Academy Ltd will not be able to compensate Petroda (Malawi) Ltd. As between landlord and tenant, where the tenant has not paid the landlord rent, the tenant has little or nothing to lose; the landlord has all to lose. No doubt, in relation to Petroda (Malawi) Ltd damages would be an adequate remedy should Maranatha International Academy Ltd succeed in the main action. Damages would be inadequate generally if they are incalculable, unascertainable or immeasurable. The defendant opposing the interim injunction could establish that damages are incalculable, unascertainable or immeasurable. The applicant could establish that the damages are calculable, ascertainable or measurable. In this particular case damages losses or damages that Petroda (Malawi) Ltd would suffer are calculable, ascertainable or measurable. That the rentals are disputed does not make them incalculable, unascertainable or immeasurable. Once the dispute is settled, the rentals will be calculable, ascertainable or measurable. The next consideration, therefore, is if the applicant will on its undertaking as to damages be able to pay the defendant's the losses should the applicant lose the action. I do not think so. On the evidence from the applicant, the applicant has generally been unable to pay rent since the lease agreement. Even now he wants to pay the arrears by installment that will give him almost 33 months of grace on the exigent arrears, not taking the current rentals into account. The application for an interim injunction should, therefore, be refused:

the applicant will not be able to compensate the defendant. On that score alone, I should refuse the injunction.

Of course, the applicant runs a school and there will be quite some problems to the pupils should the injunction be refused. But the loss that the applicant would suffer should I refuse the injunction will be the profits that will be lost. Those are calculable and ascertainable even if they will involve accountants and financial managers to engage. The fact that they will be ascertained with difficulty or painstakingly does not make them incalculable. The question then is whether the defendant will be able to pay them. I think so. The defendant owns the property and, as we speak, the applicant owes the defendant arrears in the environs of hundreds of millions of Kwachas that can set off any losses that the applicant will suffer.

*Are there serious issues to be tried?*

Even if I am erroneous on whether damages would be an adequate remedy for the parties and that the applicant will be unable to pay them, the matter still fails on the next consideration, namely, whether, there is a serious triable issue, one with a prospect of success. Indeed any interpretation of the principles or guidelines must not fetter the discretion inherent in this equitable relief for the court to do justice to the parties(*R v Secretary of State for Transport, ex parte Factortame Ltd (No2)* [1991] 1 AC 603; [1990] 3 WLR 818), with equity! In that sense equity is not law; equity goes beyond law; equity goes where the law could fail. Moreover, the principles in *American Cyanamid v Ethicon* are not to be treated or interpreted as statutes (*Lansing Linde Ltd v Kerr* [1991] 1 All ER 418). This notwithstanding, a serious issue to be tried comports two aspects; the factual or legal issue must be serious as to the issue itself and tinged with complexity or novelty; and, the issue to be determined must have serious consequences on the outcome. The first aspect excludes trivia and peripheral issues on matters of fact or law which can be easily resolved by the judge. The second aspect excludes granting or refusing interim relief based on matters that have little or no consequences on the outcome of the trial.

The triable issues in this case fail on both aspects. Starting with the last aspect first, whichever way the matter raised in the originating process resolves,

the tenant will be liable to pay huge sums of rent arrears for which the tenant cannot lawfully stop the eviction or distress for rent. It matters less to the ultimate actions of the landlord that the issues which Maranatha International Academy Ltd wants determined are answered in the applicant's favour. If the distress was done unlawfully or wrongly, the landlord can do it properly and lawfully immediately I refuse the interim injunction. My refusal to grant the injunction would be an exercise in futility if the landlord can distrain for rent after I have refused him. On the second aspect, all the matters raised in paragraphs 1, 2, 3 and 5 of the statement of the case have been canvassed in this Court in the case of *Joubertina Furnishers (Pty) Limited t/a Carnivals Furnishers v Lilongwe City Mall* and, in my judgment, need no repetition. Counsel for the Maranatha International Academy Ltd relies very strongly that the Malawi Supreme Court in *Gurmair Garments Manufacturing (EPZ) Ltd (In Liquidation)* (2006) Malawi Supreme Court Civil Appeal Case No 29 (unreported) said:

> *"In Malawi a landlord who claims that a tenant owes him arrears of rent must obtain a warrant of distress and a notice of distress for rent from the Sheriff of Malawi who also happens to be the Registrar of the High Court of Malawi ... The person levying distress for rent must possess the warrant and notice of distress."*

The applicant argues that the Malawi Supreme Court was laying a new precedent. If the Supreme Court was doing that, the decision is against the common law and various statutes applicable in Malawi on this area of law. The Sheriff of Malawi acts under the Sheriffs Act. In the Act the sheriff's functions relate to 'process' which, under section 2 of the Act, means 'a formal written authority issued by a court for the enforcement of a judgment and includes a warrant of possession and any other written warrant of arrest, commitment or imprisonment.' The Sherriff Act is clear on two things: the Sheriff of Malawi acts on formal authority 'for the enforcement of a judgment'; and the landlord's distress for rent is not included in the processes from courts that the Sheriff of Malawi must act on. In *Chakwantha v Prime Insurance Ltd* (2010) Civil Cause No 2195 (HC) (PR) (unreported) this Court cited this passage from *Lewin v The Queen*, 2011 DTC 1354 [at 1979], 2011 TCC 476, Bédard J., said

> *"The Latin maxim "***expressio unius est exclusio alterius***", also known as the principle of implied exclusion, states that where the legislator causes a*

*provision to apply to a number of categories but fails to include one that that could easily have been included, one may infer that the legislator intended to exclude that category from the application of the provision".*

The Sheriffs Act requires the Sheriff of Malawi to work on processes issued by the authority of the courts. The Sheriffs Act gives no power to the Sheriff of Malawi to issue any processes, including processes of distress for rent by landlords.

Moreover, there is no provision in the Sheriff Act for the Sheriff to issue a notice or any warrant, let alone a warrant for distress or a notice when the landlord is distraining for rent whatever is the basis of the Sheriff's actions in enforcing court processes issued by the court. The Sheriff of Malawi, therefore, cannot and should not issue a warrant of distress. Warrants of distress are specific court processes; distress for rent does not require a warrant of distress. The Supreme Court could not confer such a power. The only provision that covers distress for rent in the Sheriff Act is section 21, but that is for where the Sheriff of Malawi executes following a court process on land. This power is a statutory right in addition to the common law right. It allows, where the landlord has not had recourse to the common law right, the landlord just to write the sheriff a seizure claim, not a warrant of distress, and with such a written claim, the Sheriff of Malawi can distrain for rent. The Sheriff of Malawi issues nothing. Section 21 empowers the Sheriff, if there is execution on land, to distrain for rents owed to the landlord on such property where goods are being seized under a court process:

*"(1) The landlord of premises in which any property is seized may claim the rent of the premises in arrear at the date of the seizure, at any time within five days next following that date, or before the removal of the property, by delivering to the Sheriff making the seizure a claim in writing, signed by himself or his agent, stating—*

*(a) the amount of the rent claimed to be in arrear; and*

*(b) the period in respect of which the rent is due.*

*(2) Where such a claim is made, the Sheriff making the seizure shall in addition thereto distrain for the rent so claimed and the cost of the distress,*

*and shall not within five days next after the distress, sell any part of the property seized, unless—*

*(a) the property is of a perishable nature; or*

*(b) the person whose property has been seized so requests in writing.*

*(3) The Sheriff shall afterwards sell under the execution and distress such of the property as will satisfy—*

*(a) first, the costs of and incidental to the sale;*

*(b) next, the claim of the landlord not exceeding—*

*(i) in a case where the tenement is let by the week, four weeks' rent;*

*(ii) in a case where the tenement is let for any other term less than a year, the rent of two terms of payment;*

*(iii) in any other case, one year's rent; and*

*(c) lastly, the amount for which the warrant of execution issued.*

*(4) The fees of the court and Sheriff for keeping possession and sale under any such distress shall be the same as would have been payable if the distress had been an execution of the court, and no other fees shall be demanded or taken in respect thereof."*

Even on this very specific power, there is no requirement that the Sheriff of Malawi should issue a warrant of distress. All the landlord does is to write the sheriff. The Sheriff of Malawi issues no warrant or anything. The Sheriff of Malawi distrains for rent based on. More importantly, neither this section nor the Sheriffs Act as a whole deals with distress of rent by the landlord under the general powers to distrain for rent.

The Malawi Supreme Court of Appeal in *Gurmair Garments Manufacturing (EPZ) Ltd (In Liquidation)* was not altering the common law right of a landlord to

distress for rent. At common law a landlord could distrain for rent without recourse to the courts by the landlord distraining or empowering another. This right is traced in the decision of *Lyons v Elliot* (1876) 1 QBD 210, cited by Counsel for the applicant. Black's Law Dictionary, 6th Edition defines distress as "A common law right of a landlord to seize a tenant's goods and chattels in a nonjudicial proceeding to satisfy arrears of rent". There is an authoritative work by Andrew J M Steven, 'The Landlord's Hypothetic in Comparative Perspective', Electronic Journal of Comparative Law (http://www.ejcl.org/121/art121-24.pdf) discussing the historical and conceptual aspects of the law on distress and the hypothetic in common law and civil law jurisdictions, respectively, including South Africa where the author states:

> *"The English equivalent of the landlord's hypothec – distress for rent – apparently originated in the Anglo-Saxon self-help remedies of the ninth century. The earliest instances recorded of it being referred to expressly are somewhat later during the reign of King Canute.15 Distress has been described judicially as 'an archaic remedy'16 and has been said to be feudal.17 The law originally required the landlord to make a number of court appearances before he could use it.18 There were restrictions on the goods which could be distrained, for example, animals and equipment necessary for running a farm were only eligible if there was a lack of other goods. Most importantly, the goods could not be sold. The landlord merely had the right to retain possession of them as a compulsitor for the tenant to pay, rather like the modern possessory lien ... There were two prominent features of the later development of distress. First, the requirement for court involvement was eased. Distress effectively became a self help remedy.25 Secondly, a statute was passed in 1689 permitting the landlord to sell the distrained goods if the tenant did not make good the rent arrears. The remedy thus became more like its civilian security counterpart."*

The common law position has remained this way, that the landlord's right to distress belongs to the landlord and does not need any judicial interventions. The Supreme Court of Appeal in *Gurmair Garments Manufacturing (EPZ) Ltd (In Liquidation)* has neither explicitly nor impliedly changed the common law.

This common law position is entrenched in Statutes of general application in England and Wales before 1902 referred to in *Joubertina Furnishers (Pty) Ltd t/a Carnivals Furnishers v Lilongwe City Mall* some of which Counsel for the Petroda (Malawi) Ltd referred to. The Malawi Supreme Court never changed the common law. The Supreme Court could not repeal statutes that apply to Malawi on the law of distress. When distraining for rent under the common law power, the landlord is not acting under the Sheriff Act. The landlord is acting at common law and under the distress for rent legislation. *A fortiori* the Sheriff of Malawi, Undersheriff or Assistant Sheriff distressing for rent for a landlord is acting under the distress for rent legislation not the Sheriff Act. There is no prospect of success on this matter if the matter was to go on trial. The statutes are clear that a landlord can only notify the Sheriff of Malawi without a formal court process or such a process on the Sheriff's part.

The Sheriff of Malawi, distraining for rent by virtue of his office, not as bailiff, does not require the certificate under section 7 of the Law of Distress Amendment Act 1888. The office of Sheriff of Malawi is a permanent and continuous office and by virtue of section 3 (3) of the Sheriffs Act occupied by an officer of the High Court who does not need Courts certification to perform duties under the Distress for rent legislation or at the aegis of the landlord exercising the common law right. It is not necessary, though usual, that the landlord should give a sheriff or bailiff a written authority to levy (Halsbury's Statutes, 4th ed., volume 13, p. 581, footnotes).

In resolving the legal issues, I was mindful of what was said by this Court in *Mwapasa and Another v Stanbic Bank Limited and another* Misc Civ. Cause No. 110 of 2003, unreported:

> *"A court must at this stage avoid resolving complex legal questions appreciated through factual and legal issues only trial can afford and unravel. On the other hand, where the legal issue is clear and simple, the court should resolve it and refuse or allow the injunction."*

The detail in arguing the legal points was necessary. Ultimately, in substance, there are no serious legal issues raised on the sparse and agreed facts to warrant a trial on the basis of which I should accord the applicant the interim relief sought.

Counsel for the applicants wants this court to resolve two other issues on trial. The first one is whether the warrant of distress issued by Veritas Chambers on behalf of the defendant is valid in law. The letter is neither a warrant nor a distress. The letter is written to Maranatha International Academy Ltd, the tenant. It is not a warrant, assuming the landlord has to issue a warrant. The landlord does not have to issue a warrant. Veritas Chambers, therefore, never issued a warrant of distress; they never issued a distress for rent. The most that the letter is that it is a notice of eviction because the applicant owed arrears of rent for the periods covered and not covered by the judgment. There is no issue to be tried on this matter.

On the second aspect, Counsel wants the trial to determine whether the landlord can distrain for rent when there are proceedings on the very rent in other courts. The landlord has not distrained for rentals covered by the judgment in the Commercial Court the subject of an appeal to the Malawi Supreme Court. The Distress report filed by the applicant alone shows that the Sheriff of Malawi only distrained for rentals from 1st March 2013 to 29 August 2013. The distress in question does not cover rentals in the judgment of the Commercial Division that is subject of appeal to the Malawi Supreme Court of Appeal. There is no issue to be tried on this aspect either.

As was suggested in *Joubertina Furnishers (Pty) Limited t/a Carnivals Furnishers v Lilongwe City Mall* where the distress is unlawful, the landlord would be liable for trespass to the goods or conversion, if the goods or chattels are sold. The action would only inure in damages which the defendant is well capable of paying.

There is probably an issue, a legal one, on whether, the landlord can evict at the same time distrain for rent. There are three perspectives: the landlord can; the landlord cannot; and the landlord can only evict after the arrears are unsatisfied after the sale. The sequence of events from the applicant's own affidavit is: (a) the landlord successfully obtained a judgment on rentals the subject matter of the decision of the Commercial Division on which the applicant has appealed to the Supreme Court; (b) the landlord distrained for rent for the period after the judgment; (c) the tenant after all these steps decided to evict the tenant for nonpayment of rent. None of these steps were simultaneous, they were sequential.

The applicant's reasoning can only mean that a tenant should use premises rent free for the period when the courts are determining the issues. That cannot be the consequence of adjudication however tardy!

*Balance of Justice and Convenience*

*Preserving the status quo ante*

If I am mistaken in thinking that there are no serious issues to be tried, this court has to consider where the balance of justice and convenience would lie should I allow or refuse the injunction. This is because, on the correct reading of the principles on this area of law, the fact that there are triable issues does not mean that the injunction should be granted as a matter of course. This was not the intention of the House of Lords in American Cyanamid v Ethicon Ltd. Rather the principle is that if there are triable issues the court must consider whether it will be just or convenient to refuse or allow the injunction. One such consideration is whether preserving the *status quo* would meet justice or convenience for the parties. Conversely, the court will consider whether maintaining the status quo will ameliorate or prevent injustice or inconvenience (*Siskina (Cargo Owners) v Distos Compania Naviera SA, The Siskina* [1977] A.C. 210 and [1977]3 All E.R.803. at 256 and 824, per Lord Diplock).

*What is the status quo ante to be maintained?*

The first task is to determine what the *status quo ante* to maintain is (*Nanguwo v Tembenu and Another* (2013) Civil Cause No 451 (unreported); *Linje v Masamba* (2013) Civil Cause No 220 (HC) (PR) (unreported). The status quo, according to Maranatha International Academy Ltd would be where, pending determination of this case, Maranatha International Academy Ltd, continues on the premises and is paying no rent or is paying current rents at the rate which it thinks are payable and small bits and pieces of arrears for a extended periods of time. That status quo must be untenable.

*Is the status quo ante sought just?*

The related question is whether this status quo is a just. In my judgment, it is not. It leaves the landlord in an unjust and inconvenient position. It is almost *cartes blanche* for the tenant who is in huge arrears of rent to use the premises without paying rent for a commercial enterprise that, on the face of it, is unsustainable in the sumptuous premises that these are known to be. The landlord is not only losing the rent, the landlord is losing the gains from investing the rentals. I find no justice in thinking that the tenant should be given this leeway at the expense of the landlord.

*Relative strength of the party's cases*

In ascertaining balance of justice or convenience the court may have to consider the relative strengths of a party's case. Generally, this must be done when in a case there is nothing to separate between the parties on the inconvenience and injustice they might suffer, mindful that the comparison is based on affidavit evidence and where there is a clearly a case made out showing a very likely result for one case as against the other. It is concomitant with justice and convenience that where a judge, on clear and admitted facts, concludes one party's case is much stronger than the other to direct the interim relief accordingly (*Series 5 Software v Clarke* [1996] 1 All E.R. 853; Series 5 Software v Clarke [1996] I All E.R. 853; *Fellows &Sons v Fisher*, ibid). As earlier demonstrated, the landlord's case is much stronger than the applicant's case. The tenant has not just paid rent and the landlord, to recover rent, has distrained and, subsequently, wants to evict the tenant. Counsel for the applicant contends that the defendant cannot distrain for rent because the actual rents due have not been ascertained and are subject to appeal to the Malawi Supreme Court of Appeal. The High Court's determination in favour of the defendants, however, on the face of it, makes the defendant's case much stronger. Counsel for Petroda (Malawi) Ltd has shown that the Maranatha International Academy Ltd has been admitting to arrears indicative that Maranatha International Academy Ltd relied on the dollar value indicated in the written agreement.

*Commercial Considerations*

Granting or refusing the injunctions can turn on commercial considerations. These commercial considerations justify refusal of the injunction despite that refusing the injunction almost has the effect of concluding the applicant's action (*Alex Mulli t/a Miijo Contractors v Standard Bank Limited* (2013) Miscellaneous Civil Cause No 53 (unreported); *R.M. Foods Ltd v. Bovril Ltd* [1982] 1 W.L.R. 661; [1982] 1 All E.R. 673, CA, at 666 and 678, per Oliver L.J.). I do not think that it makes any commercial sense for allowing the tenant not to pay the rent due, let alone to allow the tenant to continue in business at the premises. The rentals due, even on the rate preferred by the applicant, are accumulating astronomically. The applicant's request to pay arrears piecemeal for extended periods is indicative of the difficulties that the tenant has in meeting his rental obligations to the landlord. It makes no business sense to allow the tenant to continue to rent the premises that are this expensive. The landlord is losing out on this huge investment.

*Denying or granting the injunction may finally dispose of the matter*

In rejecting the interim injunction, I am mindful that the action may finally dispose of the matter. For indeed, my rejection of the interim relief the landlord has to sell the distressed goods to recover the arrears. The tenant, therefore, continuation with the action would be unnecessary. That, however, can also be said if I allowed the injunction. The tenant would effectively continue to use the premises without paying the arrears of rent, unless of course, trial of the action is expedited. Where, therefore, an injunction is likely to dispose of the matter, the words of Lord Diplock in *N.W.L. Ltd v Woods* [1979] 1294, 1307, are instructive:

> *"Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the applicant would have succeed in establishing his right to injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other*".

Exception to *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396

Unless something really exceptional exists, the court would find it extremely difficult to order an interim injunction on a landlord who, to enforce payment, distrains for rent. The common law gives the landlord the right, without court action, to distrain for rent when the tenant defaults. Once the distress is proper, the tenant has no cause of action against the landlord to sustain an application for interlocutory relief. Granting interlocutory relief in such a case is impracticable. It is possible to argue that in such a case, we are applying the principles in *American Cyanamid Co v Ethicon Ltd* (*Cambridge Nutrition Limited v. British Broadcasting Corporation* [1990] 3 All E.R. 523 at 539 CA, per Ralph Gibson L.J., and *Lawrence David Limited v Ashton sub nomine Ashton v Lawrence David Ltd* [1991] All E.R. 385, 396). May be this is just an exception to *American Cyanamid Co v Ethicon Ltd* (see *Cayne v. Global Natural Resources Plc*. (1984) 1 All E.R. 225 at 234 and 238, CA, per Kerr and May L.JJ and *Cambridge Nutrition Limited V. British Broadcasting Corporation (*1990). At the end of the day, courts are supposed to do that which is just and fair, whether we are in the confines of the *American Cyanamid Co v Ethicon Ltd* or we are in the usual court business, doing justice in a particular case. I think that in this case, granting the injunction so that the landlord does not recover rentals from a tenant goes to the core of the right to distress which this court, after its existence cannot abridge, except by legislation. There has been a lot of legislation to protect the tenant in a dwelling house, for good reasons. As between commercial entities, such intrusion may be unnecessary. There might be no reason why one commercial entity should bear the loss of another commercial entity. It probably makes sense, but very little business sense.

I think that it is open to the applicant to apply for a speedy trial to alleviate the losses that may occur. I do not think that granting the injunction in this situation would be just. The court must avoid the situation where legal processes are multiplied or manufactured to forestall accrued rights.

I dismiss the application for an interim injunction with costs.

Made this 27th Day of November 2013

D.F. Mwaungulu,

JUDGE