

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 3041 OF 2006**

BETWEEN:

SIKU TRANSPORTPLAINTIFF

AND

CHIOSA MWITIYA.....DEDENDANT

CORAM: HONOURABLE JUSTICE M. L. KAMWAMBE

Mr Tandwe of Counsel for the Plaintiff

Mr Nanthuru of Counsel for the Defendant

Ben Lackson Official Interpreter

RULING

Kamwambe, J

This is plaintiff's application for the grant of a mandatory injunction for the defendant to remove his motor boat and other property from plaintiff's premises otherwise known as Plot No. 626 situated at Liwonde Township in Machinga District, and an interlocutory injunction restraining the defendant, his servants, agents or whosoever from bringing any other property onto the said plot which has been sold to the plaintiff.

The defendant was the owner of the said property which was sold to the plaintiff by Stanbic Bank in exercise of its powers of sale of the property on 20th October 2006 the defendant successfully obtained an injunction restraining Stanbic Bank from selling the property. Unfortunately by that date, probably due to not verifying facts on the ground, the property had already been sold. The plaintiff became the equitable owner of the premises since he has not yet been registered as proprietor. This is of course following the equitable principle that equity treats as done that which ought to be done. In fact the plaintiff took up possession. Whether he has legal title or not is therefore not an issue to this application.

In applications for injunctions the first guideline to consider is whether there is an arguable claim which the plaintiff seeks to protect. This claim should not be frivolous and vexatious. In mandatory injunctions especially it should be shown that there is an unusually strong case with a high probability of success. ***(See Leisure Dater vs Bell (1988) FSR 387)*** I have no problems in finding that the plaintiff has an unusually strong case against the defendant with a high probability of succeeding.

If I may point out in the outset that trespass is different from the tort of nuisance in that in the former you need not prove damage as in the latter. The former is not dependent on damage. Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction or both ***(Clerk and Liudsell on Tort Sixteenth Edition London Sweet & Maxwell 1989 pp 1307 – 1308)***.

It will be appropriate to address the nature of the affidavit of Arthur Nanthuru which in part goes as follows”

“4.2 Due to the tide, the boat now lies on the bank on Shire River several metres away from the water.

4.3 The only way the boat can be removed is when the tide reaches it and it is driven away.

4.4 It is impossible to do that now without breaking it up and therefore destroying it.

Now that the country has experienced lots of rains, if the court can take judicial notice of this fact, I would not be wrong to assume that enough tide has reached the 35 foot boat and that it can now be removed without any damage to it. I am saying this on the basis of the affidavit in opposition, otherwise I would not see any further good reason for the defendant opposing the injunction. The facts on the ground have now changed and the defendant should take advantage of the tides reaching the boat. In fact even without waiting for the outcome of this application the defendant should be expected to have removed the boat and other property from the premises. The issue whether or not the defendant's property on the plaintiff's land is impeding development works is in my view not relevant to this application. The plaintiff is simply entitled to peaceful and unimpeded enjoyment of his property. The defendant has and knows the solution and hence I now quote paragraph 6 of the said affidavit in opposition by Mr Nanthuru which says:-

“If the boat is removed without being driven away in water, it will be extremely damaged, resulting into massive loss to the defendant. There is hope that the rainy season will bring enough water for the boat to be driven away.”

This buttresses my point that the only plausible reason that the defendant can have is the low tide which can cause the boat to sustain damage. Now that indeed there have been enough rains what justification does he have to maintain the objection. He is expected to positively do the needful.

With due respect this is not a case one would support to preserve the status quo ante i.e. the continued stay of the defendant's boat on the premises. In fact Mr Nanthuru has said in his skeletal arguments at page 8 that all the defendant is asking is that he be allowed to remove the boat when the river water reaches it.

In view of what I have stated above I grant the plaintiff both reliefs of the mandatory injunction and interlocutory injunction as sought. I decline to grant the third relief sought that there be an inquiry as to damages following the grant of the above orders since the court has not been addressed on it so as to know its purpose.

Made in Chambers this 22nd March, 2007 in Blantyre.

M L Kamwambe

JUDGE