

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 1948 OF 2008**

**BETWEEN:**

VERONICA FRANCIS TAMBALA.....PLAINTIFF

- and -

MR B. S. MANGULAMA.....DEFENDANT

**CORAM: THE HON JUSTICE S. A. KALEMBERA**  
Mr Kataika of Counsel for the plaintiff  
Mr E. K. Kaphale of Counsel for the defendant  
Mr Manda, official interpreter  
Mrs L. Kasasi - typesetter

**RULING**

*Kalembera J,*

This is an application on **inter partes** summons for an injunction. The application is made under Order 29, rule 1 of the Rules of the Supreme Court (RSC). The application is supported by an affidavit sworn by the plaintiff. The plaintiff has further filed skeletal arguments in support of the application. The defendants have filed two affidavits in opposition sworn by the defendant and Mr Kaphale, counsel for the defendant respectively. The defendant has further filed skeletal arguments in opposition to this application.

The brief facts of this matter are such that the plaintiff is the widow of one, Mr Ambuje Francis Tambala (deceased). The deceased obtained a piece of land at Nancholi Township in the City of Blantyre in 1988. It is alleged that the defendant who owns an adjacent land has encroached on the plaintiff's land. The plaintiff through Originating Summons has brought this action against the defendant seeking the court's determination as follows:-

- a. A declaration that the defendant transferred ownership of a portion of land between his plot number 278/1 and the plaintiff's plot number 278/2.

- b. A declaration that the defendant is estopped from denying the plaintiff's ownership rights over the said piece of land.
- c. A declaration that the defendant's claim of ownership of the said portion of land is statute barred and that the plaintiff and his predecessor in title have acquired prescriptive rights over the said portion of land.
- d. An order of damages for trees and crops destroyed by the defendant on the said portion of land, general damages for loss of use of the said portion of land.
- e. An order for costs of this action.

The plaintiff also brought an **ex-parte** summons for an interlocutory injunction on 5<sup>th</sup> August 2008 where Potani J, directed that due to lack of urgency the application be made **inter partes**, hence this application.

It has been deponed and argued on behalf of the plaintiff, that being the widow of the deceased owner of the land in question she is entitled to bring this action on the deceased estate more or so that the deceased left a Will in which he purportedly bequeathed the said land and house on plot number 278/2 Nancholi to the plaintiff and Lonjezo Tambala her son.

The plaintiff further argue that the deceased in 1990 acquired additional portion of land from the defendant whose plot is adjacent to the deceased's plot Title Number 278/2 and that since 1990 the new boundary has been observed and respected by both parties and that the defendant even planted blue gum trees along the new boundary.

The plaintiff further avers that immediately after the demise of her husband the defendant started reclaiming the old boundaries thus repossessing the piece of land that he had transferred to the deceased. The plaintiff therefore prays to this court for an order of interlocutory injunction that the defendant either by himself or by whosoever is acting under him, should be restrained from developing or in any way interfering with a portion of land situate at Nancholi between plots Title Numbers 278/1 and 278/2 and further that a mandatory injunction be issued ordering the defendant to remove sand, bricks and any other stones that he has put on the said portion of land until the final determination of this matter or other further order of the court.

On the other hand the defendant's contention is that by a certificate of lease dated 19<sup>th</sup> September 1996, he was granted a lease of registered land by the Malawi Government over title number 278/1. The lease has been exhibited as Ex 'BSM1'. He has further averred and contended that his certificate of lease

shows that the area granted to him was 2.704 hectares and that he developed his piece of land and so too did the deceased develop his adjacent plot of land. It is his further contention that between 1995 and 2001 he was on diplomatic mission in Germany and Japan and that before he left there was no encroachment on his land. It was only later in 2006 that he noticed that the beacons demarcating the end of his plot that joins the plaintiff's plot were missing and upon inquiries from the Survey Office and the plaintiff's, he was informed by the Survey Office through a letter dated 2<sup>nd</sup> May 2006 that the plaintiff's deceased husband had caused an informal survey of the land to be done without his knowledge and consent and without updating the records at the Land's registry. All in all the defendant contends that at no point in time did he ever sell or agree to sell or part with any portion of his land, and that if anything the plaintiffs never exercised ownership rights over his piece of land with his knowledge and consent.

Mr Kalekeni Kaphale, counsel for the defendant has further averred in his affidavit in opposition to the interlocutory injunction that there was no formal re-survey of the land, no evidence of the purchase of the encroached land, no evidence of defendant's consent to the re-survey and the consent of the Commissioner of Lands, that the plaintiff has no title to the land, the plaintiff did not acquire any prescription title over the defendant land and finally that there is no serious question to be tried.

The issue for determination of the court at this stage is whether this is a proper case in which an interlocutory injunction and a mandatory injunction ought to be granted or not. The purpose of an interlocutory injunction has always been to preserve the status quo until the rights of the parties have been determined in an action. In the case of **Mangulama and Four Others vs. Dematt, Civil Cause No. 893 of 1996**, Justice Tambala as he then was had this to say: -

*“Applications for interlocutory injunction are not an occasion for demonstrating that the parties are clearly wrong or have no credible evidence....the purpose of and order of interim injunction is to preserve the **status quo** of the parties until their rights are determined.”*

The principles governing the grant or refusal of an injunction have always been those enunciated by Lord Diplock in the landmark case of **The American Cyanamid Company vs. Ethicon Limited** [1975] AC 393; [1975] 1 ALL ER 505. Firstly, the plaintiff must show that he has a good arguable claim to the right that he or she seeks to protect. Secondly, the court must not attempt to decide this claim on the affidavits, it is enough if the plaintiff shows that there is a serious question to be tried. Where the plaintiff has satisfied these tests, the grant or refusal or an injunction is a matter for the exercise of the courts discretion on a balance of convenience; and in deciding the question of the balance of convenience, the court must consider whether damages would be sufficient

remedy, if so an injunction ought not to be granted. However, whether the court is of the view that the plaintiff's case lacks merit or prospects of success at trial, it should not even go on to consider when the balance of convenience lies.

It must be noted from the outset that there is no dispute that the plaintiff is the widow of the late Mr Ambuje Tambala and that she is a beneficiary of the land in the will of the deceased titled plot no 278/2. She has brought this action therefore, in her capacity as the widow of the deceased and as beneficiary under the said will of the deceased. It has been strongly argued by the defendant that this court in deciding whether it ought to grant or refuse to grant the interim injunction prayed for, must **inter alia** take into consideration the contention that the plaintiff has no **locus standi** to commence this action.

Counsel for the plaintiff has submitted that on the basis of Sections 10, 7 and 4 of the Statute Law (Miscellaneous Provision) Act, the plaintiff being the widow of the deceased has the right and **locus standi** to commence these proceedings on behalf of the deceased estate. The said section 10(1) provides as follows:-

*“Subject to this section, on the death of any person after the commencement of this Act, all causes of action subsisting or vested in him shall survive against, or as the case may be for the benefit of his estate: Provided that this subsection shall not apply to cases of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claim for damages on the ground of adultery”.*

Section 7 provides as follows: -

*Where in any case, intended and provided for by this Part, there shall be no executor or administrator of the person deceased or if no action is brought by such executor or administrator within six months after the death of such deceased person, an action may be brought by and in the name or names of all or any of the person for whose benefit such action would have been brought, if it had been brought by and in the name of such executor so brought shall be for the benefit of the same person or persons as if were brought by and in the name of such executor or administrator”.*

Part I of the said Statute Law (miscellaneous Provisions) provides for instances where death has been occasioned through unlawful act or fatal accident. Section 4 and 7 being in Part I of the said Act relate to instances where death of the deceased has thus been occasioned as a result of a wrongful act or fatal accident. Whereas Section 10 which is in Part II of the said Act is concerned with effect of death on certain causes of action. These causes of

action in my considered view must have been subsisting against or vested in the deceased in order for such causes of action to survive. In the matter at hand, the plaintiff has averred in her affidavit in support that it was only after the demise of her husband that the defendant started reclaiming the land thus this purported cause of action arose. The said Section 10 of Statute Law (miscellaneous Provisions) Act does not therefore cover the cause of action, the subject of these proceedings.

Furthermore, the plaintiff has not demonstrated or has she claimed or alleged that her deceased husband's death was occasioned by any wrongful act for the plaintiff to rely on Section 4 and 7 of the Statute Law (Miscellaneous Provisions) Act. If that were the case the plaintiff would have indeed had the right to commence these proceedings (Ref. **Nangawa vs. Yanu Yanu Bus Company Ltd** [1997] 2 MLR 121).

To compound the issue, the plaintiff has failed to demonstrate that probate was granted to the deceased will exhibited as Ex 2VFT 3". It is indeed in compliance with section 37 of the Wills and Inheritance that probate of a will when granted established the will and evidences the title of the executor from the death of the testator . The plaintiff therefore jumped the gun, she ought to have had the other processes done in order to establish the will. The plaintiff has therefore failed to satisfy the principles as enunciated in the **American Cynamid Case** (supra). She has no **locus standi** or right to sue the defendant on her behalf and on behalf of the deceased estate, therefore has failed to sustain or satisfy the principles enunciated in **American Cynamid Case**. The plaintiff has therefore failed to satisfy the principles as enunciated in the **American Cynamid Case** (supra).

In the premises it would be a futile exercise, having found that the plaintiff has no **locus standi** to go further to look at the other considerations in granting or refusing an injunction.

I consequently dismiss the **inter partes** application for an interlocutory injunction on the ground that the plaintiff has no **locus standi** and therefore no arguable claim or right to protect.

**PRONOUNCED** in chambers this 22<sup>nd</sup> October 2008 at Blantyre.

S. A. Kalembera  
**JUDGE**