IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 437 OF 2015

BETWEEN:

BRIAN MCHAWI.....APPLICANT

AND

CENTRAL GOVERNMENT STORES.....1ST RESPONDNET

THE ATTORNEY GENERAL.....2ND RESPONDENT

CORAM: THE HON JUSTICE H.S.B. POTANI

Mr. Chisiza, Counsel for the Applicant

Mr. Kanchiputu, Court Clerk

RULING

By way of an *ex parte* application, on November 5, 2016, the applicant obtained an order of injunction against the respondents worded as follows:

The Respondent either by themselves, their agents or servants or howsoever be forthwith requested to unseal house No. CY/ST/16 (Chinyonga Township) and be restrained from evicting the applicant from the same.

Further it was stipulated in the order that the applicant should take out an *inter parties* application within 7 days from the date of the order and that the validity of the injunction shall only be extended on an *inter partes* hearing. The case record shows that it was only on January 7, 2016, way after the 7 days had expired when the applicant took out the *inter partes* application without seeking an order of the court for extension of time. What this means is that upon the expiry of the stipulated 7 days the, *ex parte* injunction order lapsed. One would suppose that the respondents should have filed a certificate of non-compliance as a formality. The court having issued the applicant's application albeit the late filing thereof, it appointed May 12, 2016, as the date of the hearing. Come the appointed day, there was no attendance on the apart of the applicant. The court was informed that there came counsel to represent the applicant but suddenly disappeared before the matter was called prompting the court to proceed to hear the respondent.

In essence the question the court has to consider is whether or not the injunction the applicant obtained *ex parte* should continue having force until the substantive determination of the applicant's claim against the respondents. This calls upon the court to consider the facts of the case in the light of the applicable law.

The grant or refusal of an injunction is a matter in the discretion of the court. The discretion has to be exercised on sound basis and to that end, there are principles and guidelines courts apply in considering whether to grant or refuse an application for interlocutory injunction as authoritatively enunciated in **American Cyanamid Co. v. Ethicon Ltd** [1975] A.C. 396; [1975] 2 W.L.R. 316. Broadly put, when an application is made for an interlocutory injunction the initial question that calls for consideration is whether the applicant has a good arguable claim to the right he seeks to protect with the aid of the injunction. If the answer to that question is in the

affirmative, then court must move on to consider whether damages be an adequate remedy for a party injured by the court's grant of or refusal of an injunction and if not where does the balance of convenience lie. The first is a threshold requirement which means if the answer is in the negative the application would collapse there and then as it would lack foundation. And having said that, it must be stated at this juncture that it is no part of the court's function at this stage of the matter to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. This is because the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete as is given on affidavit and has not been tested by oral cross-examination.

There are affidavits filed by the parties in relation to the matter under consideration. As cautioned earlier, the court at this stage must desist from deciding on the merits of the applicant's claim but only consider if the applicant has an arguable claim against the respondents. In considering whether the applicant has an arguable claim, it is noted that from the applicants own affidavit in support, as it emerges from paragraphs 8 and 9 thereof, despite several applications by the applicant to the respondents to purchase the house in issue, there was no response. What this means therefore, as rightly argued by counsel for the respondent is that there was no offer made to the applicant. That said, the court would be quick to observe that the manner in which the applicant has presented his case is that he attempts to rely on offers made to other people who at some point occupied the houses and also tenants in other houses belonging to the respondents. This is unattainable and cannot be a foundation for his claim. The applicant therefore has failed to show a good arguable claim and therefore his application has failed the threshold requirement. Even if it

had passed this requirement, the application would most likely have not succeeded as the case is one in which damages would easily be calculable, that is, the cost of buying a similar house and the applicant has not shown that the respondents would not be in a position to pay such damages. The end result is that the applicant's application has to fail and is accordingly dismissed consequent upon which the *ex parte* injunction is formally discharged.

The respondents are awarded costs of the application.

Made this day of May 31, 2016, at Blantyre in the Republic of Malawi.

H.S.B. POTANI
JUDGE