



JUDICIARY
IN THE HIGH COURT OF MALAWI PRINCIPAL
REGISTRY
CIVIL CAUSE NO. 101 OF 2016

BETWEEN:

PREMIER BUS SERVICES LTD APPLICANT

-AND-

NEDBANK MALAWI LIMITED RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Banda, of Counsel, for the Applicant

Messrs Mmeta and Kagundu, of Counsel, for the Respondent Ms. Annie Mpasu,
Court Clerk

RULING

Kenyatta Nyirenda, J

This is the Applicant's inter-partes summons to restore the order of interlocutory injunction granted to it on 10th March 2016 restraining the Defendant from repossessing and offering for sale the Plaintiff's Passenger Service Coaches being Motor Vehicle Registration Numbers NA 4917, NA5919, NA4818, NA4929 and NA 4925 pending the determination of the action herein or until further order of the Court [hereinafter referred to as the "injunction"].

The summons is supported by an affidavit sworn by the Managing Director of the Applicant, Mr. Steve Chitonya Mwanyongo [hereinafter referred to as the "Applicant's affidavit"]. For reasons which appear presently, it is necessary to reproduce the substantive part of the Applicant's affidavit in full:

- "2. *That the commenced action on the 10th March 2016 through Messrs Legalwide seeking declarations and interlocutory Order for Injunction declarations as follows:*
- (a) *A declaration that the Defendant's conduct in purporting to and repossessing the Plaintiff's Passenger Service Coaches being Motor*

Vehicle Registration Numbers: NA4917, NA4818, NA4929 and NA4925 is manifestly unfair and in bad faith;

- (b) A declaration that the Defendant 's conduct is offering /or sale, purporting to sell and advertising for sale the Plaintiff's Passenger Service vehicles under the contract herein is not in tandem with the spirit and intendment of the Consumer Protection and Competition and Fair Trading Act;*
 - (c) A declaration that the Defendants conduct is unreasonable when they very well know that the Plaintiff has to date substantially contributed a lot to the repayment of the loan and the only way the Plaintiff can satisfy the same through operating the said Buses;*
 - (d) An order of interlocutory injunction restraining the Defendant, either by itself, servants, agents or whosoever from repossessing the Buses or in any way interfering with the peaceful enjoyment of the same offering for sale purporting to sell and advertising for sale the Plaintiff's namely: NA4917, NA4818, NA4929 and NA4925 until the determination of this matter or until further order of the court;*
 - (e) Any further order that the Honourable Court may be deem reasonable in the circumstances.*
- 4. That the matter was called for hearing of the Originating Summons and continuation of the injunction on the 2011 day of April, 2016 where the court directed that submissions on the same be filed within fourteen (14) days.*
- 5. That however the Lawyers that used to act for the Plaintiff on the same Messrs Legalwide at the time of handover gave the indication that the submissions were duly filed and the Plaintiff had no reason to believe otherwise than that.*
- 6. That it therefore comes as a big surprise to realize that the action has been dismissed for failure to comply with directions and further that the interim order sought has been discharged.*
- 7. That the same leaves the Plaintiff with no right to be protected at all since the same is a life time investment.*
- 8. That the Plaintiff since obtaining the interim order for injunction has been making substantial deposits into the Defendant's account at an average of MK14,000,000. 00 per months. Exhibited hereto and marked "SCM1" are the bank statements showing the deposits.*
- 9. That further to making the said deposits the Plaintiff has been engaged in meaningful negotiations with the Defendant all pointing towards trying to find an amicable solution to the issue at hand. Exhibited hereto and marked "SCM2" is the correspondence from the Defendant confirming the negotiations.*

10. *That the Plaintiff has a genuine interest to protect as shown and has come to Court in good faith and still insists on the right to be heard by the court for a resolution of the court on the merits of the case.*
11. *That for that reason the Plaintiff prays that injunction that was granted herein be restored since the noncompliance with directions was not due to the Plaintiff fault and that if the injunction herein is not restored the Plaintiff stands to lose that which he seeks to protect in the main action since the said buses have been advertised for one sale in the local print media. Exhibited and marked "SCM3 "is one of the advertisements in the local print media."*

The Respondent is opposed to the summons and it filed an affidavit in opposition, sworn by Mr. Sullivan Kagundu, the Respondent's legal practitioner [Hereinafter referred to as the "Respondent's Affidavit"]. The relevant part of the Respondent's Affidavit reads as follows:

- "9. THAT the affidavit of Steve Chitonya discloses no cause why the Applicant's lawyers failed to file the said submissions with the Court if so minded.*
10. *That it is not disputed by the Applicant that the hearing of the Originating Summons and the discharge/ continuation of the injunction already took place and the restoration and perpetuation of the order of injunction is not only an outrageous abuse of the Court process but also unjust on the Respondent.*
11. *That since the matter was already dismissed because of the Applicant's noncompliance with the Court's directions and not the Respondent's wrong doing, it is proper and just that the order of injunction be varied to the effect that whosoever has possession of the buses at the time of this Application should surrender the same to the Court 's until the determination of this matter.*
12. *THAT the Applicant's application lacks merit and it is an abuse of court process and if the order is restored, it is the Applicant who stands to benefit from their own non-compliance as such this application must be dismissed.*
13. *THAT in the alternative if the court is of the view that the Order should be restored, it would be proper and just considering the period it that the interlocutory injunction has been in place to vary the order of injunction to the effect that the Applicant should surrender possession of the buses to the court until the determination of this matter"*

Counsel Banda submitted that the injunction was discharged due to the fault of the Applicant's previous lawyers. He thus contended that it would not be just to deprive the Applicant of its right to a fair hearing on account of the conduct of its previous lawyers.

The submissions by Counsel Mmeta followed very much the "arguments" set out in the Respondent's Affidavit. He contended that the Applicant's affidavit discloses no cause why the Applicant's previous lawyers failed to comply with the order of the Court. It was also his contention that restoration of the injunction would simply mean that the Applicant would benefit from its non-compliance with order of the Court.

I have carefully considered the submissions made by both Counsel. I will first discuss the contention by Counsel Banda that the Applicant must not be punished due to the conduct of its previous lawyers. A similar argument was unsuccessfully advanced in the case of **Kulinji Mafunga v. Litto Phiri t/a Eagle Contractors, HC/PR Civil Appeal Case No. 498 of 2012 (unreported)**. I find the following passage therein, at page 10, particularly apposite:

"Furthermore, and perhaps more importantly, a client and his or her legal practitioner have a very special principal and agent relationship. A lawyer acts, as an agent, on behalf of the client, with consequences that bind the client. I find the American case of Link v. Wabash Railroad Co 370 U.S. 626, 633-34 (1962) to be both instructive and illuminating. The case concerns a review by the United States Supreme Court of a District Court's sua sponte dismissal of diversity negligence case. Six years after the Appellant had filed the matter, the District Court scheduled a pre-trial conference and gave counsel two weeks' notice of the scheduled conference. On the day of conference, the Appellant's counsel called the Court to say that he would be unable to attend the conference, giving the impolitic reason that he was busy preparing some documents for the State Supreme Court. The attorney did not attend the conference, and the District Court dismissed the matter for failure to appear and prosecute the claim. In reviewing the District Court's dismissal, the Supreme Court made the following pertinent observation:

"There is certainly no merit to the contention that dismissal of the petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose his attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney'" - [Emphasis by underlining supplied]

I cannot agree more with the reasoning in **Link v. Wabash Railroad Co.**, supra. Our judicial system, as we know it, would simply collapse if Courts were to adopt,

as a matter of unqualified principle, the notion that a client (principal) can avoid the consequences of the acts or omissions of his freely appointed agent (lawyer).

I say "as a matter of unqualified principle" because it is not to be thought that it will necessarily be fatal in all circumstances where a party seeks to have a judgment set aside on the ground that it his or her lawyer's action, omission or conduct which led to the dismissal of a case. The legal principles pertaining to a particular legal question or exceptional facts obtaining in a particular case may make it unjust not to allow an application to restore an order entered as a result of the conduct of a party's lawyer.

In the case before me, it is commonplace that the main action was restored to the cause list. I am thus persuaded by the argument by Counsel Banda that in the absence of the injunction, the Applicant would lose that which he seeks to protect under the main action. In any case, it is always important, I believe, to bear in mind that the ultimate aim of the Court is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. I need hardly say that Courts loath the perdition of cases through technicalities.

In light of the foregoing, I am satisfied that this is a proper case where the injunction ought to be restored. I so order.

Having so ordered, I have to consider the alternative prayer by the Respondent to the effect that that the possession of the buses should be surrendered to the Court until determination of this case. In terms of the documents filed by the Respondent, the alternative prayer is premised on the fact that "During the whole period, the Applicant has been using the buses and need we say the said motor vehicles have been depreciating in value".

The Applicant is opposed to alternative prayer. Counsel Banda submitted that the balance of convenience tilts in favour of the Applicant keeping the buses in business for the benefit of both parties. He further submitted that if the buses are taken away from the Applicant, the Applicant might not be able to meet its obligations under the Hire Purchase Agreement that the parties entered into.

I have considered the submissions by both Counsel and I am inclined to agree with Counsel Banda that the balance of conveniences weighs very much in favour of the Applicant retaining possession of the buses pending determination of the main

case. It is common knowledge that, all things considered , a motor vehicle that is simply parked without being used is more likely to deteriorate much faster than a motor vehicle that is being put to use. In any case, I am not convinced that it makes business sense to keep the buses idle when there is evidence that the Applicant keeps on "making substantial deposits into the Dependant's account at an average of MK14,000,000. 00 per months". All in all, the Respondent's alternative prayer is also dismissed.

For the sake of completeness, the main case is set down for hearing in open court on 25th October 2016 at 2o'clock in the afternoon.

Pronounced in Chambers this 19th day of September 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE