

JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
CIVIL CAUSE NO. 115 OF 2021
(Before Honourable Justice Kenyatta Nyirenda)

BETWEEN

IQBAL HUSSEIN SHAIKH CLAIMANT

AND

JOE HUSSEIN MWASE DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Tepeka, Counsel for the Claimant
Mr. Chidothe, Counsel for the Defendant
Mr. Henry Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is my Ruling on an inter-partes application by the Claimant for an order of interlocutory injunction ordering the the Defendant to immediately suspend all construction works on, near and across the Claimant's land under title number Kabvunguti 25/65 situate at Kasungu pending the full and final determination of the substantive case herein.

The application is supported by the following statement, sworn by the Claimant:

- 3. *THAT I am the owner of a piece of land under title Number Kabvunguti 25/65 situated at Kasungu District. I hereby attach a copy of the Certificate of Lease for the said piece of land marked and exhibited as "IH1".*
- 4. *THAT the Defendant claims to own an adjacent piece of land close to my land named in paragraph 3 above.*
- 5. *THAT I purchased the above named land in 2016 from the late Aaron Gadama family who also handed over all the necessary documents about the land to me. I*

hereby attach and exhibit copies of the documents named herein marked and exhibited as "IH 2" and "IH 3".

6. **THAT** the deed document for the above named piece of land shows that the Gadama family acquired it in 1958 and were in peaceful possession of the same since that time.
7. **THAT** in 2016 upon the acquisition of this land under title Number **Kabvunguti 25/65** from the late Aaron Gadama family I constructed shops and other buildings for commercial purposes.
8. **THAT** I have been in quiet enjoyment of this piece of land until July, 2021 when the Defendant herein started constructing a warehouse from his so called adjacent land into my land named herein. As if this was not enough the Defendant also demolished part of the buildings I constructed claiming that portion of the land to be his, despite having no any evidence to support his claim. I herein attach and exhibit copies of photos showing the part where the Defendant has demolished part of my buildings marked and exhibited as "IH 4".
9. **THAT** I tried to talk to the Defendant to stop what he was doing as it was illegal and I even showed him all papers from Kasungu Town Planning Committee and from The Regional Commissioner for Physical Planning, Physical Maps and Grants Permission clearly showing the boundary of my plot but the Defendant has refused to listen and through threats and intimidation the Defendant is still continuing with the illegal constructions into my land named herein.
10. **THAT** seeing that the Defendant has refused to stop with the encroachment into my land, I wrote a letter to Kasungu Municipal Council to resolve the matter. I hereby attached a copy of the Letter I wrote to Kasungu Municipal Council to intervene in this matter marked and exhibited as "IH 5".
11. **THAT** following my letter, the Director of Planning & Development for Kasungu Municipal Council wrote the Defendant a letter about my complaint and they also requested the Defendant to attend a hearing to resolve the issue about the boundary. The Defendant was also asked to bring all the necessary documents to support his case. However, the Defendant refused to respond to calls by Kasungu Municipal Council. I hereby attach and exhibit a copy of the Letter from Kasungu Municipal Council addressed to the Defendant marked and exhibited as "IH 6".
12. **THAT** it should be mentioned here that in the Letter referred to in Paragraph 11 above Kasungu Municipal Council invited the Defendant to a hearing and the Defendant was also requested to bring any documents to support his claim but the Defendant without giving any reason has refused to do so.
13. **THAT**, despite all my efforts to peacefully resolve the matter with the Defendant, the Defendant has neglected to stop the encroachment by continuing to build structures from his alleged adjacent land extending into my land herein as well as demolishing old buildings on my land.

14. *THAT* therefore, unless stopped by an Order of this Honourable Court, the Defendant has through threats and intimidation vowed to continue with the encroachment and this is really affecting my peacefully enjoyment of my property and being used for commercial purposes, the economic damage is mounting and there is so much tension so that I am fearing for my own safety and the safety of my tenants.
15. *THAT* furthermore, since the Defendant have started constructing permanent structures extending into my land herein and therefore if this order is not granted by this Court by the time this matter is resolved in my favour it will be difficult and costly for the me to demolish the structures. Therefore, in the light of the foregoing it is only fair to both parties herein that an Order of an injunction is granted so that the Defendant should immediately suspend all construction works until the final determination of the matter herein.
16. *THAT* further, in the event of being found liable in trespass as a result of the encroachment, the Defendant would not be able to pay damages (damages would be an inadequate remedy) as it is not clear on how the Defendant would remedy the damage and loss I have suffered.
17. *THAT* I undertake to pay damages should it later transpire that the Order herein was erroneously granted."

Upon perusing the application, I granted the Claimant an order of interlocutory injunction subject to an *inter-partes* hearing.

The Defendant has filed with Court a sworn statement in opposition and the same states as follows:

3. *THAT* I have read the sworn statement in support of the application for an injunction herein and wish to respond as follows:
4. *THAT* I refer to paragraph 3 and 4 of sworn statement in support of the application for an injunction herein and wish to confirm that the Claimant and I have separate plots in Kasungu and we share boundary.
5. *THAT* my plot was allocated to me by Kasungu Town Assembly on 24th November, 2005 and was registered as Plot Number 131. Copies of Application for lease, Sketch plan and letter of consent from Kasungu Town Assembly are annexed hereto and marked as "JH1", "JH2", "JH3" respectively.
6. *THAT* at that time, my plot was created between two plots, namely, Plot No. 11 and 217. By then, Plot Number 11 was owned by the Gadama family.
7. *THAT* sometime in 2016, the claimant bought the plot Number 11 from the Gadama family. Immediately after purchasing the said plot, he applied for change of ownership.

8. **THAT** on 26th July, 2016, Plot Number 11 was registered in the name of the Claimant under title Number 25/65.
9. **THAT** I repeat paragraph 8 hereof and state that the letter from Kasungu Municipal Council marked as "IH 6" in the sworn statement of **IQBAL HUSSEIN SHEIKH** confirms that Plot 11 is also known as title Number 25/65.
10. **THAT** I refer to paragraphs 2, 3, 4, 5, 6 and 7 of the Sworn Statement in support of the application for an injunction herein and state that the area in dispute is part of plot 13-1 not plot Number 11 or 25/65 as alleged by the claimant.
11. **THAT** the Claimant is the one who has encroached on my plot by extending his warehouse and a tank beyond his boundary. Copies of the pictures of the extensions made by the Claimant are now shown to me and marked as "JH 4".
12. **THAT** I tried on several occasions to stop him from his encroachment but all my efforts proved futile.
13. **THAT** consequently, I decided to erect a wall on the boundary as a way of stopping him from continuing encroaching my land. I further removed the part of the structure that extended into my plot.
14. **THAT** when the claimant lodged a complaint before Kasungu District Assembly, I requested them to come and resolve the land dispute at plot but they rejected.
15. **THAT** I therefore felt that their request was in bad faith so I decided not to go there.
16. **THAT** I verily believe that the injunction herein if granted dispose the claim herein in that it will give the Claimant a leeway to continue intruding on my plot.
17. **THAT** furthermore, the Claimant is guilty of suppressing material facts in that he did not disclose to this court the fact that he is erecting his structures beyond his boundary and that before I decided to put up my structure, I requested him to stop extending into my plot.
18. **THAT** I run a wholesale business in Kasungu styled Future General Dealers and Transportation Business styled as Future Tours.
19. **THAT** it is therefore not true that I cannot be able to pay damages if the Claimants succeeds in this claim.
20. **THAT** it is therefore not true that I cannot be able to pay damages if the Claimants succeeds in this claim.

An interlocutory injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined. Order 10, r. 27, of the CPR provides that a court may grant an injunction by an interlocutory order when it appears to the court that (a) there is a serious question to be tried, (b) damages may not be an adequate remedy and (c) it shall be just to do so.

Having carefully read and considered the sworn statements and the submissions by Counsel, it is very clear to me that this case raises triable issues, with the obvious one being issue relating to the ownership of the land in dispute. Both parties claim to be the rightful proprietors of the land in dispute

On the question of damages, there is really little to say on the matter. It is trite that every piece of land is of particular and unique value to the owner and damages are an inadequate remedy and, in any case, damages would be difficult to assess: see **Julie F. Mulipa v. Mr. and Mrs. Bibiyani and Others unknown, Land Cause No. 105 of 2016 (unreported)**, wherein Tembo, J., while quoting **Nanguwo v. Tembenu and another, HC/PR Civil Cause No. 451 of 2013 (unreported)**, stated as follows:

"What this Court wishes to observe is that land is inherently unique and therefore damages are not an adequate remedy where the same is dealt with adversely. Therefore, the issue on adequacy of damages is ordinarily out of the question in relation to applications for injunction in relation to land."

As regards the balance of justice, sometimes it is best to grant an order of interlocutory injunction so as to maintain the status quo until the trial and at other times, it is best not to impose any restraint on the defendant: see the cases of **Hubbard v. Vosper [1972] 2 Q.B. 84** and **Henry Malista & Others v Village Headman Sakhama (Enock Mututu), Civil Cause no.66 of 2018**. See also **American Cyanamid case**.

Where the act complained of is still in preliminary stages, the preservation of the status quo favours the applicant. If the respondent has gone a long way, he or she claims the benefit of the preservation of the status quo. However, the court must desist from availing a benefit to a respondent who rushed his or her work with a view to defeating the applicant's attempt to stop him or her: see **Shepherd Holmes Ltd v. Sandham [1971] Ch. 340**.

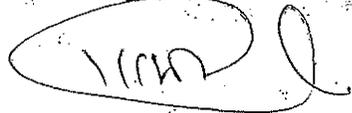
In the present case, the unchallenged evidence is that the Claimant has been in possession of the land in dispute since 2016 and it is only in the last five months that the Defendant entered into the land in dispute, demolished part of the buildings

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thereon and started taking preparatory steps to build his own structures thereon. In short, it is my finding that the complained acts are still in the preliminary stages. That being the case, the preservation of the status quo favours the Claimant. In the premises, the order of interlocutory injunction is granted, as prayed.

Pronounced in Chambers this 29th day of November 2021 at Lilongwe in the Republic of Malawi.



Kenyatta Nyirenda

JUDGE