

**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. ⁶⁶202 OF 2018**

BETWEEN

HENRY MALISITA AND 3 OTHERS CLAIMANTS

AND

**GROUP VILLAGE HEADMAN
SAKHAMA (ENOCK MUTUTU) DEFENDANT**

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mrs. Mauluka, of Counsel, for the Claimants
Mr. Chipembere, of Counsel, for the Defendant
Mrs. Doreen Nkangala, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is my ruling on an inter-partes application by the Claimants for an order of interlocutory injunction. The application is brought under Order 10, r.27, of the Courts (High Court) (Civil Procedure) Rules [hereinafter referred to as “CPR”].

The background to the application is as follows. On 24th May 2018, the Claimants commenced an action by a writ of summons against the Defendant. The Statement of Case provides as follows:

- “1. *The Claimants are farmers and residents of Sakhama Village, Traditional Authority Mwalama in Mulanje District and we are all farmers by profession.*
2. *All the Claimants have lived in Sakhama Village for over 10 years and have all acquired different pieces of land at different times as well as at different prices.*
3. *At the time the Claimants acquired the pieces of land, Group Village Headman Sakhama, who is now deceased oversaw the transactions.*
4. *The Claimants have worked on these plots of lands with their families from the times they bought the land until April 2017, when each of them received a court*

order that the new group village man Sakhama had obtained a judgement in the magistrate court against Amos Chikwatu to surrender the farm lands he was using and this court order extended to the four Claimants.

5. *The Claimants were surprised as we were not a party to the case.*
6. *Soon after the service the village headman took over ownership of the Claimants' farmlands.*
7. *The Claimants reported the matter to the police and the Traditional Authority of the area but they have not been assisted.*

WHEREFORE the Claimant prays for:

- i. A declaratory order that the Defendant wrongfully entered onto the lands of the Claimants*
- ii. A permanent Order of Injunction restraining the Defendant from entering and cultivating and burning bricks on the Claimant's lands, up until the hearing and determination of this matter or till further order of the court*
- iii. Damages for loss of use of land*
- iv. Damages for diminution in value of the land*
- v. Exemplary damages to be assessed*
- vi. Costs of this action."*

Almost contemporaneously with the issuance of the writ of summons, the Claimants filed an ex-parte application for an order of interlocutory injunction restraining the Defendant from entering, cultivating and burning bricks on the Claimant's farm lands pending the hearing and determination of this matter or until a further order of the court.

The ex-parte application was supported by a sworn statement by the 1st Claimant. In addition to the averments in the Statement of Case, the 1st Claimant's sworn statement:

- (a) contends that what the Defendant is doing is illegal and an abuse of his powers and the same is adversely affecting the Claimants' rights to farm and feed their families and do business; and
- (b) states that unless restrained by an Order of Injunction the Defendant will continue to interfere with the Claimants' constitutionally recognized right to economic activity and livelihood and the Defendant's action is likely to cause damage/losses to their land

which cannot be compensated by an award of damages as the Defendant is carrying on business of burning bricks on the land.

The ex-parte application came before me on 24th May 2018 and I ordered that it come by way of inter-partes hearing on 26th June 2018.

The main issue for determination of the court is whether the court should grant an order of interlocutory injunction, as was argued by the Plaintiff through her Counsel or dismiss the instant summons, as was argued by Counsel for the Defendants.

An interlocutory injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined: see Order 29, rule 1(2) of the Rules of Supreme Court, **Series 5 Software Ltd v. Clarke & Others [1996] 1 ALL ER 853** and **Ian Kanyuka v. Thom Chumia & Others, PR Civil Cause No. 58 of 2003**. In the latter case, Tembo J, as he then was, observed as follows:

“The usual purpose of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action. The injunction will almost always be negative in form, thus to restrain the defendant from doing some act. The principles to be applied in applications for injunction have been authoritatively explained by Lord Diplock in American Cyanamid Co. v. Ethicon Limited [1975] A.C. 396.

Very summarily, Lord Diplock laid down the following procedures as appropriate in principle:

1. Provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a *prima facie* case
2. The court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory injunction
3. As regards the balance of convenience, the court should first consider whether, if the plaintiff succeeds, he would be adequately compensated by damages for the loss sustained between the application and the trial, in which case no interlocutory injunction should normally be granted
4. If damages would not provide an adequate remedy the court should then consider whether if the plaintiff fails, the defendant would be adequately compensated under the plaintiff's undertaking in damages,

in which case there would be no reason upon this ground to refuse an interlocutory injunction

5. Then one goes to consider all other matters relevant to the balance of convenience, an important factor in the balance, should this otherwise be even, being preservation of the status quo
6. Finally, and apparently only when the balance still appears even, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence.

The submissions by the Claimants are couched in the following terms:

“5.1. Is there a serious question to be tried?”

5.1.1. *The defendant in this matter is interfering with the Claimants' right to do an economic activity, own property and earn livelihood in Malawi. There is need to protect the rights of the Claimants which without a restraint or intervention from the court will continue to be violated by the defendant.*

5.1.2. *We submit that there is indeed a serious question to be tried which necessitates the granting of an interlocutory injunction.*

5.2. Does the Claimant have an arguable claim to the right sought to be protected?

5.2.1 *The defendant action poses a great risk of negatively affecting the Claimants' right to an economic activity, own property and to earn livelihood as he has occupied their lands and is using them to his own benefit.*

5.2.2 *It is our submission that the Claimants have an arguable claim to the right they seek to protect.*

5.3 Would damages be an adequate remedy to the Applicant?

5.3.1 *The defendant action pose a great risk to the claimant's quality of land, on which he is burning bricks and Claimant's right to own the land as he is also trying to sell some of the pieces of land. It is imperative to mention that the damage that can be done to the land cannot quantified enough to make payment of damages adequate.*

5.3.2 *If the defendant is not restrained by an Order of injunction the Claimants' constitutional rights will be greatly affected negatively.*

5.3.3 *We therefore submit that in the circumstances of this case, damages would not adequately compensate the Claimants for the loss which is likely to be suffered if an injunction is not granted.*"

In response, the position of the Defendant is that there is no issue to be tried in that the purported sale of the land in question was void ab initio. This issue is fully dealt with in paragraph 3.2.3 of the Defendant's Skeleton Arguments which reads as follows:

"3.2.3.6 *In demonstrating that there is no triable issue we defer to **Section 25 of the Land Act** which provides as follows;*

"25. Vesting of customary land and mineral rights thereof in president.

All customary land is hereby declared to be the lawful and undoubted property of the people of Malawi and is vested in perpetuity in the President for the purposes of this Act

3.2.3.7 *The High Court in the case of **Mkoka v Banda and another** [1992] 15 MLR 278 (HC) Mbalame, J. on page 281 stated as follows on the sale of customary land;*

"Unlike freehold land, leasehold land or registered land, an occupant of customary land cannot have title to the land, as the same is vested in the President. At the most, such occupant has a licence or permission from the chief of the area to use the land. Whether or not this licence is transferable with or without the consent of the chief, is, in my judgment, not the subject of this ruling. Suffice to say that neither the original purported seller of the land, Mr. Mnamadzi, nor the plaintiff had any title in the land. It follows, therefore, that the plaintiff could transfer any title to the defendant..."

3.2.3.8 *The High Court had another occasion to interpret and pronounce on the meaning of **Section 25 of the Land Act** in the case the **Registered Trustees of the Church of God of Prophecy and Kondwani Mkisi Civil Cause Number 1210 of 2008 (unreported)**. Twea, J. as he then was stated;*

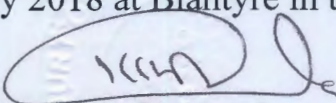
"Further, that the land the defendant is claiming is customary land. Such land is subject to Section 25 of the Land act. It belong to the people of Malawi and is vested in perpetuity in the President. No single individual has title to it and hence it cannot be alienated by sale"

3.2.3.9 *A closer look the summons and statement of case as read with the sworn statement of Henry Malista reveals that the Claimants' claim is founded on a purchase of land and there are exhibits of sale agreement to that effect marked **HMI**.*

- 3.2.3.10 *Paragraph 6 of the sworn statement states that the said pieces of land are at Sakhama Village, Traditional Authority Mabuka in Mulanje District.*
- 3.2.3.11 *It is noteworthy that the said land is customary land and by the holding in the cases of the **Registered Trustees of the Church of God of Prophecy and Kondwani Mkisi** (supra) and **Mkoka v Banda and another** (supra) is not subject for sale.*
- 3.2.3.12 *The sale was therefore void ab initio*
- 3.2.2.13 *The claimants cannot benefit from an illegal transaction and their action is founded on an illegality.*
- 3.2.3.14 *In the premises, there is no issue to be tried.”*

Having considered the evidence and the legal arguments advanced by Counsel, I deem it prudent to address what in my view constitutes the threshold question, namely, whether or not the application for an interlocutory injunction can be granted when the acts complained of are premised on a court order. According to the Claimants' own evidence, each of them received a court order to the effect that the judgement of the First Grade Magistrate Court sitting at Mulanje extended to the Claimants. To my mind, the court order has to continue to apply until, if at all, a contrary decision is made in the substantive action. I, therefore, dismiss the application for an interlocutory injunction.

Pronounced in Chambers this 4th July 2018 at Blantyre in the Republic of Malawi.


Kenyatta Nyirenda
JUDGE