

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CASE NO. 142 OF 2004**

BETWEEN

E. BANDA PLAINTIFF

VS

F. BANDA DEFENDANT

CORAM: Hon Justice Chombo

Nankhuni	:	Counsel for Defendant
Plaintiff	:	Unrepresented
Msiska	:	Court official

RULING

I have before me an application for an order to vacate an injunction granted to the applicant on 27th February 2004 restraining the Defendant by himself, his servants or agents from occupying or continuing to occupy or to trespass on property plot Title Number Bwaila 21/233 in Chilinde in the city of Lilongwe.

The plaintiff's legal representatives, Legal Aid were duly served with the summons for today's proceedings. They did not come to court nor gave reasons for their absence. The application was heard in their absence.

The Application was supported by an affidavit. It was the contention of the Defendant that the Plaintiff obtained her order for an injunction by suppression of material facts.

Evidence was given, supported by documentary evidence, that the plaintiff was not maintaining and paying school fees for the two children but only one.

Counsel also argued that according to Order 29 rule 1(3) the injunction obtained by the Plaintiff was irregular in that there was no originating process and therefore the injunction was irregularly obtained and the proceedings be dismissed on these grounds.

It is true, and regrettably so, that the substantive action was not filed with the court when the matter first came to court and that her application for an interlocutory injunction was granted that notwithstanding. The plaintiff should have been advised accordingly about the implications of such a pertinent omission of the process. The plaintiff was not represented when the matter first come to court. The plaintiff is now represented by Legal Aid and she should have been advised correctly and the anomaly corrected. This has not been done, nor did the lawyers come to court; despite being served; this is regrettable.

The marriage of the Plaintiff and Defendant was dissolved in Blantyre at the Soche Magistrate's Court. Unfortunately a copy of the order made by the lower court has not been exhibited for benefit of this court; and yet the same has been referred to in the affidavit relied upon by the parties. The affidavit of the plaintiff actually alluded to some of the things that are said to be contained in the said order which the Defendant now disputes.

The plaintiff got her injunction on 27th February 2004. The main thrust of the injunction was to restrain the Defendant, himself his servants or agents from occupying or continuing to occupy or trespass on property on Title Deed No. 21/233 in the city of Lilongwe, which property, according to the Plaintiff's affidavit before **Chinangwa, J** is part of the matrimonial property in issue and source of income. She deponed that the said property was, by some mutual agreement or arrangement, left to her to administer by the Defendant. The plaintiff did not claim ownership of the said house but only alluded that as part of the matrimonial property she was looking for her own share of the same.

The Defendant has supported his affidavit with documentary evidence that he is the sole owner of the said house and that he is

servicing the loan with New Building Society single handedly and therefore the plaintiff cannot or should not restrain him from dealing with his own property as he wishes. This is evidence exhibited and marked as **GNN1** and **GNN2**. He also submitted proof of the fact that he is paying school fees for one of the children who stays with him. These documents are exhibited and marked as **GNN3** and **GNN6**; thus disputing the plaintiff's claim that she is looking after and paying school fees for the two children.

I have already lamented the decision by the parties not to attach a copy of the order of the lower court; the same would have assisted me to look at what the lower court said about the matrimonial property and how the same should be dealt with. It is true that the house in question is registered and the loan is being serviced by the Defendant, but the same could be part of the matrimonial property that is or will be subject of a distribution order. Although that fact has not been the main point of argument here and it is not known what the court below said about the matter. If it is, which I would want to presume is the reason why the plaintiff wants to protect the property, then it will only be right and proper that no one party deals with the property in such a way that it would permanently deprive the other of its benefit. I also, however, take into account the interests of the Defendant, that he is the registered owner of the said house and that contrary to what the plaintiff indicated, he is actually responsible for one of the two children of the marriage. These facts were not disclosed to court in the plaintiff's application.

As correctly observed by the Defendant's counsel an order for an injunction is only an interim remedy and not a permanent one. The plaintiff should have applied to court for proceedings to determine the rights of the parties. I would be a bit cautious in this respect about what order to make. It has happened in many occasions that in trying to cure one wrong you end up causing unnecessary complications. I therefore, having said all that has been said, order that instead of granting the Defendant's prayer for an order to discharge the injunction, order that the Defendant commence proceedings to determine the rights of the parties. Such proceedings to commence not later than 30 days from the date of this order.

Made Chambers in this 20th July 2004.

E.J. CHOMBO
JUDGE