

**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY**

**CIVIL CAUSE NO. 803 OF 2009**

**BETWEEN**

**IBRAHIM MAXWELL CHANDE ..... PETITIONER**

**AND**

**VIJAY BHUSHAN MITTAL ..... RESPONDENT**

**CORAM : HON. JUSTICE MZIKAMANDA**  
: Salima, Counsel for the Applicant  
: Thengolose, Counsel for the Respondent  
: Mrs. Munyenyembe – Court Interpreter

**ORDER**

**MZIKAMANDA, J.**

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This is an application for an injunction restraining the respondents from evicting the occupants of property known as Bwaila 8/192 through a warrant of distress or otherwise. The application is made under Order 29 of RSC. It is opposed.

The affidavit in support shows that the applicant is one of the administrators of the estate of one Maxwell Yasin Chande (deceased) who owned property Bwaila 8/192 in the City of Lilongwe. Indefund Limited held a charge in respect of the said property for a loan advanced to the said Maxwell Yasin Chande. Indefund Limited then purported to exercise its power of sale over the property and recover vacant possession thereof on alleged default by the said Maxwell Yasin Chande and the matter was before the High Court Principal Registry under Civil Cause No. 2198 of 2003. The matter went to the Malawi Supreme Court of Appeal under Civil Cause No. 11 of 2007 wherein the applicant is the appellant. The appeal in the Malawi Supreme Court of Appeal was heard on 19<sup>th</sup> July 2009 and by 6<sup>th</sup> November, 2009 Court's judgment was still being awaited.

Indeed the same was still being awaited even by 1<sup>st</sup> December, 2009 when the matter was argued before me. Some of the main orders being sought on the appeal are an order setting aside the order of possession of the property and an Order rescinding the sale of the said property. The respondent has nonetheless caused issuance of a warrant of distress on the said properties and some tenants therein have already been evicted despite that the tenants have been paying their rentals. Should the appeal succeed, the same will be rendered nugatory if the respondent is not restrained from evicting the tenants and the applicant will have lost a lot in terms of rentals. The affidavit in opposition shows that there is no proof to show that the applicant is the administrator of the estate as alleged. The High Court Principal Registry having ruled in Civil Cause No. 2198 of 2003 in favour of Indefund Limited and having ordered the applicant to vacate the

premises in issue there is nothing to stop the respondent from realizing possession of the property in issue. The applicant never obtained an order of Stay against the respondent, pending the appeal to the Malawi Supreme Court of Appeal. The respondent and Indefund Limited did obtain an order of injunction against the applicant, restraining him from trespassing on the property in issue. That order still stands and applicant has chosen not to comply with it. Indefund Limited paid K491,503.07 city rates and sold the respondent the property for which he was duly registered as proprietor. A notice of change of ownership was duly made to all existing tenants on the property. Despite the notice, the tenants have chosen not to pay their rentals to the respondent and continue to pay to the applicant. Thus the applicant appears before this court with unclean hands and the respondent prays for the dismissal of the summons with costs.

There were arguments by both counsel which followed the affidavits, I will take them into account.

I have examined the application including the affidavits and the other documents. What is clear is that this is not the first time the applicant and the respondent have been to court on the same matter. When they first were in the High Court Principal Registry the respondents were the successful party. It is also clear that the applicant was not satisfied with the High Court Ruling and he appealed to the Malawi Supreme Court of Appeal. The appeal was argued in the Malawi Supreme Court on 19<sup>th</sup> July 2009 and the Court's judgment is still being awaited.

It is also clear that the applicant did not apply for an Order of Stay of the High Court ruling pending appeal. An appeal does not operate as an automatic stay of execution of judgment.

Then of course the respondent obtained an injunction against the applicant in December 1998 restraining the applicant from trespassing on the property in question. That order of injunction subsists to date. Yet the applicant has been collecting rentals in respect of the property.

To my mind this was a proper case where the applicant should have applied for an order of Stay of the High Court Principal Registry ruling pending the appeal to the Malawi Supreme Court of Appeal. He did not. Then there is the order of injunction against him obtained by the respondent. He does not seem to have ever applied to have that order dissolved or vacated. Yet he continues to reap benefits from the property. That appears to be going against the order of injunction against him. I can understand why counsel for the respondent argued that the applicant has come to equity with unclean hands. Equity does not assist those who come to it with dirty hands. The relief the applicant seeks here of an injunction is an equitable relief granted at the discretion of the court.

Yes, there are arguable issues but these issues are already in court. I have considered whether damages would not be adequate remedy on the application by the applicant. He complains about losing rentals.

Those are calculable. Any other loss that the applicant may suffer can be compensated by damages.

In the light of all the above I am inclined to exercise my discretion against granting of the injunction. The balance of convenience tilts against my granting this applicant. The application is refused. The respondent gets the costs.

MADE in Chambers this 5<sup>th</sup> day of March, 2010 at 8.30 am.

R.R. Mzikamanda

**J U D G E**