JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 8 OF 2011

BETWEEN:

THE STATE
-AND –
THE CHIEF IMMIGRATION OFFICER.....RESPONDENT

- AND -

EX PARTE: DOLAH MIAH.....1ST APPLICANT
MUHAMMAD HOSSAN.....2ND APPLICANT
NURAZZMAN.....3RD APPLICANT
RAHAT .....4TH APPLICANT
SELIM REZA.....5TH APPLICANT
MOHI UDDIN.....6TH APPLICANT
SHUVA AHMAD.....7TH APPLICANT
MUHAMMED MAMUM.....8TH APPLICANT

CORAM: THE HONOURABLE MR JUSTICE J. S. MANYUNGWA
Mr Chipeta, of Counsel, for the Applicants
Miss Mapemba, Senior State Advocate, for the Respondent
Mrs N. Nyirenda – Official Interpreter

RULING

Manyungwa, J

INTRODUCTION:

This is the applicants' application for continuation of interim orders which were obtained by the applicants ex – parte on 2nd March, 2011. The application is made pursuant to order 53 and order 29 rule 1 of the Rules of the Supreme Court, 1999[1], and is supported by an affidavit sworn by Mr

[1] Supreme Court Practice, 1999 Edition

Michael Goba Chipeta, of Counsel, on behalf of the eight applicants. Counsel also filed skeleton arguments to buttress the applicants' case. The summons for continuation of interim orders are opposed by the respondent and to that extent there is an affidavit in opposition sworn by Mr John Kachingwe an immigration officer and there are also skeleton arguments filed on behalf of the respondents.

We should hasten to mention that the applicants on 2nd March, 2011 applied and were granted leave to move for judicial review, against the decision made by the respondent in refusing the applicants' entry into Malawi, and/or transit visas, to the applicants. Amongst the interim reliefs that the applicants sought at the time of obtaining leave to move for judicial review, were a stay of the respondent's decision, and also an interim order of ex – parte injunction restraining the respondent from implementing its decision and continued detention of the applicants and/or deporting the applicants before the conclusion of the main action herein. The said interim orders were granted subject to an inter – orates hearing which was ordered to come within 5 days next from the 2nd day of March, 2011, and the same was heard on 8th March, 2011 hence, this ruling.

The eight applicants are Bangladesh nationals allegedly en – route to Mozambique while the respondent is the Chief Immigration Officer, of the Department of Immigration, in the Ministry of Home Affairs. At the hearing of the inter – partes summons the applicants were represented by Mr Michael Goba Chipeta, of Counsel while the respondent was represented by Dame Mapemba, Senior State Advocate.

THE APPLICANTS' CASE

In his affidavit in support of the summons which was also relied on when the applicants obtained leave to move for judicial review, Mr Michael Goba Chipeta, a legal practitioner in the firm of Messrs Ralph & Arnold Associates deposed that the eight applicants are Bangladeshi nationals on their tour to Mozambique and that the part of Mozambique the applicants wanted to visit being close to the boarder in Mulanje. On Friday 25th February, 2011, the applicants arrived in Malawi on the footing that they would apply for a Malawian Transit Visa as well make arrangements for the Mozambican Visa there being no High Commission in Bangladesh, upon arrival in Malawi. The deponent further states that upon arrival at Chileka Airport the applicants were detained and refused entry into Malawi and/or transit visas, without justifiable reasons, by the respondent and that at the time of the hearing of the leave to move for judicial review the

applicants were still in such detention waiting for deportation on the following day, the 3rd of February, 2011. The deponent contended further that by virtue of the foregoing the applicants had suffered damage and as such they longed for the court to review the respondent's decision and that as such this was a matter of extreme urgency which meant that unless the respondent was restrained by an order of this court, the respondent would have the applicants deported before the main action herein was concluded.

Wherefore the deponent prayed for the continuation of the interim orders which the applicants had obtained ex – parte on the 2nd of March, 2011.

THE RESPONDENT'S CASE

As we earlier on indicated, the respondent opposes the applicants' summons herein and there is an affidavit in opposition sworn by Mr John Kachingwe, an Immigration Officer of the Immigration Department who deposed that the eight applicants, who are Bangladesh nationals are alleged to have been travelling to Mozambique although they failed to state the same when they were asked at the airport even in the presence of an interpreter. The deponent also states that the applicants also failed to state the same i.e. their destination and reason for travel on the entry card as required by law, as is evident from exhibit **'EXR1'.**

The deponent further stated that the applicants do not understand any of the prescribed languages as is required by law and that the only language they could speak was Bangladesh which, in any case, is not one of the prescribed languages under the law. Furthermore the deponent contended that the applicants did not at any point mention that they were travelling to Mozambique even when there was present an interpreter during the time they were being interviewed and that this issue was only mentioned the hearing of these proceedings. The deponent further contends that on leaving their country all the applicants indicated that they were going to Tanzania, but surprisingly the flight that took them to Malawi was originating from Kenya via Tanzania as is evident from exhibit **'EXB2'.** This was also the information available in their passports and air tickets. The deponent contends that it was evident from the applicants' passports that their last destination was Tanzania and further that they all have return tickets for the same, and that upon arrival in Tanzania therefore and before proceeding to Malawi, the applicants could have gotten approval from the Malawi Embassy in Dar – Es – Salaam.

It is therefore contended by the deponent on behalf of the respondent that if indeed the applicants were travelling to Mozambique they could have connected directly from Tanzania without having to pass through or pass – by Malawi. The deponent therefore states that the deponent's destination is or was therefore vague and further that even if it was true that they were going to Mozambique, the applicants had no documents to substantiate the said claim i.e. entry visa to Mozambique or a return air ticket from Mozambique as is clearly evident from exhibit **'R3'.** The deponent furthermore states that Bangladeshis do not require a visa in order for them to enter Malawi either when transiting or merely visiting, however they require an approval letter from the Chief Immigration Officer, which the applicants did not have. The deponent further states that the said approval letter from the Chief Immigration Officer is issued to an intended traveller well in advance before entry into Malawi is sought. The deponent therefore contends that without proof that the applicants were indeed going to Mozambique, it was virtually impossible for them to be allowed entry into the country without proof of last destination. The deponent moreover states that the applicants were not detained to be deported but rather that they were so detained due to the fact that they were denied entry and were to be given back to their carrier to fly them back after refusal of entry into the country.

The deponent further contendes that the respondent suspects that the applicants wanted to enter Malawi through the back door by pretending that they were only transiting through Malawi to Mozambique. The deponent therefore prays on behalf of the respondent that the interim order of injunction should not be continued on account of the foregoing reasons. Alternatively the deponent prays that if this court deems fit, then the court should order that the applicants be escorted to the Mozambican boarder by Immigration officials so that they should not disappear within Malawi.

ISSUE(S) FOR DETERMINATION

The main issue(s) for the determination of the court are whether or not in the circumstances of the case the interim orders that were granted to the applicants ex – parte on the 2nd March, 2011 should be continued as was argued by the applicants and their legal practitioners or whether the said interim orders should be vacated or discharged as was argued by the respondent and their legal practitioners.

THE LAW

According to Order 29 rule 1 of the Rules of Supreme Court, it is provided that:

Order 29 r 1

(1) "An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of a cause or matter, whether or not a claim for the injunction was included in the party's writ, Originating Summons, counter – claim or third party notice, as the case may be.

(2) Where the case is one of urgency such application may be made ex – parte on affidavit but except as aforesaid, such application must be made by motion or summons".

Further, it is provided under Order 53 at 53/14/49 that an interlocutory injunction can be obtained in judicial review proceedings.

> *"An interlocutory injunction can be obtained in judicial review proceedings pending the determination of the substantive judicial application, or if the urgency of the case justifies it, pending the hearing of the leave application. The approach to applications for interlocutory injunctions in judicial review proceedings is similar to that adopted in the case of applications under Order 29 or an interlocutory injunction in an ordinary action. See* ***R V Kensington and Chelsea Royal London Borough council ex – p Hammell***[1]***.***

The law as regards interlocutory injunctions is, in our view, very clear. 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. See also Order 29 rule 2 of the Rules of the Supreme Court. As was stated by Tambala J, in the case of ***Mangulama and Four Others V Dematt***[2]***.***

> *"Applications for interlocutory injunctions are not occasions for demonstrating that the parties are clearly wrong or have no credible evidence ...The usual purpose of an order of interim injunction is to preserve the* ***status quo*** *of the parties until their rights have been determined".*

It is now well settled that the principles governing the grant or refusal of an interlocutory injunction are those that were enunciated by Lord Diplock in what has now become a landmark case on interlocutory injunctions namely

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[1] ***R V Kensington and Chelsea Royal London Borough Council ex p Hammell*** [1989]QB 518; [1989] 1 AllER 1202

[2] ***Mangulama & Four Others V Dematt*** Civil Cause No. 893 of 1999

***The American Cynamide Company V Ethicon Ltd*[1].** The first principle is that the plaintiff must show that he or she has a good arguable claim to the right he or she seeks to protect. Secondly, the court must not at the interlocutory stage, attempt to decide the disputed issues of fact on the affidavits before it, it is enough if the plaintiff shows that there is a serious question to be tried. Thirdly, if the plaintiff satisfies these tests, the grant or refusal of an injunction is for the exercise of the court's discretion on a balance of convenience. In deciding where the balance of convenience lies, the court must consider whether damages are a sufficient remedy; if so an injunction ought not be granted.

In the case of ***Candlex Limited V Phiri***[2] it was stated:

> *"It is accepted that the procedure relating to the grant or refusal of an interlocutory and the tests to be applied are generally those laid down by Lord Diplock in American* ***Cynamide V Ethicon Limited*** *[supra]. It is important to recognise these principles as guidelines which are not cast in stone although variations from them are limited. Put simply, the guidelines require that initially the applicant must show that there is a serious question to be tried. If the answer is yes, then the grant or refusal of an injunction will be at the discretion of the court. In exercising its discretion the court must consider whether damages would be an adequate remedy for a party injured by the court's grant or refusal to grant an injunction. If damages are not an adequate remedy or the losing party would not be able to pay them, then the court must consider where the balance of convenience lies".*

And in the case of ***Ian Kanyuka suing on his own behalf and on behalf of all National Executive Members of the National Democratic Alliance (NDA) V Chiumia***[3], Tembo, J as he then was said:

> *"Order 29 of the Rules of the Supreme Court makes provision for general principles respecting the grant or refusal of an application for interlocutory injunction. The usual purpose of an interlocutory injunction is to preserve the* ***status quo*** *until the rights of the parties have been determined in an action. The Order is negative in form, thus to restrain the defendant from doing some act. The*

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[1] *The American Cynamide Company V Ethicon Limited* [1975] AC 393
[2] *Candlex Limited V Phiri* Civil Cause Number 713 of 2000
[3] *Ian Kanyuka suing on his own behalf and on behalf of ll National Executive Members of the National Democratic Alliance (NDA) V Chiumia & Others* Civil Cause Number 58 of 2005

principles to be applied in application for interlocutory injunctions have been authoritatively explained by Lord Diplock in ***American Cynamide V Ethicon Limited*** *[supra]. The plaintiff must establish that he has a good arguable claim to the right he seeks to protect. The court must not attempt to decide the claim on affidavits; it is enough if the plaintiff shows that there is a serious question to be tried. If the plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on a balance of convenience. Thus, the court ought to consider whether damages would be a sufficient remedy. If so an injunction ought not be granted. Damages may not be a sufficient remedy if the wrong doer is unlikely to be able to pay them. Besides, damages may not be a sufficient remedy if the wrong in question, is irreparable or outside the scope of pecuniary compensation or if damages would be difficult to assess. It will in general be material for the court to consider whether more harm will be done by granting or refusing an injunction. In particular it will usually be wiser to delay a new activity rather than risk one that is already established".*

The question therefore as to whether the applicants herein have demonstrated that they have a good arguable claim to the right that they seek to protect should be answered, we think, in the negative. This is simply because contrary to the requirement of the law, the applicants when asked as to their destination upon landing at Kamuzu International Airport, failed to state on the entry card their destination and reason for travel. This was so even when an Interpreter was called to assist, the applicants failed to state their destination, let alone inform or tell the Immigration officials that they were travelling or intended to travel to Mozambique, yet the law requires that before one is allowed entry they must state their destination and reason for travel. Furthermore the applicants only speak Bangladesh, which is not one of the prescribed languages. Moreover, it would appear from a close reading of exhibit **'Exh. 2'** that upon leaving their country of Bangladesh, all the applicants indicated that they were travelling to Tanzania and yet surprisingly the flight that took into Malawi was coming from Kenya and it went via Tanzania. This fact is also confirmed on the applicants' tickets and passports, that their destination was Tanzania, not even Mozambique. Even Photostat copies of the applicants boarding passes on Flight QM 301, and Air Malawi Flight flying from Kenya to Malawi via Dar – Es – Salaam, showed the same and thus according to the tickets of the applicants was Dar – Es – Salaam supposed to be the applicants' last destination, according to the information contained in their passports but surprisingly, the

applicants proceeded to Malawi and alleged that they were proceeding to Mozambique, despite there being a direct flight from Dar – Es – Salaam to Mozambique. It is even more intriguing that the issue of the applicants wanting to pass through Malawi en – route to Mozambique came from the affidavit sworn by counsel and not the applicants themselves, and even if it were so, the respondent contended, quite rightly so, we think, that the applicants could have obtained a Letter of Approval from the Malawi Embassy in Dar – Es – Salaam.

Furthermore, if one is not a citizen of a country the position is that they need a return air ticket. The applicants were therefore denied entry, and contrary to what they asserted in their affidavits the applicants, were not being deported but denied entry, As matters stand, therefore we thus agree with Counsel for the respondent, that the applicants suppressed material facts, and have thus failed to continue the court or show that they have a good arguable claim. Moreover, the applicants were given reasons as to why entry was being denied.

CONCLUSION

In these circumstances and by reason of the foregoing we do not see enough reasons for continuing the ex – parte order of injunction that was granted to the applicants herein. We are thus compelled to discharge the ex – parte order of injunction herein.

Similarly, on the same grounds and on the aforementioned reasons, we equally discharge the stay order herein.

COSTS

Costs generally follow the event and as the applicants have failed in these summons we order that the applicants do bear the costs of these proceedings.

Made in Chambers at Principal Registry, Blantyre this 29th day of March, 2011.

Joselph S. Manyungwa
JUDGE