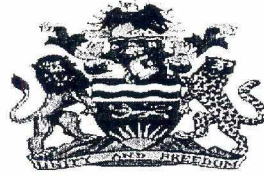


JUDGEMENTS FOR JULY, 2013

Contents:

- **Thom Njilika v. Malawi Revenue Authority.** Civil Cause No. 320 of 2013. **Made** this 29th Day of July, 2013. **By The Honourable Justice D. F. Mwaungulu**



JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CASE NO 320 OF 2013

BETWEEN

THOM NJILIKA

PLAINTIFF

AND

MALAWI REVENUE AUTHORITY

DEFENDANT

CORAM

THE HONOURABLE MR. JUSTICE D.F. MWAUNGULU

Kamkwasi, for the Plaintiff

Chipeta, for the Defendant

Mwanyongo, Official Court Interpreter

Mwaungulu J**ORDER**

This matter captivates because of the approach of the Malawi Supreme Court of Appeal in *Muluzi v Director of the Anti-Corruption Bureau* (2005) Malawi Supreme Court of Appeal Civil Appeal No 17 (unreported), cited by Counsel for the Malawi Revenue Authority. I think I am expressing the law correctly when stating that our court can grant interlocutory injunctions to forestall criminal proceedings. What was not said in *Muluzi v Director of the Anti-Corruption Bureau*, which is what I want to say *in limine* is that, before considering *American Cynamid v Ethicon*, the court must contend with the equity maxim that equity does enjoin criminal proceedings, perhaps, for the same reasons that Singini, JA., suggests in *Muluzi v Director of the Anti-Corruption Bureau*.

This application arises from the events of 25 June 2013 when officers of the Malawi Revenue Authority, acting on information that the applicant was guilty of offences against the customs laws, descended on the applicant's premises. They went to several premises and were prevented by the applicant's servants from getting in one of them. Apparently, the applicant did not want them to do so because the next day he would be able to bring proofs that the goods were not there in contravention of the customs laws. If the applicant was allowed to do this, he would have removed the goods. The Malawi Revenue Authority officers, properly, in my view, doubted the efficacy of any arrangement that would require police or customs officers' surveillance while the applicant tried to verify and bring documents proving payment of duty on imported goods. They, because they had a magistrate's imprimatur, broke the shop and seized many goods. There is a dispute whether documents the applicant introduces to prove payment of duty relate to goods seized by the Malawi Revenue Authority. The bottom line, however, is that the goods are subject to criminal proceedings.

On 27 June 2013 the plaintiff took a writ of summons claiming damages for trespass to goods and an order for a mandatory injunction requiring the Malawi Revenue Authority to restore the seized goods to the applicant. On the same date the applicant appeared before me for an interim injunction without notice on the other party the effect of which was going to be that the Malawi Revenue Authority would release the goods. I refused the application without notice based on the presumption of regularity and ordered that the application for interim injunction be with notice on the other party.

I, on the principles of equity, would not grant an interim injunction, not even a permanent one, in this case. Injunctions are remedies in equity that have been applied by law courts only by the fusion of courts of law with courts of equity in a manner that allows this court to grant both equitable and legal relief. Equity, however, is a body of principles of its own that, where they apply, supersede complement or augment laws. In relation to rights under the Constitution, they can be a limitation of the right, as laws. As Justice Frankfurter observed in *Stefanelli et al v Minard et al* 342 U.S. 117:

“For even if the power to grant the relief here sought may fairly and constitutionally be derived from the generality of language of the Civil Rights Act, to sustain the claim would disregard the power of courts of equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the wisdom of using their power.”

In the equitable jurisdiction the maxim is that equity will not enjoin a criminal prosecution. There have been three justifications for the equitable approach. First is the consideration that what is sought by the equitable relief can as well be resolved by the criminal process. Like here, in granting the injunction, I will consider the very question whether the goods offend the customs laws and,

therefore, amenable to forfeiture. That question will be resolved by the criminal proceedings. In *Douglas v City of Jeanette* 319 U.S. 157, Stone C.J., said:

“It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction.

Secondly, there is another principle of equity that equity does not lie where there is another “plain, adequate and complete remedy, *Boise Artesian Water Co. v. Boise City*, 213 U.S. 276, 281 , 29 S. Sup. Ct. 426; *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 11, 12 S., 19 Sup. Ct. 77”:

“That a suit in equity does not lie where there is a plain adequate and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical and efficient as that which equity could afford.”

In this case, as Counsel for the Malawi Revenue Authority submits, there is an elaborate recovery procedure in the Customs and Excise Act to recover the goods should the criminal proceedings fail or tally.

The third reason is the very fact that a court of equity lacks jurisdiction generally on the prosecution, punishment and exercise of clemency for suspects and offenders. In this sense, prosecution is used to generally include matters of investigation and crime. I do not think that it would comport well for the justice system if the court of equity was always called to act in legitimate criminal investigations and prosecutions.

“The rule that equity jurisdiction does not extend to enjoining pending criminal prosecutions, has no exceptions. No extraordinary circumstances will serve to create such jurisdiction. That equity will stay its hand in respect to criminal proceedings, always when they are pending, and ordinarily when they are threatened, is a rule of wide and general application under our legal system. It is a rule of the state courts in respect to criminal proceedings in the same or other state courts ... It is a principle expressing a sound policy that the processes of the criminal law should be permitted to reach an orderly conclusion in the criminal courts where they belong.”

Irreparable damage is which cannot be compensated in money. In this particular case, as Counsel for the Malawi Revenue argues, the damages that the applicant may suffer can be compensated in money and the Malawi Revenue authority can pay the money. I would not, based on the maxim, therefore, bid that equity interfere in this criminal process.

The Supreme Court of Appeal decision, if it is meant to suggest that the balance of convenience or justice will always tilt in favour of criminal proceedings, it might lead to situations where, existing, imminent and great threats to freedoms, the court of equity would forever be restrained from doing what clearly comports with equity and equitable reliefs. On the other hand, equitable principles would not create a situation where criminal proceedings are always stalled because the constitution or rights created under it are questioned by citizens sometimes on the slightest of impulse or reason. It is the latter aspect that inspired this comment from Justice Frankfurter in *Stefanelli et al v Minard et al*

“The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law -- with its far-

flung and undefined range -- would invite a flanking movement against the system of State courts by resort to the federal forum, with review, if need be, to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit [juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts.

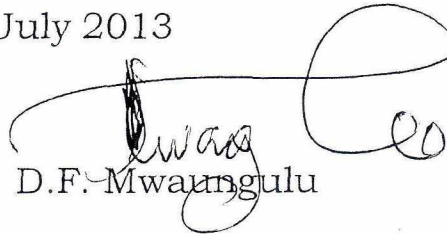
The Supreme Court of Appeals approach where the public interest in prosecution of crime is a factor that has to be taken account would result only in not granting equitable injunctions in all criminal cases. For in all criminal cases, there will always be triable issues and the public interest in criminal justice from not prosecuting or investigating crime cannot be compensated with money or loss of freedom of freedom cannot be compensated with money. Equally, certain property or personal rights, like loss of employment, may not be monetarily compensated. If all turned on balance of convenience and the consideration is that the criminal process must be upheld all the same and all the time, the principles of equity will have succumbed to the principle that equity follows the law, an unwholesome marriage of convenience. The doctrine, however, implies that this Court will first apply the law and, if the law is unjust, equity will provide a remedy. That is always how it should be. There must, therefore, always a possibility for the court in criminal proceedings to do equity. This case, however, is not such a one.

Even on the principles in *American Cyanamid v Ethicon*, the case breaks down on the status quo that this injunction would want to maintain. It must be that the applicant wants the good returned, as if there is no crime suspected. That would be equitable if the crime was not committed. If the crime was committed granting the refusing the injunction would be equitable. The equity maxim is where the equities are equal, the law prevails. The explanation for this maxim is that where two people claim thing and the court cannot really decide who to give them to, they leave the

matter where it is. In this respect the goods should remain with the Malawi Revenue Authority and dealt with as under section 147 of the Customs and Excise Act

The application is dismissed with costs

Made this 29th Day of July 2013

A handwritten signature in black ink, appearing to read 'D.F. Mwaungulu', is written over a horizontal line. The signature is stylized and cursive.

D.F. Mwaungulu

JUDGE