

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CASE NO. 360 OF 2004**

BETWEEN

PENJANI MWANJALA.....APPLICANT
(on her own behalf & on behalf of other dependants)

-AND-

ESTATE OF MR. NJOBVU..... RESPONDENT

CORAM: MANDA, **SENIOR DEPUTY REGISTRAR**

Katemula for applicant

RULING

This is the applicant's application taken out by way of Originating Summons, under Order 113 of the Rules of the Supreme Court. The application was brought by the applicant on her own behalf and on behalf of other beneficiaries of the estate of the late Mrs L. S. T Mwanjala.

The application is supported by an affidavit sworn by the applicant in which she deposed that in 1998 her deceased mother bought a plot from a Mr. K. Kadango. The plot is situated at Area 36 and is plot number 36/1/309. The applicant further averred that after buying the plot, her late mother built a house on it and asked the applicant's elder brother to occupy it since there was no one to take care of it at the time. The applicant then went on to inform the court that elder brother, who goes by the name of Billy Mwanjala, sold the house to the late Mr. Njobvu and that this was done without the consent of the late Mrs Mwanjala or any of the beneficiaries to her estate. It was also stated in the affidavit that Mrs Mwanjala died intestate but that Billy was never appointed

administrator of his mother's estate nor was he given title to the said house. The applicant went further to contend that in any case, a simple search by the defendant at the Lilongwe City Assembly would have revealed to him that the said house was part of a deceased estate of the late Mrs Mwanjala and that all transactions would have been done by the Administrator or any appointed agent of the said estate. It was therefore on this background that the applicant sought to recover possession of the said house from the defendant estate.

An application under Order 113 rule 1 of the Rules of the Supreme Court is brought where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his. This Order provides for a procedure for the recovery of possession of land which is in wrongful occupation by trespassers. In this regard it is in my view important to bear in mind the distinction that is made between possession of title and mere possession. While as in the former there is claim of right, the same cannot be said in the latter situation.

Apart from distinguishing between possession of title and mere possession, it is also in my view worthwhile to consider the aspect of wrongful occupation. One is deemed to be in wrongful occupation where one does not have the right of claim and where one takes possession of the land without the authority of the one who has the right of claim or in other words one who has title, hence the term trespasser.

In this instance then the question becomes can the defendant be said to have occupied the house within the meaning of Order 113 of the Rules of the Supreme Court. Indeed can he be said to be a trespasser. In my view the responses to these questions will be in the negative. I say this in view of the fact that it is admitted that the defendant bought the house, albeit, from someone who could apparently not have passed title to him. Nevertheless the fact that the defendant assumed that he had bought this house would entitle him to lay claim to it. Indeed the defendant cannot be said to be a trespasser because his occupation of the house was on the understanding that he had acquired title to the same.

Further to that, it might be worthwhile to consider the point as to whether Billy, as one of the beneficiaries could not have passed title to a bona fide purchaser. It was mentioned that at the time of the said sale no Letters of Administration had been issued and that the house in question was under the control of Billy, who was told to occupy the house by the late mother. Since at this point it still remains unclear

whether the letters were issued and to whom they were issued, there might be questions as to the possibility of the said letters of administration being granted to Billy because he seems to be the oldest among the siblings. Assuming then that the letters of Administration were granted to Billy, it would be worthwhile to consider whether he could not have been able to pass title of the property. Indeed it is my view that they would have to be a distinction between the responsibility of Billy towards his siblings and his ability to pass title to a bona fide purchaser. This is of course just in passing, suffice to say however that in as far as these proceedings are concerned, the defendant cannot be said to be trespassing on the plot in question because he was invited onto the premises by Billy, through the purported sale. In this regard then I do not think that this is a matter that can be summarily tried because it raises serious issues, especially with regard to title to the land and the question as to whether the late Mr. Njobvu was a bona fide purchaser. Having considered this then it is my view that the applicant's application can not succeed and I do accordingly dismiss it with costs. The application is also dismissed with contempt because there was no proof that the Respondent was served with a notice of the hearing and Counsel never mentioned anything to that effect.

Despite dismissing the application, it is the order of this court that the proceedings should continue as if the same had been commenced by way of a writ and that all pleadings should be served as soon as possible.

Made in Chambers this.....day of.....2004

K. T. MANDA
SENIOR DEPUTY REGISTRAR