

**REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
CIVIL CAUSE NO. 195 OF 2011_**

BETWEEN

MICHAEL A. KUMPOLOTA.....
PLAINTIFF

-and-

JAMES K. NTHALA 1ST
DEFENDANT

MORTON H. NYIRENDA..... 2ND
DEFENDANT

Coram: Honorable Mr. Justice D.T.K. Madise
Mr. L. Mbulo Counsel for the Plaintiff
Mr. M. Amidu Counsel for the Defendants
Mrs. M. Lisiya Official Interpreter
Mr. C.B. Mutinti Court Reporter

Madise, J

JUDGMENT

1.0 Introduction

1.1 On 4 October 2011 the Plaintiff took out a writ of summons against the Defendants claiming a refund of the sum of K1, 500.000.00 being the purchase price of a house plus interest and damages for breach of contract and in the alternative he claims specific performance. The Defendants denied the claim and called the Plaintiff to strict proof.

1.2 Being a civil matter the law is that the burden of proof lies on the person who alleges that a given fact exist and wants the court to believe his story. The standard required is on a balance/scale of probabilities. Whichever story is more probable than not carries the day.

1.3 Statement of Claim

- 1) By a Sale Agreement dated 11th day of January 2011 made between the Plaintiff and the Defendant, the Plaintiff agreed to purchase from the Defendant who agreed to sell a house situated at Zolozolo in Mzuzu at the price of MK1,500.000.00.
- 2) On or about the 12th day of January 2011 the Plaintiff duly executed payment for the said house to the Defendant.
- 3) The Defendant has to date failed to transfer the said house to the Plaintiff but has sold the same to another party.

And the Plaintiff claims:

- a) Immediate refund of K1, 500,000.00 plus interest to be assessed.
- b) Alternatively, the Plaintiff claims specific performance by the Defendant as per agreed in the Sale Agreement.
- c) Damages for breach of contract.
- d) Costs of this action.

1.4 Statement of Defence

- 1) The 1st Defendant admits the contents of paragraph 1 and 2 of the Plaintiff's statement of claim and states that he had only acted in the transaction and stopped at the time when it came to his knowledge that he had no Title to the house at plot number DD/2/232 Zolozolo Botanic Gardens.
- 2) When it came to his knowledge that he is not the title holder of the house of plot number DD/2/232 Zolozolo Botanic Gardens but Tionge Nthala, he explained the issue to the Plaintiff and told him to deal with the title holder who was offering the house for sale at the price of K2, 000,000.00 and not K1, 500,000.00 which he illegally offered to the Plaintiff.
- 3) The 1st Defendant refers to paragraph 2 hereof and states that the Plaintiff refused to proceed with the transaction since he had no K2, 000,000.00 to pay for the house as offered by the title holder.
- 4) Upon the failure by the Plaintiff as stated in paragraph 3 hereof, it was then agreed that the Plaintiff be given back his money he had so far paid, but the Plaintiff refused to accept the payment and argued that he had to be given interest of K500, 000.00.
- 5) The 1st Defendant will at trial give evidence to prove that the said K1,500,000.00 had never been used by the 1st Defendant and was available to be given back to the Plaintiff but his refusal and the demand of K500,000.00 as interest was so outrageous that the 1st Defendant failed to understand.
- 6) The 1st Defendant refers to paragraph 5 of his defence and states that the money has not been paid back to the Plaintiff only because he had refused to get it back as such the claim for interest herein is baseless since the money was never illegally withheld from him but for his own choice to refuse it at the time the purported agreement was being

revoked for lack of capacity of the 1st Defendant to proceed with the transaction as he had no title to the house.

- 7) The Plaintiff disappeared and never came to collect his money and the next thing was my receipt of the summons.
- 8) The 1st Defendant refers to paragraph 1 of his defence and by virtue thereof he contends that he had no any house on any plot, or at all that he could ably offer any person for sale.
- 9) The 1st Defendant refers to paragraph 2 of his defence and will at the time of trial state in evidence that the 2nd Defendant was offered sale of the house of K2, 000,000.00 by the title holder of the house and he fully paid after a discount of K50, 000.00 and was given occupation of the house at that time to present.
- 10) Save as herein before admitted, the 1st Defendant deny each and every allegation of fact as if each was set out and traversed seriatim.

1.5 2nd Defendant's Statement of Defence

- 1) Paragraph 1 of the Plaintiff's statement of claim is denied and the Plaintiff shall be put to strict proof thereof and the 2nd Defendant, during the time of hearing this matter shall proffer evidence to prove that at the time he purchased the house on plot number DD/2/232 Zolozolo Botanic Gardens in the City of Mzuzu, he purchased it as a full bonafide purchaser for value, which value was more than what the Plaintiff alleges to have offered allegedly for the same house.
- 2) The 2nd Defendant makes reference to paragraph 2 of the Plaintiff's statement of claim, denies its contents and puts the Plaintiff to strict proof thereof and the 2nd Defendant shall at the time of trial contend that he entered into agreement of sale of plot number DD/2/232 Zolozolo Botanic Gardens with the title holder, Tionge Nthala at a consideration of K1, 950,000.00, which he fully paid and was given occupation of the house immediately after full payment.

- 3) The 2nd Defendant refers to paragraph 2 of his defence and state that when he paid the K1, 950,000.00 and took immediate occupation of the house he caused maintenance and ameliorations to and around the house.

Particulars of the maintenance

- a) The main bedroom had no floor concrete, which the 2nd Defendant made full concrete in that room.
 - b) Fixation of florescent holders and tubes in the house.
 - c) Installed energy saver bulb holders.
 - d) Planted hedge flowers and shrubs around the house.
 - e) Planted *kapinga* on the grounds around the house.
 - f) Fixed loose windows in front of the house.
- 4) The 2nd Defendant refers to paragraph 3 of the Plaintiff's statement of claim and states that he does not know of any other transaction on the same plot except his that resulted into the transfer of the house to himself and immediate occupation of the same.
- 5) The 2nd Defendant refers to paragraph 4 hereof and will at the time of trial state that he has been in occupation of the house for three years now from the time of purchase to present.
- 6) The claims outlined in the Plaintiff's statement of claim are without any basis and must therefore be dismissed with costs.
- 7) Save as herein admitted the Defendants deny each and every allegation of fact contained in the statement of claim as if each were set out and traversed seriatim.

2.0 The Issues

There are two issues for determination before me.

- 1) Whether the 1st Defendant should refund the Plaintiff the sum of K1, 500,000.00 plus interest and also pay damages for breach of contract.

- 2) Whether the Defendant should hand over the house and transfer title to the Plaintiff.

3.0 The Evidence

3.1 The facts are not in dispute. By a sale agreement dated 11 January 2011 made between the Plaintiff and the Defendant the Plaintiff agreed to purchase from the Defendant a house situate at Zolozolo in Mzuzu at a price of K1,500,000.00 (One Million Five Hundred Thousand Kwacha). On 12 January 2011 the Plaintiff duly executed the agreement by paying the purchase price to the Defendant. However the Defendant failed to handover the house or transfer the title to the said house to the Plaintiff. He eventually and sold the said house to another buyer.

3.2 The 1st Defendant's story is that the title to the house belonged to his wife and he had no power to sell and he had offered to refund the money to the Plaintiff. The Plaintiff refused this offer and insisted to have the house. The house was instead sold to another person, the 2nd Defendant at a price of K2, 000,000.00 less K50, 000.00 being a discount. When the Defendant wanted to return the K1, 500,000.00 the Plaintiff allegedly demanded K500, 000.00 as interest on top of the K1, 500, 00.00. Hence these proceedings.

3.3 The 2nd Defendant pleads no knowledge of any transaction as a bona fide purchase of a legal estate without knowledge of any encumbrance and puts the Plaintiff to strict proof. The Plaintiff claims a refund of the sum of K1, 500.000.00 being the purchase price of a house plus interest and damages for breach of contract and in the alternative he claims specific performance.

4.0 The Finding

4.1 The 1st Defendant is a dishonest man. He fooled the Plaintiff and now he wants to fool this Court into believing he had no title to transfer. That it was his wife who had title. The truth of the matter is that the 1st Defendant had

title which he could have transferred to the Plaintiff. However he was so greedy when he saw the K2, 000,000.00. He wanted To refund the K1, 500,000.00 so that he can still get the K500, 000.00. This was fraud of the highest order. Today he is still keeping the K1, 500,000 and he sold the house to another person.

5.0 Conclusion

5.1 I therefore proceed to order the 1st Defendant to refund the K1, 500,000.00 within 7 days plus interest at commercial bank rate with effect from the day he received the money. I further award damages for breach of contract as the 1st Defendant made the Plaintiff to believe he had a house and title to sell and transfer. The Hon Registrar will assess the damages. The Plaintiff must file summons for assessment of damages within 14 days. The case against the 2nd Defendant is dismissed with costs to be borne by the 1st Defendant.

6.0 Costs

Costs are in the discretion of the court and they normally follow the event. See section 30 of Courts Act and Order 62 r 3 RSC. I award them to the Plaintiff.

Pronounced in Open Court at Mzuzu in the Republic on 8th February, 2016.

Dingiswayo Madise
JUDGE