

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 709 OF 2001

BETWEEN:

STANLEY KAPALASA..... PLAINTIFF

AND

PETER KAZEMBEDEFENDANT

CORAM: MKANDAWIRE, J
Msiska, of Counsel for the Plaintiff ✓
Banda, of Counsel for the Defendant

JUDGEMENT

On 16th March, 2001 the plaintiff obtained an interlocutory injunction on an ex parte application restraining the defendant from entering trespassing, cultivating, building and occupying freehold land situate at Namiyango being part of Title Number Namiyango 140. This order was to run for 7 days during which period an inter parties application was to be filed. No interparties application was filed so that the order of 16th March, 2001 expired. It would appear that the defendant took advantage of the situation and re-entered the disputed piece of land.

The plaintiff has now filed an inter parties application to refrain the defendant from interfering with the piece of land in whatsoever manner.

The plaintiff is a son of the late Wyson Afiki Kapalasa. Before he died the deceased owned a parcel of land whose approximate area is 4.24 hectares. Such ownership was duly evidenced by a land certificate exhibited and marked SK. Upon the demise of the late Mr Kapalasa this parcel of land formed part of the deceased estate. It would appear that he died in estate. The plaintiff who is a son of the deceased is clearly a beneficiary of the estate and is entitled to sue in his own right in order to protect the beneficial interest.

In his affidavit the plaintiff says that in the year 2000 he had decided to subdivide the parcel of land into small plots. To this effect he engaged the services of a surveyor. Work commenced and a deed plan was duly prepared but before fixing beacons the surveyor demanded payment. It would appear that the plaintiff was unable to pay and so the exercise was suspended.

When the defendant saw that the plaintiff was demarcating the land he demanded a title deed from the plaintiff claiming that he had bought 5 acres from the plaintiff's late father. The defendant claimed that he had bought the land in 1990. The defendant entered upon the part he claimed he bought and started building thereon. The plaintiff refused to give the defendant the title deed as he had no knowledge of the alleged transaction. The plaintiff submits that the piece of land is his

only source of livelihood including that of the other beneficiaries.

On his part the defendant says that he had brought the 5 acres from the Plaintiff's late father at K12,500.00. The purchase price was fully paid. In his affidavit the defendant said that the deceased widow and all other beneficiaries knew of the transaction. He says he has been cultivating on the land uninterrupted since 1990. He even planted bluegum trees which are fully grown. It is his submission that the plaintiff and the other beneficiaries acquiesced to his occupying and farming on the position of land.


The plaintiff has commenced an action for trespass. Having read the affidavits of the parties and heard their learned counsel I am satisfied that the balance of convenience lies heavily in favour of the plaintiff. If the defendant continues his activities on the land there will irreparable damage such that monetary compensation will not be sufficient remedy. The defendant has produced a document signed by Mrs Kapalasa as evidence of the alleged transaction. This is dated 2 December, 2000. This document is grossly suspect and cannot support the defendant's claim. Under the Statute of Frauds, 1677 it is the party to be charged who has to sign. The deceased's widow has no authority whatsoever to sign a document purporting to record the alleged contract of sale between the defendant and the late Wyson Afiki Kapalasa. It seems to me that the defendant is taking advantage of the situation.

I therefore order that the defendant be forthwith restrained from entering, trespassing, cultivating, building on and occupying freehold land situate at Namiyango being part of Title Number, Namiyango 140. The defendant must therefore cease all activity whatsoever.

This order shall remain in force until the determination of the action commenced herein or until further order.

Costs of the application be in the cause.

Made in Chambers this 18th day of September 2001 at Blantyre.



M P MKANDAWIRE
JUDGE