

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 378 OF 2001

BETWEEN:

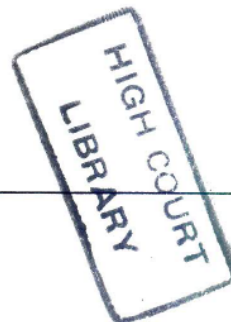
MAHENDERA PURMESSUR PLAINTIFF

AND

ESTHER MWITHA & ANELE MWITHA1ST DEFENDANT

JOHN ZINGALE2ND DEFENDANT

CORAM: MKANDAWIRE, J
Msiska, Counsel for the Plaintiff
Mjele, Counsel for the Defendant
Chingana (Mrs) Official Interpreter



RULING

In his originating summons the plaintiff seeks a number of orders and declarations as follows:

1. That an agreement dated 18th May 1999 between the plaintiff and R.L. Mwitha is a valid contract of the sale of land in terms of section 4 of the Statute of frauds 1677.
2. That the subsequent sale agreement between the 1st defendants is invalid and bad at law.

3. That the second defendant's occupation of Title number NY 413 situate at Nyambadwe is illegal and unlawful.

Pursuant to the determination of the above issues the plaintiff will seek the following reliefs:-

- (a) Declaration that the plaintiff is the legal owner of property Title Number 413 situate at Nyambadwe.
- (b) Declaration that vacant possession of property Title Number 413 at Nyambadwe be delivered to the plaintiff.
- (c) An order that the second defendant do pay the plaintiff rentals from the date of occupation to the date of delivery of vacant possession of the house.

The facts as they appear in the affidavits are as follows: The plaintiff was a transporter and knew the late Julio Mwitha sometime in 1995 in the course of business transactions. Then on 15th March, 1997 the late Mr Julio Mwitha borrowed the sum of K1,500,000.00 from the plaintiff. The plaintiff took two passports as security, one expired and the other was valid. The agreement was reduced into writing signed by both parties and exhibited as JM. The late Julio Mwitha's brother Mr Rodgers Mwitha signed as a witness. It was submitted by Mr Msiska

that on the agreement, the words lender and borrower are shown in reverse but that in fact the lender was the plaintiff and the borrower the late Julio Mwitha. After a few months late Julio Mwitha's health began to deteriorate and he passed away on 12th September 1997 before he repaid the money borrowed from the plaintiff.

After the death of late Julio Mwitha, the plaintiff started to visit Mrs Miriam Mwitha and Mr Rodgers Mwitha to find out whether the loan could be repaid from the deceased's estate. Both Mrs Miriam Mwitha and Mr Rodgers Mwitha her husband's brother promised to source the money and repay the loan. However, after close to a year they found it almost impossible to pay back the money and so they asked the plaintiff whether he could accept alternative means of settling the debt.

Then the plaintiff was invited to a meeting at Nyambadwe P T C. Present at that meeting were Mrs Miriam Mwitha, Mrs Rodgers Mwitha, Esther Mwitha, Anele Mwitha and the father of late Julio Mwitha. They then proceeded to the deceased's house Title Number Ny 413 Nyambadwe and offered to sell it to the plaintiff at a concessionary price of K2,000,000.00 bearing in mind that the deceased estate owed him K1,500,000.00. This was the alternative means of settling the debt, the plaintiff accepted the offer but said he would pay by instalments. The plaintiff was given a copy of the title deeds. This arrangement was made in April, 1999. On 18th May 1999 the agreement was reduced in writing and it was exhibited as JM 3. This document shows that the buyer was the plaintiff, Mr Rodgers Mwitha as seller and Mrs Miriam

Mwitha as witness. By 10th June, 2000, the plaintiff had paid a total of K1,2000000.00 towards the purchase price. At that time the house was rented out to Finance Corporation Malawi Ltd. Unfortunately Mr Rodgers Lameck Mwitha suddenly became ill in July 2000 and died thereafter.

After the death of Mr Rodgers Lameck Mwitha the plaintiff got rumours that the house was being sold by the sisters of the late Julio Mwitha. He then went to find out from Mrs Miriam Mwitha widow of late Rodgers Lameck Mwitha who assured him that he allegations were false. She further informed him that a caution had already been registered at the Lands Registry to avoid any unconventional sales. The caution was made on 15th December 1999 and was exhibited as JM 4. It was then agreed that the plaintiff would get possession of the house on 1st January 2001 when the lease to Finance Corporation Mw Ltd expired. On 15th September 200, the plaintiff wrote Finance Corporation Mw Ltd requesting them to hand over the keys to him when the lease expires. In reply he was informed that a request had already been made on behalf of Mr John Zingale who had allegedly bought the house and that he would take occupation on 1st October 2000. When the plaintiff confronted Mr Zingale he was told that he (Mr Zingale) had bought the house on 16th August , 2000 from Miss Esther Mwitha. It is the plaintiff's case that he was the bona fide purchaser of the house. Had Mr Zingale made proper searches at the Lands Registry, he would have found that there was a caution preventing such unconventional sales.

There are affidavits in opposition. The first is by Mrs Miriam Mwitha. She is a widow of Late Rodgers Lameck Mwitha. She says that she is not aware of the K1,500,000.00 debt between the plaintiff and late Julio Mwitha. She and her late husband knew the plaintiff as a business colleague. The plaintiff used to supply them with oil and tyre on credit. At the death of her husband they owed that plaintiff K1,200,00.00 for goods supplied to them. She said her late husband never offered house No. Ny 4134 Nyambadwe to the plaintiff and it is not true that the plaintiff paid any money towards the purchase of this house. She says that the purported signatures of her husband R.L. Mwitha appearing on the alleged sale agreement of the house with the plaintiff J M 3 are not the ~~truth~~^e signatures of her husband. She said that before his death her husband Rodgers Lameck Mwitha told her that eh had offered the house to John Zingale for K3,50,00.00. According to her the house was never sold to the plaintiff.

There is also an affidavit deponed to by Esther Mwitha. She is a sister to late Julio to late Julio Mwitha. She and her sister Anele Mwitha were appointed administrators of the estate of Julio Mwitha on 2nd November 2000. However, before they were so appointed the family on their own had appointed late Rodgers Lameck Mwitha. It is significant that the house in Nyambadwe was given to late Rodgers Mwitha, Esther Mwitha and Anele Mwitha. When late Rodgers Mwitha was dealing with the deceased estate, he used to consult his sisters Esther Mwitha and Anele Mwitha. All Esther Mwitha Knows is sale of the house to John Zingale. Rodgers Lameck Mwitha did not tell her of the alleged sale to

the plaintiff. She is not even aware of the debt between the plaintiff and late Julio Mwitha. She too disputed the signatures on the document exhibited by the plaintiff.

Finally there is the affidavit of John Zingale. All he says is that he bought the house Title N^o. Nyambadwe 413 from Esther Mwitha and Anele Mwitha as Administrators of the Estate of Julio Mwitha. He says that he is not aware of any dealings between the plaintiff and the 1st defendants as he was not a party to them.

What is most unfortunate about this case is that Mr Rodgers Lameck Mwitha who featured very prominently is no longer in this world.

Be that as it may I shall try my best to find out what happened. I think the starting point is the alleged loan agreement between the plaintiff and the late Julio Mwitha. As to this the plaintiff exhibited the purported loan agreement marked "J M." This is said to have been by the plaintiff and the late Julio Mwitha. There was an earlier case Civil Case No. 3132 of 2000 between Esther Mwitha and the plaintiff herein. In that case Esther was seeking an injunction to restrain the plaintiff from blocking the entrance to the very house in Nyambadwe, the subject matter in these proceedings. As I said before Esther Mwitha in her affidavit in opposition in the present case disputes the authority of the alleged loan agreement. She says that in Civil cause No. 3132 of 2000 the plaintiff exhibited the same loan agreement but the signatures of late Julio Mwitha are not the same. It is very true that the purported

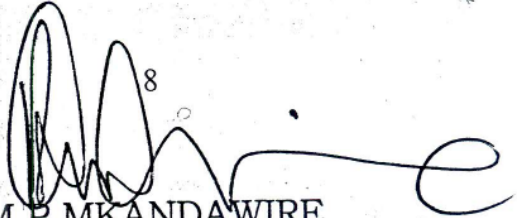
signatures of late Julio Mwitha on the loan agreement exhibited in this case and that exhibited in Civil Case No. 3132 OF 2000 are fundamentally different. You do not need an expert to tell the difference. The wording is exactly the same but the signatures of late Julio Mwitha. Unfortunately there is no explanation as to what happened to the original copy. I have a feeling that someone is playing around with signatures of persons who are no longer in this world.

In her affidavit, Mirriam denied any knowledge of the purported Sale agreement between the plaintiff and her late husband Rogers Lameck Mwitha. She exhibits late Rogers Lameck Mwitha's Signature in his passport. That signature is clearly different from those on the purported Sale agreement which is 'JM3' Even on the purported loan agreement itself it is easy to see that someone was labouring to make the signatures Rodger Lameck Mwitha.

I am inclined to agree with Mirriam Mwitha and Esther Mwitha that the authority of these two documents is seriously in question, this being the case I do not have to labour myself with the question whether late Rogers Lameck Mwitha had the authority to sell the house as I am not satisfied that such a transaction took place.

In the result, I dismiss the summons with costs.

Made in Chambers this 12th day of February, 2002 at Blantyre.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke ending in a small flourish.

M P MKANDAWIRE

JUDGE