



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 4176 OF 2002

BETWEEN:

MRS B. CHIBWANA.....
..... PLAINTIFF

and

MISS L.
SANGALA..... D
DEFENDANT

CORAM: HON. JUSTICE F.E. KAPANDA

Mr. Nkhoma, of Counsel for the Plaintiff
Mr. Gulumba, of Counsel for the Defendant
Jere, Official Interpreter

Place and Dates of hearing :Blantyre 19th
July 2004,

20th July 2004

and 12th October 2004

Date of Judgment : 27th May 2005

Editorial Note

The matter herein revolves around ownership and possession of land in the City of Blantyre. There is a dispute concerning who owns and possess the piece of land along the Chileka Air Port Road at Chatha Village in the City of Blantyre of the Republic of Malawi. The Court has to determine who, between the Plaintiff and the Defendant, has better title to the land in question. Further, this Court has to decide on what type of land constitutes the subject matter of this action.

JUDGMENT

Introduction

A dispute has arisen concerning some piece of land situated along the Chileka Air Port Road, at a place popularly called Chatha, in the City of Blantyre of the Republic of Malawi. On the one hand, the Plaintiff claims that the land in question belongs to her late husband who was granted a 99 years lease by government. The Defendant, on the other hand, asserts that the land is hers having bought same from a Mr Zulu. As will be seen later in this judgment, the Defendant's argument is that she bought the land from a Mr. Zulu and that it has been her desire to apply for a leasehold title of the said land.

The Plaintiff, by a Writ of Summons, has therefore commenced this action claiming damages for trespass to this land. She further claims costs of this action. The Defendant is disputing the claim by the Plaintiff. Further, the defendant denies being liable to pay any damages or at all or any costs.

Pleadings

The Plaintiff's claim and the Defendant's response

At this juncture the Court would wish to set out the particulars of the claim by the Plaintiff and the Defendant's response. The complaint by the Plaintiff and the response of the Defendant are to be found in the pleadings that were exchanged between the Plaintiff and the Defendant. These are the Plaintiff's Statement of Claim and, the Defendant's Amended Defence.

The allegations by the Plaintiff

At the time the Plaintiff commenced this action she made allegations of fact which are contained in the statement of claim¹ attached to the Writ of Summons mentioned above.

The essence of the Plaintiff's allegations of fact may be summarized as follows:

¹In the statement of claim it is pleaded by the plaintiff as follows:

"STATEMENT OF CLAIM

1. The Plaintiff is the Administrator of Late Dr R.S.M. Chibwana's estate who until his death was husband to the Plaintiff and the Plaintiff is suing as Administrator of the estate.
2. Late Dr R.S.M. Chibwana applied for and was granted a 99 year lease of Plot No. Michiru 5/1 on 22nd June 1992 and upon his death the plot became part of the deceased estate. The title in his favour was registered as Application Number 748/95 dated 13th July 1995.
3. The Defendant fully knowing that the plot belonged to the deceased trespassed on the plot claiming that she had been granted the Plot by a Mr Zulu.
4. Despite the Plaintiff's explanation that the plot belonged to the Late Dr Chibwana's estate. The Defendant proceeded to construct a brick fence on the plot.
5. The Defendant entered the plot fully knowing that the plot belonged to a third party and proceeded to construct the brick fence thereby trespassing on the plot to the detriment of the Plaintiff.
6. The Plaintiff has thereby suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGES

7. (a) Damages
(b) Loss of amenities (use of land)
(c) Exemplary damages

The Plaintiff further claims costs of this action.

Dated this 30th day of January 2003.

(Signed)

LawBide Associates
Legal Practitioners for the Plaintiff"

It is alleged by her that the Defendant has trespassed on a plot of land being title Michiru 5/1. Further, the Plaintiff contends that the Defendant entered this plot of land fully knowing that it belonged to her late husband and proceeded to construct a brick fence thereby trespassing on the said plot of land. She is therefore seeking redress from this Court.

The response by the Defendant

The Defendant has squarely responded to the Plaintiff's allegations of fact. The Defendant's answer is contained in the Amended Defence² dated 19th July 2004. As will be observed from the Amended Defence, the Defendant is basically denying all the allegations of fact made by the Plaintiff.

² The following is what the Defendant has averred in answer to the Plaintiff's allegations:

"AMENDED DEFENCE

1. The Defendant refers to paragraph 1 of the Statement of Claim and states that at the date of commencement of this action the Plaintiff was not the administrator of her deceased husband's estate.
2. The Defendant refers to paragraph 2 of the Statement of Claim and states that the land in issue herein is and has always been customary land since the same has never been declared [by notice under the Minister's hand and published in the gazette], to be public land as required by Section 27(1) of the Land Act (Cap. 57:01) of the Laws of Malawi.
3. The Defendant denies the contents of paragraphs 3 and 4 of the Statement of Claim and puts the Plaintiff to strict proof thereof.
4. The Defendant states that she legally acquired ownership of the land in issue from the previous freehold owners of the land Mr & Mrs Zulu.
5. The Defendant states that there is no proof that the land herein is indeed public land as the alleged acquisition of the land by the Government was never gazetted.
6. Further, the previous owners of the land (Mr & Mrs Zulu) never received any notice from Government pursuant to the provisions of the Lands Acquisition Act (Cap. 58:04) of the Laws of Malawi, as a result of which they resisted any attempt to dislodge them from the land.
7. The Defendant denies that she has caused any loss or damage to the Plaintiff since she legally obtained ownership of the land.
8. The Defendant therefore denies the Plaintiff's claim for damages as enumerated in paragraph 7(a), (b) and (c).
9. The Defendant denies each and every allegation of fact contained in the Statement of Claim as if the same were set forth herein and traversed seriatim.

WHEREFORE the Defendant prays that the Plaintiff's action be dismissed with costs.

Dated the 19th day of July 2004.

(Signed)

Naphambo & Company
Legal Practitioners for the Defendant"

Further, the Defendant avers that the land in question has always been customary land and not public land. Thus, the said land was incapable of being offered by Government to the Plaintiff as leasehold land. It is her further contention that she legally acquired the land from the previous freehold owners of the land.

The above is a sketch of what the pleadings are in this action. It is now necessary that I should set out the issues that arise, and fall, to be decided by this Court.

Issues for Determination

As I see it, there is principally one issue that requires to be determined by this Court *viz* who is the owner of the land in issue in this matter. Additionally, from the pleadings that have been exchanged between the parties, there is need for me to further answer the following questions:

- (a) Whether or not the Plaintiff has a valid claim to the land in question, alternatively.
- (b) Who, between the Plaintiff and the Defendant, has a proper claim of title to the land in issue?
- (c) Whether or not, if the Plaintiff's claim to title of the land is valid, the Defendant has trespassed on the said land and is therefore liable to pay general or exemplary damages to the Plaintiff.

The above is what I discern to be the issues for determination in this matter. The Court will shortly embark on the exercise of determining them but before that is done it will be necessary to comment on the evidence that is on record and the facts that emerged from the testimony of the parties.

The Testimony and the Facts

The Evidence

The Plaintiff called two witnesses to prove her case against the Defendant. The witnesses were the Plaintiff herself and a Lands Assistant from the Ministry of lands who was paraded as an expert witness. It must be noted though that this Court does not believe that the so called Lands Assistant qualified to be treated as an expert witness. In the Court's view, he was just an ordinary witness and he will be treated as such. Indeed, the Court observed that the Lands Assistant's job in the Ministry of lands involved doing clerical work.

There were four witnesses from the Defendant's side. These

were the Defendant herself and three other witnesses.

Accordingly, there were a total of six witnesses who testified in this case. All of them, except one, offered written witness statements.

Facts of the case

I shall now proceed to summarise the facts that emerged from the testimony of the above mentioned witnesses. The following are the material facts that were gathered from the witnesses:

The Land

It is common cause that the land, the subject matter of this action, is situated along the Chileka Road at a place called Chatha Village. However, the parties are not in agreement as to whether the *locus in quo* we visited as a Court is the land that is the subject matter of the Plaintiff's claim. Indeed, it is an undeniable fact that the evidence on record shows that the size of the land either party claims to be hers is different. The Defendant's lay-out plan tendered in evidence shows that the size of the land she claims to be hers is 0.2433 hectares. The Deed Plan that the Plaintiff tendered in evidence indicates that the size of the land her husband allegedly acquired from the Minister responsible for land matters is 0.1336 hectares. The so called expert from the Department of Lands did not help matters on the proper identification and size of the land the court visited at Chatha Village. He admitted that he was not a Land Surveyor. Accordingly, he was not capable of interpreting maps. In point of fact, the alleged expert witness conceded that the first time he came to visit the *locus in quo* was when he was taken to the place by the Plaintiff. The Plaintiff had wanted to be assisted in identifying a piece of land that had been leased to her late husband. Actually, it transpired from the testimony of the Plaintiff that she did not know the location of the plot of land because she had never been to the said land until after the death of her husband.

Tenure of the land

The two parties herein have offered different testimonies as regards the tenure of the land. On the one hand the Plaintiff purported to show that the land in issue was public land but later converted into a lease hold land when it was offered to the Plaintiff's husband. She produced the following letter to support her assertion:

“Dr R.S.M. Chibwana
P.O. Box 30164
Chichiri

23rd June 1992

Blantyre 3

cc : Mr Zulu
Kameza Village
Blantyre

: The District Commissioner
P/Bag 97
Blantyre

Dear Sir

APPLICATION FOR A LEASE OF PLOT MC1/456
(NOW KNOWN AS PLOT MC1/285) AT NGUMBE
IN THE CITY OF BLANTYRE

Please refer to your lease application which you submitted to this office over Plot MC1/456 (Now known as Plot MC1/285) at Ngumbe in the City of Blantyre.

You are now authorized to start development on the plot.

Mr Zulu to whom this letter is copied is advised not to cause problems during construction work. This office sent an officer on 22nd June 1992 to his place to inform him that Plot MC1/456 on which he is cultivating was allocated to Dr. Chibwana and that he (Mr Zulu) should advise how much compensation he would wish to receive for his trees and bananas. Mr Zulu shoes to settle on the land himself. Mr Zulu was given an alternative that the District Commissioner, Blantyre might be requested to assess compensation if he was unable to arrive at any figure himself.

The plot is public land though used customarily. The allocation of the plot by this office to Dr. Chibwana is in order.

The District Commissioner is by copy of this letter asked to take note of the steps taken over the issue of this plot.

Yours faithfully

(Signed)

D.A.K. Bandawe

REGIONAL CONTROLLER OF LAND AND VALUATION (S)" [underlining supplied by me]

The Defendant on the other hand endeavoured to demonstrate that at the time she acquired this piece of land it was being used as customary land but it was in point of fact freehold land. Further, the defendant stated that she is in the process of converting it into a leasehold land. Hence, she produced in evidence her application for a lease and a receipt showing that the same Department of Lands her application.

Acquisition of the land

Just as the Plaintiff and the Defendant have adduced two conflicting testimonies regarding the tenure of the land in question the parties are at cross purposes as regards how they acquired this piece of land. As mentioned earlier, the Plaintiff attempted to prove that her late husband acquired this land, which was previously public land, from the Malawi Government. The lease document, which is dated 13th July 1995, that was tendered in evidence shows that the Plaintiff's husband acquired a piece of land measuring 0.1336 hectares known as plot Piece No. 254 at Ngumbe in the City of Blantyre of the Republic of Malawi. Further, there is evidence tendered demonstrating that the Plaintiff's plot is known as Plot No. MC1/285.

The Defendant's story, on the other hand, is that she acquired the piece of land from a Mr Zulu. This piece of land, the Defendant further avers, was at one point in time a subject of sale agreement between the said Mr Zulu and the Plaintiff's husband. The agreement fell through because the parties never agreed on the purchase price. It is indeed the Defendant's further averment that the said land is customary comprising of 0.2433 hectares of land and that it is on Plot No. MC/320-321. The Defendant further put it in evidence that she bought the land on 3rd February 1997.

The above are the material facts that were disclosed by the evidence on record. I will now proceed to deal with the law and determine the issues for consideration in this matter.

Consideration of the issues

The land in dispute: Whose is it?

The question posed above is necessary if this Court is to determine the question of trespass and other incidental matters in this action. Indeed, when answering this question the Court will bear in mind that it was made to visit the locus in quo for it to see for itself the land either party is claiming to be hers. Further, this Court is alive to the fact that it is an established principle of law, and I need not cite an authority for it, that he/she who alleges the affirmative of the existence of a fact must prove it by evidence. Accordingly, it rests on the Plaintiff to adduce cogent evidence to prove that the land in dispute is hers. As a matter of fact, it is incumbent upon the Plaintiff to demonstrate that the lease document that she produced in court relates to the land that the Defendant has started construction works on.

This Court finds and concludes that the Plaintiff has failed to

prove the allegation that the land in dispute is hers. This conclusion is premised on the following reasons:

For starters, it is well to observe that the lease document produced before this Court clearly demonstrates that the Plaintiff's husband acquired a plot of land comprising 0.1336 hectares. Yet the area of the land we visited is not known since the so called expert never demonstrated to the court what area it comprised of. Moreover, the plot number of the land the Plaintiff is claiming is obviously different from the one shown on the lay out plan and lease application form introduced in evidence by the Defendant. It is observed that the Plaintiff's land is on Plot Piece No. 254 (now Plot No. MC1/285) whereas the Defendant's (the place the Court visited) is on Plot No. MC1/320-321. Sadly, the officer from the Department of Lands did not help matters as he was unable to assist the Court in identifying the land belonging to the Plaintiff from the map. The source of his information as regards the *locus in quo*, it was revealed in cross examination, was the Department of Lands' Land Surveyor. The fact that this officer did not assist us was not surprising since this officer admitted that he is unable to read maps. In point of fact, he revealed in cross-examination that when the Plaintiff first went to their offices the latter failed to identify where her husband's land was. It was allegedly a Land Surveyor from the Department of Lands who purportedly assisted in identifying the land. Unfortunately, this Land Surveyor was not called to testify in this matter. Accordingly, whatever the Land Assistant told this Court is nothing but hearsay evidence. I must add that that the Plaintiff failed to identify the land was to be expected as the Plaintiff had never been to see the land at the time her husband was alive.

In sum, the fact that the Plaintiff has a lease document only shows that *prima facie* she has some land³. But she has failed to prove, on a balance of probability, that the parcel of land the Court visited is the one particularly mentioned in the lease dated 1st day of December 1992 between the Malawi Government and her husband. Further, I must point out that the evidence that the plaintiff adduced to prove her claim leaves a lot to be desired. The plaintiff's case surely was bound to fail. Here is a person who all along did not know the location of her husband's plot of land. She then allegedly seeks the assistance of people from the Department of Lands to identify the piece of land. On the day she first went to identify the land there was a Land Surveyor. Surprisingly, and indeed unfortunately, on the day of trial she decides to call a person who is paraded as an expert when he is not and offers evidence that is clearly hearsay. As a matter of fact, the evidence of the so called expert does not assist the court for he is not the Land Surveyor who allegedly assisted in the identification of the

³ *Fredrick Masi Laja vs Isaac Jamu* Civil Cause No. 2879 of 1998 (unreported)

piece of land that had been given to the Plaintiff's husband.

Has the Defendant trespassed on the Plaintiff's Land?

The Court has found and concluded that the Plaintiff has failed to establish that the land we visited is hers or is the one that her husband was allocated by the Malawi Government. It follows, therefore, that the issue of trespass does not arise.

Conclusion

The Plaintiff's action is dismissed with costs. The costs are to be taxed by the Registrar if not agreed to between the parties. Naturally, the injunction that she obtained against the Defendant will stand dissolved. It is so ordered.

Pronounced in open Court this day of 27th day of May 2005 at Principal Registry, Blantyre.

F.E. Kapanda
JUDGE