

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 2124 OF 2006

(Being Lilongwe District Registry Civil Cause Number 195 of 2006)

BETWEEN

**SIGELE
APPELLANT**

H.

MBENDERA

AND

**RESERVE
RESPONDENT**

BANK

OF

MALAWI

**CORAM: Hon. Justice J. Katsala
Chisale, of Counsel for the Appellant
Kafere (Mrs), of Counsel for the Respondent
Chuma, official interpreter**

RULING

This is an appeal against an order made by the Senior Deputy Registrar at Lilongwe under RSC Order 113 granting the Reserve Bank of Malawi possession of a house on Plot Number CSS/22/6 in Chilomoni Township in the City of Blantyre.

The facts of the case are not in dispute. The Reserve Bank of Malawi operates a Housing Loan Scheme for the benefit of its members of staff. The employees are allowed to obtain loans under the scheme to purchase houses and repay the loans over an agreed period of time. Mr Allan Konzamkamwa was one of the respondent's employees. He obtained a loan of K1, 950, 000.00 under the scheme and purchased a house on Plot Number CSS/22/6 in Chilomoni Township in the City of Blantyre. He also accessed further sums so that his total indebtedness under the scheme went up to K2, 183, 550.00. As required by the scheme he signed a memorandum of understanding in which, among other things, he undertook not to sell the house without the prior permission of the respondent whilst the loan was still outstanding, and that any breach of this provision would constitute misconduct, which may result in disciplinary action including

dismissal, being meted out on him. However, despite such undertaking he went ahead and advertised the house for sale in the newspaper through an estate agent. The appellant responded to the advertisement and entered into negotiations with him which culminated in her purchasing the house at the price of K2, 600, 000.00. Upon discovering this development the respondent took out a summons under Order 113 r.1 of the Rules of the Supreme Court against the appellant and Allan Konzamkamwa claiming the possession of the property on the ground that these two were in possession of the property without the respondent's license or consent. The Senior Deputy Registrar after hearing arguments granted the application and ordered the appellant and Mr Konzamkamwa, who is the first defendant in the action, to deliver up possession of the property to the respondent.

The appellant filed seven grounds of appeal but during the hearing before me she summarized them into three grounds as follows:

- (a) The learned Registrar erred in law in finding that O.113 procedure was applicable to the circumstances of the case.
- (b) The learned Registrar erred in law in failing to recognize that the appellant was a bona fide purchaser of a legal estate whose title to the property could not be defeated by the respondent.
- (c) The learned Registrar erred in law in failing to recognize that the respondent's failure to register its interest in the property rendered its interest in the house, if any, null and void.

The appellant submitted that the summary procedure in this rule is only available to the persons mentioned in the rule. The appellant does not fall in the category because she is in possession of the premises on the strength of a sale agreement with Mr Allan Konzamkamwa who gave her the license or consent to possess the property despite that he may have been breaching the covenant with the respondent. That at the time of purchase the appellant was not aware of the respondent's interest (if any) in the property. She had checked the property register at the Blantyre City Assembly where she confirmed that the property was registered in the name of Mr Konzamkamwa. She is therefore a bona fide purchaser of a legal estate without notice whose title cannot be defeated by the respondent's unsecured interest in the property. Further the appellant submitted that the respondent's interest in the property, if any, is null and void because the respondent did not register the deed conferring such interest as required by the Deeds Registration Act.

On the other hand the respondent submitted that the circumstances of this case warrant the use of the summary procedure under RSC O.113. As financier of the funds with which its employee purchased the property, the respondent acquired an equitable interest in the property and is entitled to possession. The funds were released on the basis of an agreement between the respondent and its employee who accepted to be bound by the terms of the Housing Loan Scheme. Among the terms is that he would not sell the property without the respondent's permission during the subsistence of the loan. Thus he could not pass title to the appellant without the respondent's license or consent, as such the appellant never acquired any title to the property. Any consent or license granted by the respondent to the employee to occupy the property was withdrawn upon the employee's breach of the regulations governing the Housing Loan Scheme. Consequently, the employee or the appellant are trespassers and have no right to

remain in possession. The respondent referred the court to the decisions of the Senior Deputy Registrar in *Reserve Bank of Malawi v. Stephen M. Ng'oma*, civil cause number 500 of 1996 (Lilongwe)(unreported), *Reserve Bank of Malawi v. Catherine Njolomole*, civil cause number 186 of 1997 (Lilongwe)(unreported) and *Reserve Bank of Malawi v. Lonely Kalindang'oma*, civil cause number 363 of 1997 (Lilongwe)(unreported), where in similar circumstances the court granted the respondent possession. It was also submitted that the appellant purported to purchase the property with full knowledge of the encumbrances and servitudes to which it was subject as such if she has any claim then it must be directed to Mr Konzamkamwa and not the respondent. It was further submitted that the respondent has an equitable interest in the property which is earlier in time than that of the appellant as such the respondent's interest ought to prevail.

I think the starting point would be to look at what RSC Order 113 r.1 provides. It states:

“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 license or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.”

It is clear from a reading of the rule that the procedure applies only to the category of people prescribed in the rule. First is that of a person who has entered into occupation of the property without the licence or consent of the person entitled to occupation or his predecessor in title, and secondly that of a person who has entered into occupation with the consent or licence of the person entitled to occupation but has remained in such occupation without the licence or consent of the person entitled to occupation or his predecessor in title, see *Bristol Corporation v Person Unknown*, [1974] 1 All ER 593, *Greater London Council v Jenkins*, [1975] 1 All ER 354 and, *Moore Properties (Ilford) Ltd v Mckee & others* [1977] 1 All ER 262. The question now is whether the appellant falls in either of these categories of people.

The respondent has argued that it was entitled to the possession of the property because it provided the funds with which its employee Mr Konzamkamwa purchased the house and that the employee occupied the property with its licence and consent. This licence and consent were withdrawn when the employee sold the property without the respondent's permission contrary to the terms of the memorandum of understanding. Consequently, the employee and/or the appellant remained or entered into occupation without the respondent's licence or consent. With the greatest respect I do not think this is a correct interpretation of the situation. It is clear from the rule that the claim to possession goes along with title. That is, who ever has the title to the land is entitled to its possession. And that is why the summary procedure under the rule would not apply against a person who is in occupation of land under the licence or consent of your predecessor in title because that person will have been granted the occupation by someone who himself was entitled to such occupation. It therefore follows in my view that the respondent has to show that it has the title to the property for it to claim entitlement to possession. Merely showing that it provided the funds with which the employee purchased the property does not suffice. Providing the funds *per se* does not confer title on the respondent. There has to be something more. And the fact that the employee agreed not to dispose of the property without the respondent's permission in it self does not confer any title to the property on the respondent.

The evidence before me shows that the employee and not the respondent acquired the property. Surely, contrary to what the respondent would like this court to believe, title passed on to the

employee and not to his employers. There is no evidence to show that the title passed on to the respondent and not to the employee. As such it is not correct to say that the employee occupied the property with the licence or consent of the respondent. The register of properties at the Blantyre City Assembly also shows that the employee is the owner of the property. I do not see any basis, in the circumstances, for holding that the respondent is the owner or title-holder of the property and therefore entitled to possession.

The respondent accepts that ideally a charge or a mortgage is the best way to secure ones interest in land. However, the respondent says that the problem it is faced with is that the property in question is located in a Traditional Housing Area (THA) where the properties have no title documents as such no charge or mortgage could have been created over the property. Well, that may be true, but in my view if the respondent had wanted to secure its interest in the property (if it has any at all) then it would have found a way of doing so. One way would have been to demand that the property be registered in its name and not the employee's name. This means that the register at Blantyre City Assembly would have shown the respondent as the owner of the property. It would therefore have been impossible for the employee to dispose of the property without the respondent's consent. I say this on the understanding that no reasonable purchaser would accept to purchase property from a person who is not appearing on the property register as having an interest in the property.

The appellant has contended that the memorandum of understanding that the respondent alleges confers an interest in the property on it (the respondent) is null and void because it was not registered in terms of the Deeds Registration Act. It seems that there is very little that I can say on this point. The Deeds Registration Act speaks for itself. Section 6 provides:

“From and after the commencement of this Act all deeds, conveyances, wills and instruments in writing whether under seal or not whereby any land or interest in or affecting land other than land registered in accordance with the Registered Land Act, may be affected at law or in equity whether executed prior or subsequent to the date of this Act are subject to compulsory registration in the Deeds Registry Office”

And section 28 provides:

“The non-registration of a document the registration whereof is compulsory according to this Act will render such document null and void.”

It is clear that if the respondent is claiming interest in the property by virtue of the memorandum of understanding signed by its employee, Mr Konzamkamwa, then it was necessary that such memorandum be registered in the Deeds Registry. The respondent accepts that no such registration was effected. The result of the omission is therefore not in doubt. The memorandum of understanding is null and void. Therefore the respondent cannot come to this court to enforce rights and obligations under it *vis-à-vis* the property.

Finally let me say that I have looked at the cases cited by the respondent in support of its arguments. With the greatest respect I do not share in the reasoning therein. In my view the decisions were made on bases which I do not find convincing in law. Further it seems that the provisions of the Deeds Registration Act were not brought to the attention of the court. I am sure that Registrars in those cases would have held otherwise if they had looked at the provisions.

In my judgment the appellant does not fall in the category of people mentioned in the rule. She is in possession of the property on the strength of the title that was passed on to her by the respondent's employee, Mr Konzamkamwa. Therefore she is not a trespasser. This obviously puts her out of the sort of persons envisaged by RSC O.113 r.1.

Therefore for these reasons I allow the appeal. The order of the Senior Deputy Registrar is set aside. Costs both here and below are for the appellant.

Pronounced in chambers at Blantyre this 26th day of July 2006.

J. KATSALA
JUDGE