



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 215 OF 2004**

BETWEEN

MRS. N.J. CHAKWERA PLAINTIFF

-AND-

MR. MWECHUMU DEFENDANT

-

CORAM : T.R. Ligowe : Assistant Registrar

Chipao : Counsel for the Plaintiff

Makono : Counsel for the Defendant

RULING

Introduction

Before me in as application to set aside an order for summary possession of land brought by the defendant.

The plaintiff brought originating summons for summary possession of land against the defendant on 25th March 2004. The land in question is plot No. 49/4/540 situate at Are 49 in the city of Lilongwe. The order was granted and is dated 8th February 2007.

The Law

An order for summary possession of land can be set aside under Order 113 rule 8 RSC. That rule provides:

“The court may, on such terms as it thinks just, set aside or vary any order made in proceedings under this Order.”

The law relating to this provision is expounded at paragraph 113/8/16 of the RSC. It is as follows:

“The application to set aside or vary the order should be made by summons served on the opposite party and supported by affidavit, stating as fully as possible the grounds relied on for setting aside or varying the order in question.

It will be seen that r.8, bears a close affinity to O.13, r.9, and O.19, r.9. This is because proceedings under this Order have or may have some of the characteristics of the procedures on failure to give notice of intention to defend or in default of defence. If a defendant, or would be defendant, applies to set aside or vary an order he should explain why he has not taken part in the proceedings earlier and either show a defence on the merits or the respects in which the order complained of has prejudiced him.

It should be emphasised that a final order for possession made by a Master in proceedings under this Order may be the subject of an appeal to the Judge in Chambers (O.58, r.1).

It should perhaps be observed that a final order for possession made in proceedings under this Order may of course be made the subject of an appeal from the Judge to the Court of Appeal (see SCA 1981, ss.15 et seq., Vol. 2, Section 20A, paras 20A-101 et seq). Whether a party aggrieved by a final order for possession made by a Judge should apply or first apply to the Court below to set it aside or to vary it, or should appeal direct to the Court of Appeal, may perhaps depend upon whether it is contended that there are fresh grounds or material for altering the decision of the Court at first instance, in which case the application should be to that Court to set it aside or vary it or that the decision of the

Court which made the order was wrong, in which case the application should be by direct appeal to the Court of Appeal."

The affidavit in support

The present application is supported by an affidavit sworn by counsel for the defendant. Paragraphs 6, 7 and 8 of the said affidavit however are irregular as they read as if the defendant himself deposed the affidavit. Be that as it may I will not bother with that technical irregularity in the interest of justice, suffice to say that counsel must always ensure affidavits are properly drawn in accordance with Order 41 RSC.

The affidavit deposes that counsel failed to attend the earlier proceedings due to handover problems within his firm when Mr. Gift Nankhuni who was previously seized of the matter left the employ of Makolego & Co. Counsel exhibits and adopts an affidavit Gift Nankhuni deposed in opposition to the summons for summary possession of the land. That affidavit was apparently already filed before the order was granted. In it Gift Nankhuni deposes that the plaintiff is not title holder of plot No. 49/4/540 in the city of Lilongwe. That if he has title then he obtained it fraudulently. The plot was part of the estate of late Mangazi and not Mangazi Maseko. But that late Mangazi had bought it from Mr. Maseko who is still alive, but did not effect change of ownership. Richard Maseko and the plaintiff lied to the City Assembly that Mr Maseko was dead in order to obtain registration. The estate of late Mangazi was distributed as far back as 2002 and Richard Maseko referred to in paragraph 3 of the affidavit in support of the summons for summary possession was given a house at Nambuma, a minibus and a Toyota Hilux pickup all of which he has admittedly sold. The property herein was not distributed to the said Richard Maliro but the mother of the late Mr. Mangazi. There is exhibited to the affidavit GNN1 entitled "Minutes of the proceedings of late Mangazi's estate" which shows the District Commissioner for Lilongwe

upheld the original distribution of the estate. However, GNN1 does not talk of Richard Maseko or Richard Maliro as stated in the affidavit but Richard Mangazi. The names are apparently confusing. The question I have myself is whether they mean one and the same person.

Counsel further deposes that he started to occupy the land between June and July 2002 as a tenant. He was paying rent to Madam Rosina Mmana who later asked him to buy it and he did on the strength of the headman, Gloria Mangazi the widow of late Mangazi and other witnesses who convinced him that the house had been given to her. And so Richard Mangazi who claims to have sold the house to the plaintiff was not the one given the house. This is the part of the affidavit that has not been properly drafted. I however can figure out what counsel wanted to say; he talks about the defendant having first occupied the land in question as a tenant.

Later in the affidavit counsel repeats that late Mr. Mangazi bought the house in question from a Mr. F. Maseko and the property was not formerly transferred from Mr. F. Maseko to late Mr. Mangazi before he died. And that Richard Mangazi who masqueraded as Richard Maseko in order to dispose of the house was just being greedy over the deceased property.

The affidavit in opposition

There is an affidavit in opposition sworn by counsel for the plaintiff which raises two issues.

The one is that the defendant delayed in making this application after being granted a stay on or about 17th May 2007. The plaintiff issued a certificate of non compliance on 18th June 2007 and proceeded to

execute. Counsel contends the defendant is merely employing delaying tactics and it would not be proper to stay execution again.

The other is that what is in the affidavit in support of this application was already considered by the court in making the order for summary possession of the land. He prays for the application to be dismissed with costs.

The Order for Summary Possession

I had occasion to read my Brother Registrar's decision, granting the order for summary possession herein. This is what he said:

“Upon hearing counsel and going through his affidavits and attached exhibits and also upon going through counsel's skeletal arguments and examining him, it is the view of this court that the plaintiff has managed to prove that she has due title to the property on plot No. 49/4/540 as the plot was duly sold to her on 15th November 2002 and title transferred to her on 11th May 2003, which was way before the alleged meeting at the DC's office of 24th September 2003 as per GNN1. Indeed it is the view of this court that exhibit GNN1 attached to the affidavit in opposition has questionable authenticity and can not be relied on. It is therefore on this basis that the court grants the plaintiff an order to take summary possession of the property on plot No 49/4/540 and that the defendant is given 30 days to vacate the said house, failing which he shall be held in contempt of court. The plaintiff is also granted costs of this action which are to be assessed if not agreed.”

Determination

The defendant might have delayed in making the present application that, he may be seen as abusing the process of the court, but to borrow the rules applicable to O.13, r.9, and O.19, r.9, to which O.113, r.8, bears a close affinity, if the defendant explains why he has not taken part in the proceedings earlier and either shows a defence on the merits or

the respects in which the order complained of has prejudiced him, then it transcends any reasons given by him for the delay in making the application even if the explanation given by him is false. (**Vann V Awford** (1986) 83 L.S. Gaz 1725; The Times, April 23 1986, C.A.)

I therefore have to see if in this application the defendant has done the needful.

Much as he has explained why he did not take part in the earlier proceedings, I would like to observe that the affidavit in support of the present application raises the same issues raised in the affidavit in opposition to the summons for summary possession in the earlier proceedings which, I concur with counsel for the plaintiff, was already considered by the court in making the order for summary possession of the land. (See the Registrar's decision granting the order above).

Counsel for the defendant argues that the issue for determination in this matter is who between the plaintiff and the defendant is a true owner of the property in question. He submits that the plaintiff cannot claim to be a *bona fide* purchaser for price without notice and that the defendant has the first claim of right over the property. He relies on section 22 of the Registered Land Act and **Shadreck Polela v Mr. Mtambo and The Attorney General**, Misc Civ Cause No. 19 of 2005 (Lilongwe Registry) (unreported)

Reading the affidavit in support and counsel's submissions, it is clear that they attack the order for possession for being wrong. The remedy therefore would not be in applying to set it aside or vary it but an appeal to a Judge in chambers. I repeat the last part of paragraph 113/8/16 of the RSC:

“Whether a party aggrieved by a final order for possession made by a Judge should apply or first apply to the Court below to set it aside or to vary it, or should appeal direct to the Court of Appeal, may perhaps depend upon whether it is contended that there are fresh grounds or material for altering the decision of the Court at first instance, in which case the application should be to that Court to set it aside or vary it or that the decision of the Court which made the order was wrong, in which case the application should be by direct appeal to the Court of Appeal.”

The view of this court is that this paragraph in essence also applies where a party is aggrieved by a final order of possession made by a Master.

The application is therefore dismissed with costs.

Made this 10th day of October 2007

T.R. Ligowe

ASSISTANT REGISTRAR