

**IN THE HIGH COURT OF MALAWI**  
**LILONGWE DISTRICT REGISTRY**  
**CIVIL CAUSE NO. 58 OF 2003**

BETWEEN:

MRS FATIMA ISMAEL.....PLAINTIFF

- AND -

LILONGWE CITY ASSEMBLY & 2 OTHERS.....DEFENDANTS

**CORAM:      JUSTICE MRS I. KAMANGA**

Khonyongwa Counsel for Plaintiff  
Mwale Counsel for 1<sup>st</sup> Defendant,  
2<sup>nd</sup> Defendant, Absent/Unrepresented  
Legal Aid For 3<sup>rd</sup> Defendant/Absent  
Mrs I. Namagonya, Court Reporter  
Mrs C. Nakweya Court Interpreter

**JUDGMENT**

The plaintiff in this matter is Fatima Ismael. She seeks this court to declare that property no. 7X/738, Lilongwe belongs to her. She also seeks general damages for loss of use of the land.

The third defendant K.J. Msefula filed a defence. He however never put up any appearance in court.

The plaintiff filed a statement of claim stating that she is the purchaser of plot number 7X/378, Area 7 in Lilongwe that she bought the plot from Fatuma Anderson on 31<sup>st</sup> May 1995 and change of ownership was duly endorsed at the Lilongwe City Council offices. The plot is within the jurisdiction of the 1<sup>st</sup> defendant a local assembly responsible for administration of traditional housing areas. The second defendants are a District Assembly acting as an agent of the Administrator General. By letter dated 7<sup>th</sup> January 2003 the 2<sup>nd</sup> defendant directed the first defendant to cancel the plaintiff's title and transfer the same to the third plaintiff. The third defendant is the purchaser of the plot in issue from the second defendant. It is plaintiff's claim that the cancellation of the change of ownership was wrong and unlawful and the consequent ownership to the third defendant is also wrongful hence the plaintiff's claims.

The third defendant filed a general defence. In his defence the third defendant stated that the contents of paragraph 2 of the plaintiff's statement of claim were not true and put the plaintiff to strict proof thereof Paragraph 2 of the statement of claim reads:

**“The plaintiff purchased the said plot no 7X/378, Lilongwe on 31<sup>st</sup> May 1995 and change of ownership was duly endorsed at the Lilongwe City Council offices”.**

Two witnesses testified for the plaintiff. The first witness was the plaintiff herself. This was her evidence. In 1995 she bought the plot in issue from Fatuma Anderson Simeon. Upon buying the plot the two went to change ownership at the Lilongwe City Council at the Civic offices in Lilongwe. She produced Exhibit P1 as proof of change of ownership. Exhibit P1 is in the following terms:

**To: (New plot holder)**

Mrs Fatima Ismail  
Kawale  
LILONGWE 2

**Plot No:** 7X/378

**Location:** Area 7

**Date:** 5<sup>th</sup> Sept. 1995

Dear Sir,

**CHANGE OF OWNERSHIP OF TRADITIONAL HOUSING AREA PLOTS**

In accordance with application made by MISS ATUMA A. SIMON on form THA/3 dated 31-05-95 for the transfer of plot, approval it hereby given to change the ownership, of the plot as follows:

Plot No:	7X/378
Location:	AREA 7
From (Former Holder)	MISS FATUMA ANDERSON SIMION
Date of Transfer:	7-6-95

ooo

**WARNING**

Failure to comply with the above conditions may render the plot liable to withdrawal and allocated to another tenant.

Signature.....

**TOWN CLERK & CHIEF EXECUTIVE**

**LILONGWE CITY ASSEMBLY**

Date: 5<sup>th</sup> September, 1995

It was her evidence that upon buying the plot she started experiencing problems with the Chief of that area. The Chief's name was Chingwali who is since dead. Despite the threats, she would still visit her plot. She removed the iron sheets from a structure that was on the plot in preparation for construction. The threats continued and she reported the issue to Fatima Anderson Simeon who had sold her the plot. Thereafter she sought the court's assistance but the courts were taking their time. After some time she went to visit her plot again where she found that a structure had been built on her plot. Once again she came to court to seek assistance through her lawyers. She produced Exhibit P2 a letter from her lawyers to the third defendant dated 14<sup>th</sup> May 2002 where the 3<sup>rd</sup> defendant is being advised to evacuate the plaintiff's premises since the third defendant trespassed on the plaintiff's premises.

The plaintiff testified that at one point she received a letter through her mailing address from the 2<sup>nd</sup> defendant. It had been addressed to the 1<sup>st</sup> defendant. She was surprised with the contents of the letter and she took it to Fatima Anderson, the seller of the plot who promised her that she would look into the issue. Exhibit P2 is as follows:

Ref No. 18/7

7<sup>th</sup> January, 2000

FROM: The District Commissioner  
P/Bag 17  
Lilongwe.

TO : The Chief Executive  
P.O. Box 30396  
Lilongwe 3.

Attention: Mr A.J.C. Kawonga

cc : K.J. Msefula  
P.O. Box 860  
Lilongwe.

: S.N. Mbawala  
P.O. Box 133  
Likuni.

Dear Sir,

**CHANGE OF OWNERSHIP OF PLOT NUMBER 7X/738**

Please refer to your letter no. LCC/PLAN/HOU/7X/378 of 30<sup>th</sup> November 1999 on the issue of change of ownership of plot No. 7x/378.

I wish to inform you that this office still insisting that you make use of our recent letter No. 18/7 of 1999.

As you are aware that we are handling this case because it is a deceased estate and we believe that you know that any mistake arising from plots

for deceased people, your office may not be responsible, unless you used a short cut.

Therefore you are requested to revoke that letter on 16<sup>th</sup> May 1995 which was written without proper investigation, therefore, we have discovered that the people who claimed that plot are not legal owners of that place and that is why they did not do any development but it was just a place for dumping litters.

The reasons for asking you to revoke that letter are as follows:-

- (a) Fatuma Simeon is a step daughter of late Simeon and we do not involve such children in these cases.
- (b) Miss Fatuma Anderson Simeon and Fatuma Ismael are not two people but the same step-daughter who is married to Mr Ismael, therefore, they cheated.
- (c) Chapter 10”02 sub reg. 17 section (3) of the “WILLS AND INHERITANCES: says “If the intestate left more than one wife surviving him each living in a different locality, each widow and her children by the intestate shall be entitled to share under this section in the intestate’s property in the locality where they live but shall have no claim to any share of the intestate’s property in the locality in which another wife lives”.

Therefore, Fatuma Ismael is not the legal owner of that plot but only that she cheated this office.

The deceased, had three wives and each wife had her own house and even if Fatuma was the daughter of late Simeon. She was not supposed to claim property from the other wife.

Therefore, if this office has mandate to administer deceased estate, please CHANGE ownership of this plot to Mr K.J. Msefula.

Your consideration on this matter will be greatly appreciated.

Yours faithfully

For: J.M. Makankhula  
**DISTRICT COMMISSIONER**

In cross examination, counsel for 1<sup>st</sup> defendant wanted to know if the plaintiff knows the owner of the plot. The plaintiff stated that she knows the owner of the plot since they live in the same neighbourhood in Kawale. Counsel for the 1<sup>st</sup> defendant wanted to know if the plaintiff had taken any steps to verify that Fatuma Anderson was the owner of the plot before buying it. The plaintiff stated that Fatuma Anderson, the seller had shown her documents relating to the plot in issue that showed that she was the legal owner. The plaintiff also stated that Fatuma had also explained to the plaintiff about the plot in the presence of the seller's mother and other relatives. Upon being asked about the nature of the documents, the plaintiff stated that the documents were in form of receipts that were proof that Fatuma had been paying city rates for the plot.

Counsel for the 1<sup>st</sup> defendant wanted to know whether the plaintiff was aware that the 1<sup>st</sup> defendants were involved in this matter to which the plaintiff responded positively. Counsel for the 1<sup>st</sup> defendant also wondered if the plaintiff was aware that the plot in issue had been a subject of deliberations at the 2<sup>nd</sup> defendants. The plaintiff responded by stating that she was aware that the plot in issue was later a subject for meetings that happened at the 2<sup>nd</sup> defendants. She also stated that she was aware of the contents of the letter (Exhibit P2) from the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant. Counsel for 1<sup>st</sup>

defendant wanted to know the plaintiff's response to the letter. The plaintiff stated that when she read the letter she was confused with its content and she just kept it. Later she visited a lawyer. She also visited the 1<sup>st</sup> defendant's offices where she was assured that there was no problem with the change of ownership of the plot and that the change of ownership to herself was still valid.

Upon being asked to explain on when the change of ownership to herself was effected, she explained that the change of ownership to herself was effected in 1995. She explained that she got the letter from the District Commissioner (1<sup>st</sup> defendants) in January 2000. And that when she got the letter she went to the owner of the plot, showed her the letter and advised her to deal with the matter. Later the owner of the plot (Fatuma Anderson) visited her and told her that everything had been settled and she (plaintiff) should continue making payments to the City Assembly on the said plot. And indeed she continued making payments. Upon the court enquiring if she received any letter from the 1<sup>st</sup> defendants that ownership of the plot had been revoked she replied in the negative.

PW2 was Fatuma Anderson Simeon. This was her evidence. Her father was given plot No. 7X/738 in 1970 by the Capital City Development Corporation. Her father had three wives. In

1975 her father gave her the plot and he applied to have the plot transferred into her name, Fatuma Anderson. She produced Exhibit P5 as evidence of transfer. Exhibit P5 reads as follows:

**CAPITAL CITY DEVELOPMENT CORPORATION**

**FORM THU/S3**

Estate Division  
P.O. Box 125  
Lilongwe

Date: 5/2/75

**APPLICATION FOR TRANSFER OF LAND SITUATED IN A TRADITIONAL HOUSING AREA IN LILONGWE DISTRICT REGISTRY**

PART A: for completion in duplicate by registered plot holder

I, ANDERSON SIMEON, in the presence of the undersigned witnesses, hereby request the transfer of Plot NO. 378 in Area NO. 4 at present allocated to me to FATUMA A. SMION of Box 91, Lilongwe.

\_\_\_\_\_  
\_\_\_\_\_

Signature of the Assignor

Address: Box 91, Lilongwe.

Occupation Businessman Date 5/2/75

\_\_\_\_\_  
\_\_\_\_\_

Signature of proposed Assignee T.A. Simeon

Address: Box 91, Lilongwe.

Occupation: Businesswoman Date 5/2/75

Exhibit P6 was a letter from the Capital City Development Corporation to a A. Simeon of P.O. Box 91, Lilongwe dated 26<sup>th</sup> February 1975 advising him that approval had been granted to transfer plot No. 378 to F.A. Simeon. Later her father died. He left three wives. One of them was living on the plot in issue.

It was PW2's testimony that from 1975 to 1989 she was paying land rent and city rates for the plot. Between 1990 and 1991 she decided to sell the plot. Appreciating that her step mother was living on the plot they started by going to court to settle the issue on ownership of the plot. It was at the Magistrate Court in Lilongwe. At the Magistrate Court she was advised to bring her stepmother since she was the one that was living on the plot. At the court, there were some differences between PW2 and her stepmother on the issue of ownership. The court advised the parties to bring to court documents pertaining to the plot. After looking at the documents and the evidence of PW2 and her stepmother the court determined that there was no difference between PW2's evidence and the information in the plot records. The court said that there was enough evidence that showed that the plot belonged to PW2. She also visited the City Assembly for advice. The City Assembly advised her that she had the right and authority to sell the plot. Seeing that both the court and the Lilongwe City Assembly had decided in her favour and she had been advised that everything was in order she started offering the plot for

sale to various people. The plaintiff expressed an interest to buy the plot. Together they went to Lilongwe City Assembly where the plaintiff was advised that she could buy the plot. The plaintiff was advised to bring to the City Assembly her photographs for their records. PW2 and the plaintiff discussed the purchase price and agreed at K11,000.00 (eleven thousand kwacha). This was in the period between 1990 and 1991.

After signing for the money the plaintiff wanted to start building on the plot. When she started the preparatory construction activities she was stopped by the Chief of the area who was siding with PW2's stepmother. The plaintiff stopped the construction works. After sometime PW2's stepmother died. Then the plaintiff visited PW2 to advise her that when she visited the plot she found that somebody had built a planned house on the same. Plaintiff wondered to PW2 how it was possible for change of ownership to be effected twice on the same plot when ownership had already been transferred to the plaintiff.

PW2 produced documents that showed that the plot had been assigned to one Anderson Simeon on 14<sup>th</sup> August 1970. There was also the transfer of the plot from Anderson Simeon to Fatuma Simeon that was effected on 26 February 1975. She also produced receipts in the names of F. A. Simeon to Capital

City Development and Malawi Housing Corporation for various payments pertaining to the plot in issue.

Let me mention that at the time that PW2 was testifying the plaintiff's legal practitioners and the 1<sup>st</sup> defendant's legal practitioners had filed with the court a Consent Order for removal of the 1<sup>st</sup> defendant. The Order was issued by the court on 12<sup>th</sup> January 2006. The court thereby proceeded to seek some clarifications from PW2. In seeking clarification the court wanted to know whether when PW2 and her stepmother visited the Magistrate court the matter was heard in court or they merely got advice from officers of the court. PW2's response was that the matter was actually heard in court before a magistrate but that she could not recall the name of the magistrate. She also advised the court that the court produced and given her a copy of the judgment which she showed the City Assembly hence the City Assembly allowing that transfer to plaintiff could be effected. She further mentioned that as the difference in ownership with her stepmother ensued she took the judgment to the District Commissioner's office hence her failure to produce it in court.

This was the evidence in court. Let me mention that one will notice that in these proceedings the 2<sup>nd</sup> and 3<sup>rd</sup> defendants never put up any appearance. Upon inquiring from counsel for the plaintiff on the absence of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants

counsel for the plaintiff advised that the 2<sup>nd</sup> defendants were served with the writ and the statement of claim. The 2<sup>nd</sup> defendants however never acknowledged service nor indicate intention to put up a defence. As to the 3<sup>rd</sup> defendant, he had filed a defence and was represented by the Department of Legal Aid. The 3<sup>rd</sup> defendant and his legal practitioners however never attended the court during notices of hearing being served on the 3<sup>rd</sup> defendant's legal practitioners. Affidavits of service to both the 2<sup>nd</sup> and third defendants were filed into court.

The issue for determination for this court is whether PW2 had a good title to plot No. 7X/378 in Area 4. And whether she could pass on this title to the plaintiff when the plaintiff bought the land?

From the evidence that was in this court, I come to these findings. One Anderson Simeon bought and was allocated the plot in issue by the then Capital City Development Corporation in 1970. In 1975, one Anderson Simeon applied to CCDC for transfer of ownership to one Fatima Anderson Simeon and the same was granted in the same year. One Anderson Simeon had three wives. His third wife lived on the plot in issue. One Anderson Simeon died. After his death differences arose between PW2 and her stepmother on ownership of the plot. PW2 claimed that she got the plot from Anderson Simeon as a

gift. The stepmother claimed that the plot belonged to her. The matter was brought to the Lilongwe Magistrate Court for determination of ownership whereupon a decision was made by the court in PW2's favour. This was in the period 1990-91. In 1995, PW2 sold the plot to the plaintiff. Upon production of the court decision on ownership of the plot and upon scrutiny of documents on record the Lilongwe City Assembly determined that the plot belonged to PW2 and that PW2 could sell the plot to the plaintiff. Later the stepmother and the Chief being aggrieved appealed to the District Commissioner. In the year 2000, five years after the transfer of ownership, the Lilongwe District Commissioner wrote to the Lilongwe City Assembly advising Lilongwe City Assembly to revoke the transfer of ownership to the plaintiff. Lilongwe District Commissioner advised Lilongwe City Assembly to change ownership to the 3<sup>rd</sup> defendant. The Lilongwe District Commissioner advised the Lilongwe City Assembly that they were doing this in their capacity as the administrator of Simeon Anderson's deceased estate. The District Commissioner indicated in his letter that upon his investigations he had found that PW2 was not a biological daughter to the deceased and consequently was not entitled to a share of the deceased estate. In his finding, the District Commissioner also indicated that the plaintiff and PW2 were one and the same person.

Let me make this observation on the District Commissioner's letter to Lilongwe City Assembly, according to the evidence in court, much as the plaintiff and PW2 had the same first names. They are different natural persons.

I will also make this observation vis-à-vis the contents of the District Commissioner's letter to the Lilongwe City Assembly. Even if PW2 was a step-daughter to the deceased, the Wills and Inheritance Act that is referred to in Exhibit P3 does not exclude step children from having a share in the deceased estate as long as that child was living with the deceased or was minor whose education was being provided for by that deceased person. In this case PW2 was a minor at the time of the demise of Anderson Simeon. She could therefore be entitled to a share of Anderson Simeon's estate as a dependant.

Let met also observe on the District Commissioner's advice to Lilongwe City Assembly that:

**“Chapter 10:02 sub reg. 17 Section (3) of the Wills and Inheritance says “if the intestate left more than one wife surviving him each living in a different locality, each widow and her children by the intestate shall be entitled to share under this section in the intestate's property in the locality where they live but shall have no claim to**

**any share of the intestate's property in the locality in which another wife lives.”**

There is no such rule as Sub Reg. 17. However Section 3 of the Wills and Inheritance Act provides as indicated in the District Commissioner's letter. Section 3 of the Wills and Inheritance Act however deals with property in respect of which the person who died did not dispose of the said property during his lifetime nor leave a Will. In the matter at hand, PW2 argued that in so far as plot No. 4/378 was concerned, the deceased transferred it to her prior to his death in 1975 as a gift and change of ownership was effected at the then CCDC ( which later was incorporated into the Lilongwe City Assembly). There is evidence of the change of ownership. The issue for consideration thereupon becomes could the change of ownership that was effected in 1975 be disregarded by the District Commissioner in 2000 as he dealt with the deceased's estate? Was plot no. 4/378 part of the deceased estate since the third wife was living on the plot at the time of Anderson Simeon's demise in 1977?

My finding is that the District Commissioner could not disregard the documentary evidence that was before him in the form of the documents that transferred ownership of the property in issue when he attempted to resolve the differences arising out of the deceased estate. In considering the third

wife's position vis-à-vis the plot which she had been using as a matrimonial home, the District Commissioner could not disregard PW2 on account that she was not the deceased's child when the District Commissioner had the documents before him.

Further, as the District Commissioner was advised that the matter had been in the Magistrate Court, in 1991, the District Commissioner had no power to reverse the finding of the Magistrate Court. The best that the District Commissioner would probably have done was to make an application to appeal out of time against the decision of the Magistrate Court in his capacity as the Administrator of the deceased estate.

Consequently, I find that the instructions that the District Commissioner gave to the Lilongwe City Assembly to revoke the change of ownership to the plaintiff were ill-conceived. The District Commissioner never considered the legality of the change of ownership document of 1975 where the deceased transferred ownership of the plot to PW2. In changing the ownership to PW2 the deceased, during his lifetime gave property to PW2, a position that could not be reversed after his death. The plot in issue could not form part of the deceased estate much as the third wife was living in it.

Consequently, the District Commissioner's instructions to the Lilongwe City Assembly to change ownership of the plot to the 3<sup>rd</sup> defendant were once more ill-conceived. The plaintiff had obtained a good title to the plot. Interestingly, much as the District Commissioner was aware that ownership had changed to the plaintiff, he never involved the plaintiff in any deliberations.

The plaintiff's prayer is she should be declared the lawful owner of property number 7/378, Lilongwe. From the analysis above, the plaintiff is the lawful owner of the property number 7/378, Lilongwe. What arises from the declaration is whether the 3<sup>rd</sup> defendant should thereupon be evicted from the property. A reading of exhibit P3 shows that the 3<sup>rd</sup> defendant was a bona fide purchaser of the plot. The 3<sup>rd</sup> defendant built on the plaintiff's property based on the instructions that the 2<sup>nd</sup> defendant gave to Lilongwe City Assembly instructing the City Assembly to change ownership of the property in issue to the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> defendant thereby bears the liability for the confusion in ownership and consequential events that ensued from the ill-conceived instructions – Exhibit P3.

Consequently, much as I declare that property no 7X/378 belongs to the plaintiff, she cannot take possession. I therefore order that the 2<sup>nd</sup> defendant should compensate the plaintiff at the current value of the plot in issue to enable the plaintiff be

brought back to the original position. Assessment to wit shall be done by the Registrar.

I also award the plaintiff damages for loss of use of the land and costs of this action.

**Made** in Open Court this 11<sup>th</sup> day of June 2008.

I.C. Kamanga (Mrs)  
**JUDGE**