

IN THE HIGH COURT OF MALAWI
LILONGWE REGISTRY
CIVIL CASE NO. 174 OF 2008

BETWEEN

TEMBO KAMPUNDI PHIRI APPLICANT

AND

SAIFRO LTD RESPONDENT

CORAM : Chombo, J.

 : Makono, Counsel for the Applicant
 : Mwale, Counsel for the Respondent (Absent)
 : Gonaulinji, Court Interpreter

RULING

The application before me is for a prayer to have a caution entered into by the defendant and one Patricia Chikapa of Nelson Civil Engineering and Borehole Drilling Contractors discharged. The application is supported by an affidavit and skeletal arguments. The application is opposed by the responded who also filed an affidavit and skeletal arguments. On the day of hearing the application the respondent was absent and unrepresented. The Court proceeded to hear the application undefended when the applicant demonstrated that there was proof of service of the summons thereof.

The brief history of the matter is that Nelson Engineering and Borehole Drilling Contractors, through its managing director, Patricia Chikapa, entered into two

separate agreements with the respondent dated 7th January 2006 and 20th February 2006. The agreements were in respect of subcontracting of borehole drilling in Nkhotakota and Ntchisi of a total of 66 boreholes. The two agreements have been exhibited before Court and marked as “ARK1” and “ARK2” respectively. After completion of the work, Nelson Engineering failed to pay the respondent in full and left a balance of K2,359,436.20. The respondent is further owed the sum of K192,793.20 loaned to the said Patricia Chikapa. Having failed to pay the outstanding sums, Patricia Chikapa assigned her property known as Title No FE/1/895, subject of this action, to the respondent. The said property was purchased from a Mr. Michael Inglis but at the time of the said assignment transfer of title had not yet been effected. The said authorization to assign the property dated 20th March 2006 was exhibited in this Court as “ARK4”. On 19 October, 2006, a caution in favour of the respondent was entered over the said property by Messrs Makolego & Company, now representing the applicant. The said caution was registered and is exhibited as ARK5.

Patricia Chikapa, with full knowledge of the said caution, managed to sell the property to the applicant herein. She made a representation to the respondent by exhibit “ARK6” that she wanted to use the said property to obtain a loan from the bank to settle the outstanding loan with the respondent and needed to have the caution discharged. She swore an affidavit of commitment to replace the caution in the said exhibit “ARK6”. One of the undertakings in that affidavit of commitment was that if the loan failed to materialize she would release the title documents for the property in question back to the respondent as continued security. Soon the caution was removed, the said Patricia Chikapa sold the

property to the applicant as evidenced by Sale Agreement exhibited as “TPK1” and the outstanding debt to the respondent remains unsettled. After the respondent was informed that the loan had not materialized the respondent replaced the caution. It was this caution that prevented the applicant to be granted consent to transfer the title into his own name. The respondent now claims that he can not have the caution removed because (a) the said Patricia Chikapa does not have any other property registered in her name thus discharging the caution will destroy his security (b) he obtained judgment in his favour in Civil Cause No. 498 of 2007 in respect of the same outstanding sums of money which sums have not been settled yet. (c) He has priority over other creditors including the applicant over the property in question because his caution was registered prior to the sale. The applicant, on the other hand submits that the loan between Patricia Chikapa and the respondent has or must have nothing to do with the property and therefore the caution must be discharged and the applicant allowed to transfer a good title to himself.

The record of events does not show, nor has the applicant argued the point, that there was a search in the Lands Registry to establish if the property was free from encumbrances at the time or immediately before the purchase of the said property. If the pre-purchase search had been carried out the applicant would have, no doubt, become aware of the true state of the property. The applicant, by failing to do the needful threw caution to the wind. *Nyirenda, J. as he then was in Pushpa Parmer v Joyce Parmer & 4 Others¹*

¹ Civil Case No. 815 of 2005, Lilongwe District Registry (Unreported).

“A purchaser who is oblivious about title documents to a land transaction could never be a bona fide purchaser. Such a purchaser is like a person who chooses to avoid doing that which is necessary for fear of discovering the truth. Surely such a person can not be a bona fide purchaser”

It is a cardinal rule that any buyer of land who buys land without carrying out the necessary search does so at their own peril. The said agreement to sale the property dated 19th January 2007, shows that the property under sale shows Patricia Chikapa as vendor and the applicant as purchaser. However, the title transfer is between Michael Inglis and the applicant. And the two transactions are over the same property FE/1/895 Falls Estate. It is the same property over which the same Patricia Chikapa had earlier authorized the respondent to enter a caution and the same is dated 6th October 2006. It is also of interest that the said Patricia used the same legal practitioner to execute the two different transactions. There is no doubt that Patricia Chikapa was either not given the necessary legal implications of her transactions, or she chose not to listen to advice, or indeed there was some deliberate oversight of the seriousness of the matters herein. And it is the same legal practitioner who assisted Patricia Chikapa to accomplish the double dealings that now represents the applicant in his action seeking to discharge the caution. I can not help comment on these observations which, in my view seem odd and dubious.

The applicant submits that because the change of ownership is from one Michael Inglis to him then the respondent has no right or interest to claim any right or

oppose the discharge of the caution. It is my finding however that the applicant should be quizzing the purported vendor how it was that (a) property in one person's name was sold in another person's name (b) how it is that Patricia Chikapa gave authority for a caution to be registered over property that did not belong to her – if indeed that property did not belong to her.

The applicant has clearly demonstrated that he bought the property from Patricia Chikapa, paid the money to her but that only change of ownership was effected with the said Michael Inglis; and the sale agreement was between Patricia Chikapa and himself and not the said Inglis and himself. Any reasonable person would come to the conclusion that the real owner of the said property is Patricia Chikapa. And exhibit "ARK3" actually bears evidence of sale of property between Inglis and Patricia Chikapa. Then Patricia freely decided to use her property as security for a loan or outstanding debt she had with the respondent. Since the caution was registered earlier than the sale of the property, and the outstanding debt is still unsettled, the respondent's interests must take priority over the interests of any other stakeholders. The first party to record its security interest in real property has priority over a later recorded interest of third party.

In order to have the Initial caution removed the said Patricia, made an affidavit of commitment in which she, among other things, states as follows:

"I guarantee that if the loan fails to materialize for any reason whatsoever, I will release the necessary documents back to SAIFRO which will be free to replace the caution".

Patricia Chikapa swore the said affidavit fraudulently knowing that she did not intend to apply for a loan to discharge her debt to the respondent but that she intended to sell the said property to the applicant and thus deprive the respondent of the only security he had. When therefore the said loan, did not materialize the respondent exercised his right and replaced the caution and he was perfectly entitled to do so.

It will be noted that although the respondent successfully sued Patricia for the recovery of the said money, the money has not been paid and Patricia, through her lawyer, applied for stay of execution. I do not therefore agree with the applicant that since the respondent got a judgment in his favour then he can not have a right to maintain the caution. The respondent has every right to maintain the caution, especially after the dubious conduct of the said Patricia Chikapa, until every penny is paid, especially that he has every right in law because of the caution that was registered long before the fraudulent agreement to sell the house was effected.

Let me offer some free advice to the applicant, his best bet is to fight out the matter with the said Patricia Chikapa and not the respondent.

At the end of the day I must therefore find that the application must be dismissed with costs.

MADE in Chambers this 13th day of June 2008.

E.J. Chombo
J U D G E