



**JUDICIARY**

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NUMBER 1145 OF 1999**

**BETWEEN:**

**W. CHOKANI .....PLAINTIFF**

**- AND -**

**PROPERTY SALES AND MANAGEMENT  
SERVICES .....DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE E. B. TWEA**

Absent, of the Counsel for the plaintiff

Absent, of the Counsel for the defendant

Mrs V. Nkhoma – Official Interpreter

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**J U D G M E N T**

**Twea, J**

This is a consolidated case involving property on title number Nyambadwe 55 in the City of Blantyre.

The facts of the case, which are not disputed as are follows:-

In January, 1998 the second and third defendants, to wit Mr Madalo Chinsima and Mrs Lefa Chinsama advertised for sale property on plot title number Nyambadwe 55 over which they had letters of administration, for the estate of the late Mr Lydon Chinsima. The sale was advertised through

an estate agent in the name of Property Sales and Management Services which was managed by the fourth defendant or the third party, as referred to in this case, one Mr Kandulu. The said advert was noted by the plaintiff, Mrs Mang'anda and the brother of the first defendant, Mr Willie Chokani, called Mr MacDonald Chokani who was DW2 in this case. They both responded to the advert.

It was the evidence of the plaintiff that after she met the fourth defendant and viewed the property, she also met the 2<sup>nd</sup> and 3<sup>rd</sup> defendant. On 28<sup>th</sup> January, 1998 she received a written offer to purchase the house at the price of K900,000. The offer was open for seven days. On the other hand, DW2 said that after he viewed the property he had a meeting with 4<sup>th</sup> defendant in the presence of a Mr Chinsima. The purchase price was agreed at K1,100,000. He communicated this to his brother, the first defendant, who was then the Malawi Ambassador to the United States of America. It is important to mention here that it transpired in Open Court that the Mr Chinsima who was present during the discussions between the 4<sup>th</sup> defendant and DW2 was Mr Chifundo Chinsima and not any of the defendants. I will come back to this later.

It was the evidence of the first defendant that when he received communication from his brother, DW 2, he requested 4<sup>th</sup> defendant to confirm the offer in writing. This was done on 18<sup>th</sup> February 1998. The offer was open for 10 days.

From the evidence before me the offer to the plaintiff was to expire on 3<sup>rd</sup> February, 1998. However, by 2<sup>nd</sup> February 1998 she had paid the 4<sup>th</sup> defendant the purchase price which included extinguishing the liability of

the personal representatives to the Commercial Bank in respect of redemption of the mortgage, the Blantyre City Assembly, for outstanding city rates, legal charges and a retainer of one month rentals for the period that she would not be in possession of the property. Put simply, the sale transaction had been completed before the offer period expired. What remained was to process the documents to effect the transfer of the land and property into her name.

On the other hand, the offer to the first defendant was to expire on 28<sup>th</sup> February 1998. By 26<sup>th</sup> February, 1998 the first defendant had caused money to be paid to the 4<sup>th</sup> defendant in the sum of K433, 450 through his bankers in Washington DC and the National Bank in Blantyre. The balance, it was agreed, accordingly to the letter dated 19<sup>th</sup> February 1998, was to be paid upon receipt of Government consent to the sale.

It transpired that by July 1998 none of the buyers had the conveyance completed. It was the evidence of the plaintiff that the land was not incumbered at time of sale. When she inquired in July 1998, she was informed that the first defendant has registered a caution against the transfer. On the other hand the first defendants evidence was that he received information that the property had been sold to someone else. Upon search at the land Registry he discovered that there was no change of name. He thus entered a caution in order to protect his interest.

The plaintiff now claims against the first defendant that the caution should be removed and that the second and third defendants should perform their part of the contract by having the caution removed. The first defendant claims his deposit from the second, third and fourth defendants.

In deciding the issues in this case I have to determine whether the 4<sup>th</sup> defendant was an agent for the second and third defendants and whether there was a valid sale between the first defendant and the fourth defendant.

It is not disputed that the sale of the property in issue was advertised in the newspapers by the fourth defendant acting for the second and third defendants. It is not disputed that the plaintiff and the first defendant reacted to the advert and inspected the property. Further it is not disputed that both of them in the course of the negotiations, dealt directly with the actual sellers, the second and third defendants, or actually believed so. It is my finding therefore, that, notwithstanding the direct or apparent direct involvement in the sales negotiation by the sellers or apparent sellers it did not divest the fourth defendant of his authority to act on behalf of the sellers. This is clear from the fact that both buyers paid the purported purchase prices to the 4<sup>th</sup> defendant as agent of the sellers. Further both looked to him to conclude the conveyance. I, therefore, find that the fourth defendant had authority to act as agent for the sellers through - out and he so acted. I also find that both the plaintiff and the first defendant had no cause to suspect that the fourth defendant was doing anything illegal.

Upon examination of the evidence, it is clear that, notwithstanding that the government authority had not been sought or obtained, the plaintiff had fully paid the purchase price and discharged the sale contract by the 2<sup>nd</sup> of February 1998, which was sixteen days before the fourth defendant made a confirmed offer to the first defendant. This notwithstanding, it is clear, in my view, that non-compliance with Section 24A of the Land Act, had the effect of giving equitable rights only and not legal title. The attempt to sell the property again by the fourth defendant will strictly be held against him.

However, when there was notice to the first defendant he was entitled to protect the interest in the property that was deemed to have arisen from the dealings between himself and the agent, as an innocent party.

In this regard I accept the view espoused by the first defendant that the doctrine of apparent authority applied. The sellers acquiesced in the acts of the agent, through the conduct of the brother of second defendant who was the son of the third defendant. They failed to failing to denounce the agent or his conduct. They attempted to settle this matter out of court through the agent by using money obtained on a purported sale of a different property. I am persuaded by the cases cited by the first defendant of *Hely. Hutchinson Vs Brayhead Ltd [1968] 1Q.B. 549* and *Branwhite Vs Worcester Works Finance Ltd [1969] 1 A. 552*. It is obvious that the sellers and the agent wanted to make K200,00 more on top of the “sale” to the plaintiff by accepting a deposit from a third party on a different property which was to be offered as an alternative to the first defendant, to the detriment of the said third party. This is how the agent hoped to make more commission. This is not only dishonest but also fraudulent. The illegality however, cannot be used to the detriment of the first defendant: *Uxbridge. Permament Benefit Building Society Vs Pickard [1939] 2 K. B. 248*. I therefore find that the first defendant too had acquired an equitable interest in the property, which, without notice, he was entitled to protect.

In the present case, the only thing that impeded transfer of ownership to the plaintiff is the caution entered by the first defendant. Once this caution is removed, it appears to me on the evidence, and also from the ruling by the Lands Registrar, that the title will be transferred to the plaintiff. Once this happens the subject – matter will have stopped to exist.

I bear in mind that both the plaintiff and the first defendant came to this court with clean hands. It is obvious from the evidence however, that the plaintiff has a stronger case in equity than does the first defendant. When the subject matter ceases to exist, the first defendant will have the right to claim the money paid to the second, third and fourth defendants as money had and received because the consideration would have completely failed: *Hitchcock Vs Giddings (1817) 4 Price 135, Cochrane Vs Willis (1865) L.R. 1 Ch. App. 50,* and *Norwich Union Fire Insurance Ltd Vs Price (W.H.) Ltd [1934] A.C. 455.* This, in essence, is the objective of the counter – claim. Notwithstanding that his claim was against fourth defendant, it came out clearly in the evidence that it affected the other defendants. I therefore give judgment in favour of the first defendant against the other defendants for the money had and received plus interest at 3% above the basic bank lending rate.

As for the plaintiff I grant that the caution be removed and that the property be fully conveyed to her within 21 days.

The second, third and fourth defendants are condemned to pay costs for this action.

***Pronounced in Open Court*** this 25<sup>th</sup> day of January, 2008 at Blantyre.

E. B. Twea  
**JUDGE**