

JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
LAND CAUSE No. 39 OF 2013



IN THE MATTER OF TITLE NUMBER SOCHE EAST CW1/3
and
IN THE MATTER OF ss 60(1), 96(1)(a) AND 139(1)(2)
OF THE REGISTERED LAND ACT

Between:

ZEBUNNISA LORGAT
(as trustee of the LORGAT TRUST)

1st PLAINTIFF

and

FAIZAL LORGAT

2nd PLAINTIFF

(on his own behalf and

on behalf of the all the beneficiaries of the LORGAT TRUST)

and

NBS BANK LIMITED

1st DEFENDANT

and

AFRICA LIFE SCIENCES LTD

2nd DEFENDANT

and

ISMAIL I. LORGAT

3rd DEFENDANT

RULING

nyaKaunda Kamanga, J.

The 1st plaintiff and 3rd defendant claim to be the two trustees of the Lorgat Trust and the registered proprietors of property known as Title Number Soche East CW1/3, hereinafter the property. The 2nd plaintiff together with others is supposed to be a beneficiary under the said trust. In September 2013 the plaintiffs commenced a civil action against the defendants by way of originating summons contending that the 3rd defendant, as Chargor, without knowledge and consent of the 1st plaintiff created a surety charge in respect of the property in favour of the 1st defendant. The surety charge was for the purpose of securing



the repayment to the 1st defendant (the Chargee) of financial facilities advanced to the 2nd defendant by the 1st defendant. On 15 August 2014 the loan obtained by the 2nd defendant stood at K244,006,130.38.

The plaintiffs came to know of the said surety charge after the 1st defendant instructed an agent to place an advertisement in a daily newspaper on 3 September 2013 calling for tenders for sale of the property after the 3rd defendant had defaulted on its obligations. On 6 September 2013 the plaintiffs obtained an order of interlocutory injunction restraining the 1st defendant from proceeding with the sale of the property. The 1st plaintiff asserts that being a joint proprietor of the property, a surety charge could not have been lawfully created in respect of the property without the knowledge and concurrence of the 1st plaintiff. The plaintiffs seek an order of the court rectifying the land register by cancelling the 1st defendant's surety charge on the property for being invalid and for having so registered by mistake or fraud, the said mistake and fraud having been caused or substantially contributed to by the 1st defendant through its act, neglect and or deceit. The plaintiffs seek against the defendants the following reliefs:

- i. An order setting aside the surety charge registered by the 1st defendant in respect of title number Soche East CW/1/3 on 7th January, 2011 as Application Number 43/2011.
- ii. A declaration that the 3rd defendant could not create a charge in respect of the property in favour of the defendant without the consent and knowledge of the 1st plaintiff, the other Trustee of Lorgat Trust, a joint proprietor of the property, in view of the provisions of sections 60(1) and 96(1)(a) of the Registered Land Act.
- iii. A declaration that the charge created by the 3rd defendant in favour of the 1st defendant in respect of the property is invalid and a nullity for contravening both sections 60(1) and 96((1)(a) of the Registered Land Act.
- iv. A declaration that the 1st defendant did not act in good faith and with due diligence when it proceeded to register a surety charge in respect of the property without first ascertaining whether the 1st plaintiff as joint proprietor thereof had knowledge and/or consented to the creation of the said surety charge.
- v. An order rectifying the land register by concealing the 1st defendant's surety charge for being invalid and for having been so registered by mistake or fraud, the said mistake and fraud having been caused or substantially contributed to by the 1st defendant through its act, neglect and or default.
- vi. Costs of this action.

The plaintiffs have outlined the issues which this court should determine to be as follows:

1. Whether or not the 3rd defendant could create a surety charge in respect of the property in favour of the 1st defendant without consent and / or knowledge of the 1st plaintiff, the other trustee of the Lorgat Trust, being a joint proprietor of the property, in view of the provisions of sections 60(1) and 96((1)(a) of the Registered Land Act.
2. Whether or not a surety charge created in contravention of both sections 60(1) and 96((1)(a) of the Registered Land Act is a valid charge.
3. Whether or not the 1st defendant acted in good faith and with due diligence when it proceeded to register a surety charge in respect of the property without first ascertaining whether the first plaintiff as joint proprietor thereof had knowledge and / or consented to the creation of the said surety charge.
4. Whether or not in the circumstances of this case the first defendant's surety charge in respect of the property is subject to the unregistered interests of the 1st and 2nd plaintiffs, the 1st defendant having had notice of the said interests before the creation of the surety charge.
5. Whether or not the High Court should order a rectification of the land register by cancelling the 1st defendant's surety charge the same having been registered by either mistake or fraud and whether or not the said mistake or fraud was caused by the 1st defendant or was substantially contributed to by it through its acts, neglect and or default.

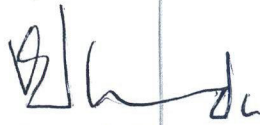
This court finds that if it were to determine the plaintiffs' originating summons under ss 60(1) and 96(1) of the Registered Land Act then this would be proceeding on the presumption that the 1st plaintiff and the 3rd defendant own the property in issue as The Trustees of the Lorgat Trust. The existence of a valid is being strongly contested by the 1st defendant. The 1st defendant has filed three affidavits strongly opposing the action on the ground that the plaintiffs have no case on merit against the 1st defendant to warrant the grant of the reliefs sought. The 1st defendant contends that Lorgat Trust was not properly registered and actions of the 3rd defendant should be binding. The 1st defendant contends that the plaintiff has not brought evidence to suggest that the 1st defendant knew that the 3rd defendant was not proprietor of the property. The 1st defendant asserts that the issue that it is a bona fide proprietor of a charge without notice of the plaintiffs' interests over the property is not in contention. The 1st defendant contends that the Registered Land Act provides a remedy to a person suffering damage by an irregular exercise of power of sale.

The 3rd defendant contends that there are irregularities in the surety charge alleging that he was not party to the loan transaction and that the charge contravened provisions of the Registered Land Act. The plaintiffs, the 1st defendant and the 3rd defendant all make allegations of fraud and misrepresentation on the part of each other in creating the surety charge in issue.

This court finds that there are several issues raised by the parties that have been referred to above, as well as those of the surety charge as a contract and the third party action, that require determination but would not be appropriately dealt by way of affidavit evidence under the present originating summons procedure: *Kamlete v Attorney General*.¹ It is therefore ordered that the action proceeds as if it had been begun by writ of summons and that the plaintiffs should file and serve its statement of claim on the defendants within 14 days hereof.

Costs occasioned by this hearing will be determined at trial.

Pronounced in chambers this 26th day of March 2015 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

Case information:

Date of hearing

Date of ruling

Mr. Baza

Mrs. Mulele

Mr. Chilenga

Mr. A. Ng'ambi

17 February 2015

26 March 2015

Counsel the plaintiffs

Counsel the 1st Defendant

Counsel the 2nd Defendant

Court Clerk

¹ [1996] MLR 184 (HC).

