



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO 398 OF 2014**

**BETWEEN:**

**ELVIS ELVIN PHIRI ..... PLAINTIFF**

**-AND-**

**TAMANDA PHIRI (NEE MIGOCI) ..... 1<sup>ST</sup> DEFENDANT**

**KNIGHT FRANK MALAWI LTD ..... 2<sup>ND</sup> DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Kauka, of Counsel, for the Plaintiff

Mr. Chiwoni, of Counsel, for the Defendant

Ms. A. Mpasu, Court Clerk

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**JUDGEMENT**

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*Kenyatta Nyirenda, J.*

The Plaintiff instituted the present case by way of originating summons by which summons he seeks against the 1<sup>st</sup> Defendant the following declaration and order:

- “(i) A declaration that the 1<sup>st</sup> defendant as well as the plaintiff are the rightful holders of the property constituted in Title Number 1044 Likhubula (also known as Plot Number LK24);
- (ii) An order directing the Registrar of Lands to enter the names of the plaintiff and the 1<sup>st</sup> defendant as the registered title holders of the above named property”

The 1<sup>st</sup> Defendant contests the Plaintiff’s action.

The facts are as contained in an affidavit sworn by the Plaintiff [hereinafter referred to as the “Plaintiff’s affidavit”] and in an affidavit sworn by Tamanda Kapezi [hereinafter referred to as the “1<sup>st</sup> Defendant’s affidavit”].

The material part of the Plaintiff’s affidavit reads as follows:

- “3. *THAT* by an agreement executed between John Damaseke Migoci (“the vendor”) on the one hand and the plaintiff and the defendant on the other hand the vendor agreed to transfer to the defendant and I Title Number 1044 (Plot No. LK 24) Likhubula at a consideration of K5,000,000-00 on terms stipulated in an agreement dated 30<sup>th</sup> January 2004. A copy of the agreement is now produced and exhibited hereto marked ‘EEP 1’.
4. *THAT* it was agreed that title to the land would pass to the defendant and I jointly in May 2014.
5. *THAT* the consideration was duly paid to the Vendor.
6. *THAT* when the agreement was executed the defendant and I had been married; the defendant and I have been divorced and the 1<sup>st</sup> defendant has appropriated the land to herself to the exclusion of me. Copies of letters dated 13<sup>th</sup> May 2014 and 16<sup>th</sup> May 2014 written to and from Knight Frank (as agents of the 1<sup>st</sup> defendant) are now produced and exhibited hereto marked ‘EEP 2’ and ‘EEP 3’ respectively.
7. *THAT* the vendor died without having executed a formal transfer of lease to the defendant and I; the Vendor was my father in law and the 1<sup>st</sup> defendant’s father.
8. *THAT* following divorce the 1<sup>st</sup> defendant has been collecting, through the 2<sup>nd</sup> Defendant, rentals on the property and has not been remitting any of it to me.
9. *THAT* in view of our present status I do not see the 1<sup>st</sup> defendant cooperating with me in any way.
10. *THAT* I verily believe that the best course of action to take is to have the property formally registered in our joint names prior to a joint sale

WHEREFORE I pray for an order directing the Registrar of Lands to register the property in the plaintiff’s and the 1<sup>st</sup> defendant’s names.”

The 1<sup>st</sup> Defendant’s affidavit is also brief and it is in the following terms:

“I, **TAMANDA KAPEZI** of P.O. Box 1556 Blantyre in the Republic of Malawi, **MAKE OATH** and **SAY** as follows:

1. *THAT* I am 1<sup>st</sup> Defendant in this matter and I have authority to make this affidavit. My name is **Tamanda Kapezi** although I have been cited as Tamanda Phiri in these proceedings by the plaintiff. The matters deposed

to herein are from my general knowledge and I believe the same to be true.

2. **THATI** was married to the Plaintiff but we are now divorced.
3. **THAT** in or around 2002 my father John Damaseke Migochi, offered for sale a piece of land on Title Number 1044 Likhubula. I refer to paragraph 3 of the affidavit in support and state that there was never executed an agreement between John Damaseke Mangochi, the Plaintiff and myself over the sale of Title Number 1044 Likhubula. The only agreement executed was between me and John Damaseke Mangochi as is clear from the Plaintiff exhibit **EEP 1**. The Plaintiff never executed the agreement and cannot claim to assume any interest in the property purchased.
4. **THAT** in addition the purchase price for the property was paid by me. The Plaintiff thus cannot claim to be joint owner of the property despite the fact we were married at the time the property was purchased. At the most, if at all, the plaintiff can only claim a tenancy in common with myself and his interest will have to be assessed as such.
5. **THAT** I refer to paragraph 6 of the affidavit in opposition and state that after my father's death my sister was looking after the property. In September 2014 I appointed the 2<sup>nd</sup> Defendants to manage the property on my behalf since I was away.
6. **THAT** in the premises, Plaintiff is not entitled to any of the declarations stated in the Originating Summons and I pray that the claims be dismissed with costs."

Neither deponent was cross-examined.

It is clear that the action is based on the Plaintiff's claim that an agreement for the sale of Title Number 1044 (Plot No. LK 24) Likhubula [hereinafter referred to as "Plot No. LK24"] was executed between John Damaseke Migochi [hereinafter called "the vendor"], on the one hand, and the Plaintiff and the Defendant, on the other hand [Hereinafter referred to as the "Sales Agreement"]. In the circumstances, it might not be out of place to set out the material part of the Sale Agreement:

**"THIS AGREEMENT** is made the 30<sup>th</sup> day of January two thousand and four **BETWEEN JOHN DAMASEKE MIGOCI** (hereinafter called "the vendor") of P.O. Box number 31945, Chichiri, Blantyre 3 in the Republic of Malawi of the one part and **ELVIN ELVIS PHIRI** and **TAMANDA PHIRI** (nee Kapezi) hereinafter called "the purchasers) of 22 Beavers Crescent, Hounslow, Middlesex TW 4 6EX England in the United Kingdom of the other part and **WITNESSETH** as follows:

**WHEREAS** the vendor is the owner of the property known as Plot No. LK 24 also known as Title Number 1044, Likhubula situated in the city of Blantyre (hereinafter called “the property”);

**AND WHEREAS** the Vendor has agreed to sell to the purchasers the said property at the purchase price of **K5,000,000.00 ( FIVE MILLION KWACHA)** out of which the Purchasers have already paid the sum of **K1,500,000.00 (ONE MILLION FIVE HUNDRED THOUSAND KWACHA)** (receipt of which sum the Vendor hereby acknowledges)

**NOW IN PURSUANCE** of the said agreement and in consideration of the sum of K5 million, the parties hereto have agreed that the Vendor shall convey to the Purchasers whole interest in the property upon the following terms and conditions:

1. **THE VENDOR** shall let out the property and out of the rentals collected, he shall keep 70% (seventy per centum) which shall be used towards payment of the purchase;
2. **THE VENDOR** shall deposit into the account of the Purchasers the remaining 30% (Thirty per centum) of the rent received;
3. **THE PARTIES** hereto have agreed that the sharing of rent hereinbefore stated shall run for a period of 10 (ten) years commencing from the month of May 2004 to May 2014, whereupon ownership of the property shall pass to the Purchasers.

**IT IS HEREBY** further agreed that in the unlikely event of the Vendor predeceasing the purchasers, ownership of the property shall pass to Mrs. Tamanda Phiri who in turn shall fulfill the Vendor’s obligations under and in accordance with this agreement.

**IN WITNESS** further agreed that in the unlikely event of the Vendor predeceasing the purchasers, ownership of the property shall pass to Mrs. Tamanda Phiri who in turn shall fulfill the Vendor’s obligations under and in accordance with this agreement.”

It is worthy mentioning that the Sale Agreement was (a) signed by the Vendor and his signature was witnessed by one C.K. Mponda, (b) signed by the 1<sup>st</sup> Defendant but her signature was not attested by any witness and (c) not signed by the Plaintiff.

Counsel Chiwoni submitted that the Plaintiff is not entitled to the reliefs being sought because there is no agreement or memorandum in writing upon which the Plaintiff can bring the present action. He contended that his submission is buttressed by sections 31 (1) and 104 of the Registered Land Act.

Section 31 of the Registered Land Act provides as follows:

*“(1) No land, lease or charge shall be capable of being disposed of except in accordance with this Act and the Local Land Boards Act and every attempt to dispose of such land, lease or charge otherwise than in accordance with such Acts shall be ineffectual to create, extinguish, transfer, vary or affect any right or interest in the land, lease or charge.”*

*(2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some other person thereunto by him lawfully authorised:*

*Provided that such an action shall not be prevented by reason only of the absence of writing where an intending purchaser or lessee who has performed or is willing to perform his part of a contract—*

- (a) has in part performance of the contract taken possession of the property or any part thereof; or*
- (b) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”*

Section 104 of the Registered Land Act deals with execution of instruments and the relevant part reads:

*“(1) Every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument:*

*Provided that the Registrar may dispense with execution by any particular party (other than the donee under a disposition by way of gift) where he considers that such execution is unnecessary.*

*(2) Subject to section 117 (2), an instrument shall be deemed to have been executed only—*

- (a) by a natural person, if signed by him;”*

Counsel Chiwoni submitted that the action herein is in respect of Plot No. LK24 which is registered land. He further submitted that much as there is the Sale Agreement, the Plaintiff is not a party thereto in that he did not append his

signature on it. It was thus argued that there is no evidence to show that the Plaintiff accepted and/ or signified that he was contracting with the other parties to the Sale Agreement and that he is bound by the terms thereof.

On his part, Counsel Kauka submitted that section 31 (2) of the Registered Land Act requires the party to be charged to sign the Sale Agreement and, as the action herein has been brought against the 1<sup>st</sup> Defendant, the party to be charged is the 1<sup>st</sup> Defendant and not the Plaintiff. In the circumstances, it was contended that the Plaintiff was not required to sign the Sales Agreement for him to bring the present action.

With regard to the Defendant's arguments pertaining to tenancy in common, Counsel Kauka submitted that the same are without merit since the sale agreement clearly states that the purchasers i.e. Plaintiff and 1<sup>st</sup> Defendant had paid the sum of K1,500,000.00 and that the balance of the purchase price would be paid by way of rentals. It was further submitted that Plot No. LK24 constituted matrimonial property subject to distribution at 50% each way.

I have carefully read the originating summons, the Plaintiff's affidavit and the 1<sup>st</sup> Defendant's affidavit, including the exhibits to the two affidavits. A perusal of the Sale Agreement shows that three persons are parties thereto, namely, the Vendor, the Plaintiff and the 1<sup>st</sup> Defendant. However, the 1<sup>st</sup> Defendant claims that the Sale Agreement was only between her and the Vendor and that this is evidenced by the Sales Agreement. The 1<sup>st</sup> Defendant also claims that she is the one who paid the purchase price

It is my considered view that it is plain to see on the two affidavits that there is serious disputation on the facts in the case herein. Firstly, why was the Sales Agreement not "properly" executed? As already noted, the Plaintiff did not sign the Sales Agreement and no reason whatsoever has been given for the omission. Secondly, it is not clear whether the consideration was paid by the Plaintiff only or by the 1<sup>st</sup> Defendant only or jointly by the Plaintiff and the 1<sup>st</sup> Defendant. Matters have not been helped by the fact that paragraph 5 of the Plaintiff's Affidavit (*THAT the consideration was duly paid to the Vendor*), is in passive voice. Thirdly, material information regarding the time when the Plaintiff and Defendant got

married and then divorced has not been stated. This is also applies to the death of the vendor. Fourthly, was Plot No LK 24 purchased as matrimonial property?

It is trite that where factual disputes are substantial, then in terms of Orders 5, rule 4 of the Rules of the Supreme Court, the matter is not appropriate to be begun by originating summons and it ought to proceed as if begun by writ. I am fortified in my view by the recently decided case (1<sup>st</sup> June 2015) of **Hetherwick Mbale v. Hissan Maganga, Misc. Civil Appeal Cause No. 21 of 2013 (unreported)** wherein I find the observations, at paragraph 86, by Mbendera SC, J.A. apposite:

*“In my years at the bar, you never used this procedure unless the proceedings arose under an Act of Parliament and one was compelled to use it. In all other circumstances you would only use it if the facts were agreed on all sides and all you sought from the court was construction or a question of law arising from the agreed facts. Here the facts were in dispute. I therefore find that the procedure adopted was altogether unsuitable. I further find that given the serious shades of disputation, the learned judge should have directed the parties to proceed as if the case was commenced by writ of summons with appropriate directions as to how the affidavits would stand.”*

In light of the foregoing, it is my finding that the mode of commencement of these proceedings is inappropriate. It is only proper, therefore, that I should refuse to grant the reliefs prayed by the Plaintiff but instead order, pursuant to Order 29/8 of the Rules of the Supreme Court, that this matter should be proceeded with as if same was commenced by a writ of summons. It is so ordered. Accordingly, the Plaintiff’s action shall be re-commenced by way of writ of summons within 14 days hereof and the issues between the parties will have to be clearly stated in the pleadings: See **W. Mang’anda v. W. Chokani, HC/PR Civil Cause No. 3054 of 2000 (unreported)**.

Pronounced in Court this 17<sup>th</sup> day of February 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda

**JUDGE**