



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NO. 43 OF 2015**



BETWEEN:

FUNNY TAUSI APPELLANT

-AND-

BLESSINGS DOMWE RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Appellant present, unrepresented
Mr. Gondwe, of Counsel, for the Respondent
Ms. A. Mpasu, Court Clerk

JUDGMENT

Kenyatta Nyirenda, J.

Introduction

This is an appeal from a decision of the Third Grade Magistrate's Court sitting at Limbe (lower court) in which the Appellant brought an action against the Respondent claiming ownership of a piece of land left by her late husband, Imran Tausi (the Deceased). The lower court found that (a) the Deceased and the Respondent entered into a sale agreement whereby the land was sold to the Respondent for the sum of K1,000,000, (b) the Respondent paid a deposit of K500,000 and (c) the Deceased passed away before the balance of K500,000 had been paid. The lower court, therefore, ordered the Respondent to pay the remaining K500,000 to the Appellant and the Tausi family and rentals from January 2014 to July 2014.



Evidence

The Appellant and two other witnesses, namely, Rashid Imran (PW2) and Lameck January (PW3), testified in support of the Appellant's case.

The Appellant told the Court that she got married to the Deceased in 1999. In 2011, they bought a plot at Nchalo Trading Centre from Mr. J. Masaza [Hereinafter referred to as the "Plot"]. On the Plot, there are two houses and the Respondent was renting one of them. As they were based in Blantyre, the Deceased used to go to Nchalo to collect monthly rentals or he would instruct his friend, Mr. Angandimaso, who is based at Nchalo, to collect the rent on his behalf. Towards end of 2013, the Deceased opened an account and instructed the Respondent to be depositing rentals for both houses into the Deceased's account.

The Appellant first met the Respondent after the Deceased's death when she went to collect rentals for November 2013. The Respondent told her that he had already deposited the money in the Deceased's account. When she went to collect rentals for December 2013, the Respondent told her that he had bought the Plot from the Deceased. She was surprised to hear this because the Respondent had not told her of this in November 2013. In any case, the Deceased never told her that he had sold the Plot. She asked the Respondent to vacate the Plot by February 2014 but he insisted to have bought the Plot. She eventually reported the matter to Police.

PW2 was a brother to the Deceased. His testimony confirmed that of the Appellant that the Deceased had bought the Plot and that since the Deceased was based in Blantyre, the Respondent was instructed to be depositing rentals in the Deceased's account. He further said that the Deceased had never informed him that he had sold the Plot to the Respondent.

PW2 also said that the Deceased had another woman by the name of Alinafe Dickson (DW3) but they were not legally married and she had no children for him. He said after the Deceased had passed away, they agreed as a family that the Appellant should collect rentals for the month of December 2013. The Respondent produced a document that indicated that the Plot had been sold to him and that he had paid K500,000, and there was a balance of K500,000. PW2 said that he was surprised to hear that DW3 was part of the sale of the Plot because by then the relationship between her and the Deceased had been terminated. He also said that DW3 had moved to an unknown place.

During cross examination, PW2 told the Court that he had met the Respondent once. The Respondent was collecting rentals and he had a document to indicate ownership of the Plot. He also said DW3 was not a lawful wife. He said he did not inform the Respondent of the death of the Deceased but believed he got the message. He was sure he was making deposits of the rentals since there were no complaints from the Deceased. He again said when they met at Police Alinafe Dickson was present but at the invitation of the Respondent. He said the Respondent was advised to remain on the Plot until the Court's determination of the dispute. PW2 insisted that the Respondent does not own the Plot because he only paid half of the full purchase price.

PW3 told the Court that he was a friend to the Deceased's family and a renowned businessman at Nchalo Trading Centre. He further told the Court that the Deceased called him and told him that he intended to sell the Plot. He further said he only heard that the Respondent bought the Plot but not even the Village Headman was aware of such sale. He also said although the Respondent is his neighbor, he never bothered to inform him that he had bought the Plot from the Deceased. PW3 said he was aware that the Respondent was collecting rentals on behalf of the Deceased.

During cross examination, PW3 said that he knew that the Deceased had two wives. He also said the Respondent had called him on phone on the issue of sale of the Plot but he had no idea he eventually bought the Plot. He maintained that the Deceased could have informed him if he had sold the Plot to the Respondent.

Three witnesses gave evidence on behalf of the Respondent, namely, the Respondent, Victoria Domwe and DW3. The Respondent testified that he started renting a house on the Plot when the owner was Mr. Masanza. The Plot was being overseen by Mr. Azimayi ndi Azibambo on behalf of Mr. Masanza. Mr. Masanza sold the Plot to the Deceased. A few weeks after the sale, the Deceased sent Alinafe Dickson, to formally introduce herself as a new plot owner on his behalf. This information was also communicated to Mr. Azimai ndi Azibambo through a written document. A month later, the Deceased personally came to the Plot and introduced himself. He was in company of his wife, DW3. The Deceased advised the Respondent to be depositing rentals in the Deceased's account. The rentals, totaling K10,500, were in respect of his own rented house and from a semi-detached house.

The Appellant further testified that before the Deceased opened the account, DW3, the Deceased's fellow truck driver and Mr. AngandiMaso were collecting the rentals.

After sometime, the Respondent was told by DW3 that the Plot was being offered for sale and this was confirmed by the Deceased himself the following day. He said that he was selling the Plot at K1,200,000. The Respondent told the Deceased that he only had K800,000 and assured him that he would have money after harvesting period. The Deceased called the following day to say he was travelling to South Africa and that he expected to be paid upon his return from South Africa. Three weeks passed without any communication. Because of the silence, the Respondent used some of the money and he only had K500,000.

The Respondent had initially suggested that the money should be deposited into the Deceased's account but later changed fearing that there would be lack of evidence of payment. They settled on having a written document. On 17th April 2013, DW3 produced a document signed by the Deceased and she also signed having received the sum of K500,000 and the Respondent also signed [Hereinafter referred to as the "Sale Agreement"].

The Respondent was advised to continue to pay rentals until when a final payment in respect of the purchase price was to be made by January 30, 2014. Towards the end of 2013, DW3 told the Respondent's wife of the death of the Deceased. After a few days, DW3 instructed the Respondent to be depositing rentals into a new account.

Around October/November 2013, Mr. Manja instructed the Respondent's wife that rentals should be given directly to Mrs. Tausi. Five days later, Mr. Manja led a delegation that met with the Appellant. He was told that the Appellant was the Deceased's legal wife. The Respondent explained to them the position regarding the Plot and showed them the documents in support of his purchase of the Plot whereupon the Respondent demanded to meet DW3 and the Deceased's family. The Respondent refused to pay them rentals and he was reported to police. He was summoned the following morning at Nchalo Police Station. Having narrated his story, he was advised to pay the Tausi family rentals for that particular month only since they did not have transport money to get them back to their home. DW3 was

invited and she produced the document for the sale of the Plot from Mr. Masanza to the Deceased and he also produced the Sale Agreement in support of his purchase of the Plot from the Deceased. The Deceased family denied knowing DW3. Mr. Masanza confirmed to know the Sale Agreement produced by Alinafe Dickson and also knowing Alinafe Dickson as a wife to the Deceased who also signed the Sale Agreement as a witness.

During cross examination, the Respondent said that he signed the Sale Agreement as a witness because of how the document was drafted by the Deceased and he was not in a position to know whether the Sale Agreement was forged or not. He also said he was instructed by the Deceased by phone to give money to DW3. He added that he was not introduced to any of the deceased relations except DW3. He went on to say that the Deceased confirmed on phone to have received the K500,000 he initially paid. He denied being certain if the Deceased had indeed travelled to South Africa or not. He concluded that he was communicating with the Deceased on different phone numbers.

DW2 is married to the Respondent. Her evidence is almost the same as that of the Respondent. She added that she had contacts with DW3 and she was always the first to meet the family members of the Deceased on issues to do with the Plot. During cross examination, DW2 told the Court that she was a witness to the sale of the Plot by the Deceased to the Respondent. She confirmed that the Respondent paid K500,000 and the sum was collected by DW3. She also said they had not yet attained ownership of the Plot because there was a balance in the sum of K500,000 to be paid. She further said the Deceased died some eight months before trial. She confirmed to have been asked to pay the remaining balance to Mr. Daudi Tausi, a brother to the Deceased.

DW3 told the Court that she got married to the Deceased in 2002 and, between 2002 and 2004, they were cohabitating at Makhetha. She further said that she decided to move from Makheta to Chemusa because she did not want to stay close to the Appellant. She proceeded to say that during her stay with the Deceased as a family they had a number of joint projects, including buying a car. She added that in 2010 she agreed with the Deceased to buy a house. She gave a detailed account of how they went about to buy the Plot and this is recorded by the lower court at page 10 of its judgment as follows:

"They initially found a house at Ndirande which was offered at K1,400,000 but they failed to buy because the owner changed his mind and in 2011 they said they met Mr. Masanza in Mozambique who when they told him of their intention, he offered to sale them his own house in Nchalo. They were satisfied and bought the houses at K400,000. Later they were introduced to Mr. Domwe who was the tenant of the main house and also a Respondent in this case, as their new Landlords. She said they were collecting rentals on monthly basis but later open an account where Mr. Domwe were making deposits of rentals. She also said they renovated the houses as they were in bad state. She also said in the course of their marriage they bought a minibus it was not road worthy. They then decided to sale the houses at Nchalo and the first person they notified was Mr. Angamaso of Nchalo. He told them that he had a customer who was offering to pay K1,300,000 but he was to get K500,000 as a commission. She said they could not accept and decided to find a customer by themselves. She further said when she went to collect rentals the last time, Mrs. Domwe asked her to confirm if they were selling the houses and when she confirmed she told her they were interested to buy. Then she said she informed the husband who told her to offer them at K1,200,000. After negotiations she said they agreed to get at K1,000,000. She said they however told them that they only had K800,000 cash. She said since they wanted the whole amount they told them they will come back to them. The witness said after they had decided, they failed to call Mr. Domwe immediately because of the busy schedule of her husband. Their intention were to go together to collect the money.

On 17/04/13 she said she was sent by her husband to go and collect the money amounting to K500,000 as part payment of the sale of the plot and houses. She said she went after the husband personally talked to Mr. Domwe. She further told the Court that the remaining K500,000 was meant for constructing a house at her home village and debt settlement."

DW3 said that, in December 2013, she got a call from Nchalo Police Station to answer a claim in connection with the Plot as the Deceased's relatives denied knowing her. She also said that Mr. Masanza confirmed to know her as the Deceased's wife.

During cross examination, DW3 told the Court that she did not attend the funeral ceremony of the Deceased because she had not been informed. She also said she never visited the Deceased's home after his death. She added that she is currently known by the name of "Alinafe Dickson". She further told the Court that the Plot was sold before the Deceased passed away and she went alone to collect the deposit of the purchase money. She also said she had not informed any of the relatives of the Deceased of the remaining balance.

Judgment of the Lower Court

The decision of the Court is to be found on page 14 of the judgment of the lower court:

"I have critically looked into the totality of the evidence before me and I find no clear declaration as to what extent each party's beneficial interest is going to be in the properties. The initial payment of K500,000 was collected and used by the late Mr. Tausi and Alinafe Dickson his second wife.

It is a fact that a sale agreement of the property was made between the late Mr. Tausi and Respondent. He was not part of the irresponsible actions of the deceased Mr. Tausi for failure to legalize his marriages and putting house in order. He innocently intended to buy properties the way Mr. Tausi wished. However, he does not fully hold the ownership of the houses because of the remaining balance of K500,000. As such the Appellant has proved her claim on balance probabilities and I would order the Respondent to pay the remaining K500,000 to the Appellant and the Tausi family and rentals from January 2014 to July 2014. The money to be deposited into Courts by 31st July 2014. Costs in the cause. I so do Order."

Grounds of Appeal

The following were the Grounds of Appeal that the Appellant advances during the hearing of the Appeal.

"The tenant took advantage of the bereaved person (Imran Tausi) by using a forged document to buy the plot, in which the signature used was not the deceased person's as per the late's signatures on his passport and on his driving licence. And that the lower court failed to consider that evidence.

The sale agreement was not witnessed by the deceased person's relations, authority, community leaders. Such as Politicians, Police, Court, Chiefs, Religious which was wrong?

The amount of MK1000,000.00 which was the purchase price and payable by way of monthly installments did not take into account the current situation of the Malawi kwacha."

The Appellant argued the three grounds of Appeal in an omnibus fashion and her main contention was that the Respondent took advantage of the Deceased by using a forged document to gain ownership of the Plot.

Analysis and Determination

In considering an appeal from the decision of a subordinate court, this Court considers evidence which was before the subordinate court and does not accept fresh evidence. This is called re-hearing.

When the Appellant presented her case in this appeal she essentially led fresh evidence, but not only that, she also dwelt much on the issues of forged documents and witnessing of the sale agreement, matters that were not raised before the lower court.

In any case, the Appellant three grounds of appeal have to fall by the wayside. Firstly, the Appellant did not show by way of evidence how the Respondent forged the Sale Agreement. The Sale Agreement was entered into between the Deceased and the Respondent, and duly witnessed, on 17th day of April 2013. The Respondent paid MK500,000.00 and the balance was to be paid later. The balance was paid through Court. All this was in accordance with the contract evidenced through the Sale Agreement.

Secondly, the Appellant failed to show how the Sale Agreement could be held to be irregular or void for failure to be witnessed by the Deceased's relations, community leaders etc. The fact of the matter is that the Respondent lawfully purchased the Plot. The Sale Agreement was witnessed by the two parties respective spouses, DW2 and DW3. I am inclined to agree with the submission by Counsel Gondwe that "There is no law which requires that the whole village of people should witness sale of land, most importantly private land"

Thirdly, the Appellant was not a party to the Sale Agreement and, consequently, she is not privy to the contract in issue. How can one who was not a party to the contract challenge it now?

Fourthly, the uncontroverted evidence is that the Plot, prior to its being sold to the Defendant, belonged to the Deceased as a sole owner thereof. In the premises, I am not convinced that the Appellant could have pursued a claim against the Respondent in respect of estate of the Deceased without first obtaining probate or letters of administration.

In the premises, this Court upholds the decision and order of the lower court. It is so ordered.

Pronounced in Court this 30th day of May 2016 at Blantyre in the Republic of Malawi.

A handwritten signature in purple ink, consisting of a large loop followed by a series of smaller loops and a final flourish.

Kenyatta Nyirenda

JUDGE