

MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
 PRINCIPAL REGISTRY
LAND CAUSE NO. 44 OF 2014

BETWEEN

JOHN WILSON ZAMMIMBA **PLAINTIFF**

and

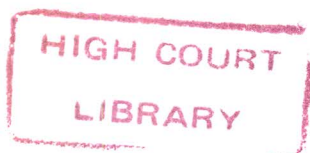
MRS CHARITY WILSON **1ST DEFENDANT**
 MRS IRENE MALUNGA **2ND DEFENDANT**
 MRS BEAUTY NDALAMA **3RD DEFENDANT**
 MRS FANNY KALUNGA **4TH DEFENDANT**

CORAM : **HIS HON. N. USIWA USIWA**..... **DEPUTY REGISTRAR**
 Mr. Nyambo of Counsel for the Plaintiff
 Miss Mr Malijani of Counsel for the Defendant
Mr. M. Kakhobwe **Official Interpreter**

ORDER ON SUMMARY POSSESSION OF LAND

This is an order on summary possession of land under **Order 113 r.1 of the Rules of the Supreme Court**. In its simplest form this is a dispute between a father and his four daughters over a house in Chimbba.

According to affidavit evidence, the father, who is the Plaintiff took out summons under 0.113 r.1 of the Rules of the Supreme Court claiming for possession of title number Michiru 65/70 comprising 0.7339 hectares of leasehold land at Chirimba in Blantyre.



He said he built this house with his own resources as a retired Civil Servant in 1982. The Defendants, he says are children of his former wife, NALESI.

He further avers, among other things, that before he married NALESI who was then his girlfriend he was already staying in Chitawira with his late wife ELLA MBITE who passed away while he was still in Chitawira and later opted to marry NALESI.

He also states that he secured the plot in question while married to ELLA MBITE and that when he was constructing the house on the plot in Chirimba, not even NALESI nor the Defendants knew anything that he was building the house. It was his other wife JOYCE MASANGANO who was staying in Bangwe who would know anything about it, he said.

It was in 1982, he says, after his retirement, that he disclosed to NALESI and her Defendant daughters that they should relocate to Chirimba.

It was in 1999 and due to marital problems that the Plaintiff left the matrimonial home and married another woman in Bangwe and that he does not want to sell this house.

THE DISPUTE arises when the Plaintiff states in his affidavit that he first sued his daughters at the magistracy for a Protection Order when the daughters started denying the Plaintiff father access to the house in question. This was after the plaintiff told them to leave the premises for wanton cutting down of trees.

THE DEFENDANTS on the other hand led by Charity who first denies marrying a Chilombo. She contends that she, her mother and sibling have contributed much to the house in dispute. However, it was the plaintiff father in 2011 on his own

without the knowledge of even their mother, who went to register the land in his own name.

She also claims that she and her sibling have registered a caution over the title.

ISSUES

The only issue therefore is to determine whether this is an appropriate case for Order 113.

THE LAW, ANALYSIS AND FINDING

The relevant order under which the originating summons is issued provides as follows: *"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being tenants or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order"*

The Order clearly provides for scenarios in which an application made thereunder can be contested and the following are the scenarios;

- (a) Where the persons in occupation are tenants
- (b) Where the persons in occupation are tenants holding over after the termination of the tenancy.

The Order is clearly directed at the following categories of persons;

- (a) A person or persons who enters in occupation of land without licence or consent of the person with title (entitled) to the land
- (b) A person or persons who entered with licence or consent but now remain in occupation of the land without licence or consent of the person with title (entitled) to the land or licence or consent of any predecessor in title of his.

Therefore, only the following can contest proceedings under 0. 113 RSC as clearly provided by the Order itself;

- (a) A person or persons in occupation as tenants
- (b) A person or persons in occupation as tenants holding over after the termination of the tenancy.
- (c) Other than the above any other person or persons contesting the summons have no merit where the identity of the land in issue is not in dispute.

In the case of **Peter Fatchi and Timothy S. Chirwa v. Mrs. John and 6 others. Civil Cause No. 148 of 2010, High Court, Principal Registry, (unreported)**; the reason for declining summary possession was because there was a dispute as to the identity or title numbers of the land in issue.

Justice Chipeta went on and isolated the following issues at page 4 of the judgment;

"Likewise, the Court cannot without calling for additional evidence, resolve the questions (i) whether Property Title No. Nancholi 288 indeed is or is not the plot that was meant to be taken by the Plaintiffs as a substitute for legal fees due to them, or (ii) whether or not it is true that the Letters of Administration that facilitated the transfer of title in question so many years after the agreement of fees in kind had been struck were indeed dubiously acquired"

Order 113 rule 1 RSC makes provision for a person to claim possession of land which is solely occupied by a person or persons who entered into or remained in occupation without the licence or consent of that person or of any predecessor in title of his .

The procedure for summary possession of land is appropriate where there is no dispute and where the existence of a serious dispute is apparent to a plaintiff he should not use this procedure and if he does the action may be struck out (see

Malawi Congress Party –vs – Pastor Makande of Kachere Assemblies of God Church and other Persons unknown Land cause no. 56 of 2012.

In the present case while the Plaintiff claims that he is the owner of the house alone, the daughters claim they did register a caution over the land. To me this sounds to be an issue too sticky to be ignored or “tried” by way of affidavit evidence.

It is therefore my finding that this is not an appropriate case to employ the procedure under Order 113 Rules of the Supreme Court. The summary procedure under Order 113 RSC is limited to the circumstances mentioned in the said Order. It is clear from the Affidavits filed by the parties to the present action that there is a serious dispute to be resolved between the parties.

It is apparent that there are serious issues to be resolved between the parties in the present case. The Court is faced with conflicting evidence from the Affidavits of the parties herein. The summary possession of land procedure in Order 113 Rules of the Supreme Court is not appropriate in the circumstance obtaining in the present case and the Plaintiffs action herein should be dismissed.

Costs to be in the course.

MADE in Chambers this **13th** day of **June, 2016**.



Nyakwawa Usiwa Usiwa
DEPUTY REGISTRAR