



MALAWI JUDICIARY

**IN THE HIGH COURT OF MALAWI**

SITTING AT BLANTYRE PRINCIPAL REGISTRY

**CIVIL CAUSE NO. 234 OF 2016**



**BETWEEN**

RICHARD MAGOMBO ..... **PLAINTIFF**

and

GOVERN BANDA & PERSONS UNKOWN ..... **DEFENDANT**

**CORAM** : **HIS HON. N. USIWA USIWA..... DEPUTY REGISTRAR**  
Mr. B Theu ..... of Counsel for the Plaintiff  
Mr Chiume ..... of Counsel for the Defendant  
**Mr. M. Kakhobwe .....Official Interpreter**

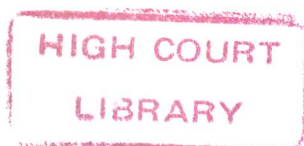
**ORDER ON SUMMARY POSSESSION OF LAND**

Earlier today I sat to hear the Plaintiff's application for an order for summary possession of land under Order 113 RSC. To wit, he prays for an order to recover vacant possession of "his" Plot No. **49/6/1119**.

The Plaintiff in his affidavit states that in September 2006 the Lilongwe City Council offered him Plot No **49/6/1119** as a replacement for another plot. He further claims that in the same month the Council **mistakenly** sent him a conditional offer of plot No. 49/6/2501 after which the Council is said to have apologized and urged him to go on with Plot No. **49/6/1119**.

On the other hand, the Defendant claims among other things that he was given Plot No. **49/6/1119** a year earlier in 2005 by the then Chief Executive Officer of Lilongwe City Council the late Donton Mkandawire.

The Defendant states that prior to that he was given a plot in Area 25. The encroachers took it. Then the Council gave him Plot No. **49/6/1119** as a replacement plot.



**I must put it on record and in bold that I had written this decision up to this far, using facts from mere affidavits in support and in opposition; which I had obviously thoroughly read.**

Then the parties arrived this morning for hearing. Instead of Mr Theu for the Plaintiff starting addressing the court, it was Mr Chiume who started applying for an adjournment in order to further get more evidence to prove the applicant wrong. But I stopped him saying I will address the application later, if necessary. To which Mr Theu agreed it was not necessary. The Defence had ample time. They argued on the matter extensively.

Then I asked both sides. To Counsel for the Plaintiff the question was to confirm whether the matter was coming under Order 113 RSC. The answer was a "yes" if I had heard him. He argued the Court only heard the adjournment part; which he opposed.

To the Defence I asked whether the purpose of seeking further for evidence was to prove that the matter need to go for trial, not to be decided here under Order 113. The reply was in the affirmative.

**Then we went off-record.** We mused on whether the court can make a decision based on affidavits only; without hearing the parties. This came about because the court had alluded to the fact that by seeking further evidence and going into investigations at Lilongwe City Council they showed to me that the matter had "sticky issues" that could not be summarily done at Registrar level but trial before a Judge. We agreed that parties ought to be heard. Otherwise why does the court dismiss a matter for non-attendance, instead of just doing a ruling based on affidavit evidence.

But in this matter I find that I partly heard the parties. I had to stop the Defence, in agreement with the Plaintiff, from further seeking more evidence. I made a "biased" decision mid-way; that the Lilongwe City Council ought to testify on how they offered title **49/6/1119** to apparently two parties and that both parties had to be given replacement plots. Above all, did the Council really apologise to the Plaintiff on this? And why do the Defendants oppose the Plaintiffs title with the seeking of further evidence? Should a Registrar delay further the Plaintiff's possession of land by unnecessary adjournments (that is if he is entitled to the land)?

These questions, according to me, point at "sticky issues" of this matter. And ***"It is important that if a summary Order is to issue, the Court should be fully satisfied that the said competing affidavits do not leave any sticky issues hanging, but that they be agreeable with each other in all material aspects"*** per Justice A.C.



Chipeta, as he then was, in **Peter Fachi and Timothy S. Chirwa v Mrs. John and Six Others. Civil Cause No. 148 of 2010, (High Court) (Principal Registry) (Unreported)**.

In that case Justice Chipeta agreed with an Assistant Registrar who had dismissed an application under O.113 and advised thus:

*"Clearly to me, no matter how clever a Court of Law be, in this case it cannot resolve the issue whether property Title No. Nancholi 288 is the former Plot No. NC 91 or the former Plot NC 92 **just by gazing at opposing affidavits the parties have filed** in the matter and second-guessing which party's position to accept or reject"*

Justice Chipeta went on to say:

*"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**"*

From that case I learn and apply the following: a Registrar like myself relies on competing affidavit evidence in applications for summary possession of land; and that where additional evidence is required on top of affidavits, then that matter is fit for a full trial before a judge. I also learn that titles can be dubiously acquired.

Again, 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: **Malawi Congress Party (MCP) v Pastor Makande of Kachere Assemblies of God and Persons Unknown (2012) Land Cause No. 56(HC) Unreported**. per Justice Chirwa.

And if Order 113/1 RSC applies strictly to the following 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;

do the parties *neatly* fit in those categories? The answer is no. The Affidavits herein contain a serious dispute over the title itself. And the dispute seems to be badly encumbered as the Defendant is said to have spent around K20,000,000.00 on the land and that he is still waiting for some response from Lilongwe City Council.

It is for the above reasons that I declined the Defendants application for adjournment. The evidence to be sought further beyond the affidavits, must be collected and reserved for a judge at trial. I also cannot grant summary possession of the land to the Plaintiff because of the sticky issues.

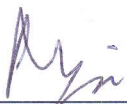
This means that I dismiss the Plaintiffs application. I rely heavily on the affidavits herein and his ultimate intention to summarily possess the land in dispute. The plaintiff ought to be looking forward for clean possession of the land after full trial of the sticky issues surrounding the title, without delay of adjournments to seek further evidence, for a Registrar.

My wish is to have the sticky issues surrounding the title cleared through a trial before a judge.

In our off-record discussion with the parties I readily granted the Plaintiff leave to appeal this decision, stating that the court need not delay the matter with adjournments when we already have a serious dispute over title. I still grant that leave to appeal.

Costs for this action are to be borne by each party since the matter is proceeding ahead, away from me, for trial or appeal; the appeal which is effectively a re-trial by a Judge.

MADE in Chambers this **29<sup>th</sup>** day of **June, 2016**.

  
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Nyakwawa Usiwa Usiwa  
**DEPUTY REGISTRAR**