



MALAWI JUDICIARY



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

LAND ~~CIVIL~~ CAUSE NO. 31 OF 2016

BETWEEN:

SMOLET KACHERE.....PLAINTIFF

-AND-

BERTHA MASIKU.....DEFENDANT

ILLOVO SUGAR MALAWI LIMITED.....OCCUPIER

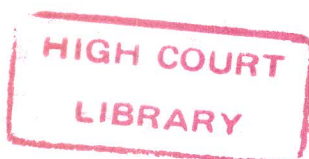
CORAM.	TAMANDA C. NYIMBA	: Assistant Registrar
	K. Mapemba	: Counsel for the Plaintiff (Absent)
	W. Hara	: Counsel for the Defendant (Absent)
	W. Kalua	: Counsel for the Occupier (Absent)
	Mrs. Phombeya	: Court Clerk

RULING ON APPLICATION FOR SUMMARY POSSESSION OF LAND UNDER ORDER 113 OF THE RULES OF THE SUPREME COURT

1. INTRODUCTION

- 1.1. On 8th March, 2016 the plaintiff herein brought an originating summons for summary possession of land under Order 113 of the Rules of the Supreme Court. In support of the application is an affidavit sworn by the plaintiff. The defendant resists the application. She has sworn an affidavit in opposition. There is a further affidavit in reply to the affidavit in opposition again sworn by the plaintiff.
- 1.2. Counsel for both parties filed written skeleton arguments and bolstered the same with oral submissions. As regards the Occupier, its Counsel addressed the court and submitted that to the extent that the Occupier is a party to these proceedings the same is a misconception and inconsequential because the Occupier, being a tenant of the defendant, will automatically be bound by whatever outcome befalls the defendant.

2. FACTUAL BACKGROUND AS SET OUT IN THE PARTIES' AFFIDAVITS



- 2.1. In his affidavit in support of the summons herein, the plaintiff has deposed that on or about December 2010 he bought a piece of land from one Miss Olivia Gomani, administratrix of the estate of the late Denson Fred Gomani henceforward referred to as "the deceased". The land, also described as plot number 290 and hereinafter referred to as "the disputed plot/premises/land", is located at Balamanja¹ Village at Monkey Bay in Mangochi district. The plaintiff has produced a copy of a Deed of Assignment² dated 13th November, 2011 to evidence a transfer of the disputed plot into his name following the purchase. Further, the plaintiff deposes that when he was readying to develop the disputed land, he noted that the defendant, who happens to own plot number 289 which is adjacent to the disputed plot, had built a parameter fence enclosing almost ninety per cent of the disputed plot and planted a small orchard and some gardens thereon.
- 2.2. The plaintiff goes on to aver that upon inquiry, he was advised that the defendant, whose plot number 289 is already developed, had leased her plot to the Occupier along with the disputed plot herein. The Occupier is currently enjoying the same as a cottage on plot number 289 and as gardens and orchard on the disputed plot but allegedly devoid of any consent from the plaintiff who is the registered owner of the disputed premises.
- 2.3. He continues to depose that upon approaching the defendant for clarification, she cheekily told him that the disputed plot was allocated to her by Lands Department because it was not being developed. She further refused to retract her registered boundaries when the plaintiff requested her to do so. Consequently, on or about 28th January, 2012 the plaintiff wrote a letter³ to the Commissioner for Lands at the Ministry of Lands and Surveys protesting about the defendant's activities to no avail. The plaintiff asserts that he is unaware of any occupier of the disputed land apart from the defendant and the Occupier in this case. He states that efforts to reason with the defendant have proved futile as the defendant has vehemently refused to move out of the disputed premises causing him to take out the originating summons herein.
- 2.4. In contrast, in her affidavit in opposition, the defendant has deposed that on 23rd June, 1992 the Minister responsible for land matters demised to her the parcel of land described as plot number 289. She further deposes that the disputed plot under discussion was vacant and for that reason she on 24th August, 2000 took the action of applying⁴ for a lease respecting the same following customary land consultation⁵ with

¹ I observe that in the plaintiff's affidavit the village is called Balamanja whilst in the documents exhibited thereto the village is named Mbalamanja. In light of this discrepancy it's safe for the court to henceforth rely on the plot number as distinct from the misspelt or misnamed village.

² Exhibit "SK 1"

³ Exhibit "SK 2"

⁴ Exhibit "BM 1"

⁵ Exhibit "BM 2"

the local chief. She duly paid the application fee⁶. She states that seeing as her application was taking long to process, she in January 2011 followed up the matter with Mangochi District Assembly where she reproduced the customary land consultation⁷ and made another payment described as scrutiny fee⁸ for the lease application. Thereafter, the District Commissioner for Mangochi District Assembly wrote⁹ the Regional Commissioner for Lands and Valuation (South) recommending the defendant's lease application in relation to the disputed plot.

- 2.5. The defendant further deposes that ultimately on 14th June, 2011, the Regional Commissioner of Lands and Valuation (South) made her an offer of a lease concerning the disputed plot for a period of 99 years¹⁰. One of the conditions which she duly complied with was payment¹¹ of the sum of K18,753.00 meant for fees and duties. Subsequently, she built a perimeter fence on the disputed plot as she was allowed to occupy the same from 1st June, 2011 after payment of the fees and duties. She adds that this was before the Deed of Assignment by the plaintiff herein. She therefore prays that the originating summons for summary possession of the land herein be dismissed on the ground that she is the rightful owner of the disputed land.
- 2.6. Responding to the foregoing, the plaintiff's material depositions in his affidavit in reply are, firstly, that the disputed premises were already owned and duly registered at the Deeds Registry in the name of the deceased (plaintiff's predecessor in title) as evidenced by a copy of the original lease¹² contrary to the defendant's assertion that the disputed land was vacant on 24th August, 2000.
- 2.7. Secondly, that the deceased was granted the lease way before the defendant had acquired hers on the adjoining plot number 289. Thirdly, that on 21st March, 2016 the plaintiff's legal practitioners conducted a search¹³ at the Deeds Registry in Lilongwe and the entries discovered clearly depict the epitome of title to be that on 11th January, 1991 the Minister of Lands demised the disputed parcel of land to the deceased; and on 13th November, 2011 Olivia Gomani as administratrix of the estate of the deceased demised the same to Smolet Kachere, the plaintiff herein.
- 2.8. Penultimately, that a mere offer of lease cannot defeat the plaintiff's registered interests in the disputed land. Finally, that the only reason the defendant did not succeed in

⁶ See Exhibit **"BM 3"** which is a poor copy of the receipt as it is hardly legible but a better copy of the same receipt appears in Exhibit **"BM 4"**.

⁷ n. 5 above

⁸ Exhibit **"BM 4"**

⁹ Exhibit **"BM 5"**

¹⁰ Exhibit **"BM 6"**

¹¹ Exhibit **"BM 7"**

¹² Exhibit **"SKS 1"**

¹³ Exhibit **"SKS 2"**

obtaining a proper lease on the disputed plot 16 years after her first application is because one cannot lease a piece of land that is already leased without the consent of the owner.

3. THE PARTIES' ARGUMENTS/SUBMISSIONS

- 3.1. Having with utmost care examined the oral and written submissions of Counsel for both parties, their principal arguments, as I see them, can be summarized as follows.
- 3.2. The plaintiff contends that the upshot of his aggregate documentary evidence as exhibited in both of his affidavits is that he has clearly established that he is the legal owner of the disputed plot. Further to that, the plaintiff is firm that he has demonstrated the circumstances the defendant has without his consent or licence entered and occupied the disputed plot thus entitling him to summary possession of the disputed land.
- 3.3. On the contrary the defendant, equally placing reliance on documents exhibited to her affidavit, pithily submits that she is in possession of the disputed plot following a lease that was offered to her by the Malawi Government after completion of appropriate formalities and she cannot for that reason be caught by the dictates of Order 113 or be characterized as a trespasser. She further argues that according to the Court in the case of *Namasasu v International Timbers Ltd*¹⁴, the procedure under Order 113 is only available to applicants with title to property against persons who entered or remained in occupation without license or consent. That the case of *Msamala v Thawani*¹⁵ is on all fours with the instant matter and the Court in that case dismissed the application for summary possession of land because the defendant was not regarded a trespasser and was not the class of occupier envisaged by the provisions of Order 113.
- 3.4. Counsel Wanangwa Hara for the defendant implored this court to pay careful attention to the fourth paragraph of exhibit "SKS1"¹⁶ wherein the lessee (that is, the plaintiff's predecessor in title or the deceased) on 11th January 1991 covenanted with the Minister of the Malawi Government Responsible for Land Matters to complete erection of buildings on the disputed plot by 30th April, 1992. In this connection, Counsel Hara asserts that it is arguable that the deceased's lease was terminated for non-performance and this state-of-affairs is supported by the evidence that when the defendant applied for a lease regarding the disputed plot, she received an offer in respect of the exact disputed plot. By reason of the foregoing, Counsel Wanangwa Hara submits that there exists in this case serious issues requiring determination in a trial rendering this action not amenable to be resolved summarily and therefore that the plaintiff's application ought to be dismissed with costs.

¹⁴ [1995] 1 MLR 157 (HC)

¹⁵ [1990] 13 MLR 250 (HC)

¹⁶ Copy of the original lease in the name of the deceased (the plaintiff's predecessor in title).

- 3.5. Counsel Mapemba for the plaintiff responded by inviting this court to distinguish the present case from the *Msamala case*¹⁷ in that the relevant litigant in the *Msamala case*¹⁸ had a lease while what the defendant in the matter under consideration has is merely an offer of a lease. Counsel Mapemba goes on to argue that the defendant received the lease offer on the footing of a mistaken belief that the disputed plot was vacant.
- 3.6. On the defendant's argument that it is probable that the deceased's lease pertaining to the disputed land was terminated for breaching the covenant specified above, Counsel Mapemba vigorously counter-argues that this is wishful thinking by the defendant because the search¹⁹ conducted on 18th March, 2016 shows that the lease is still valid and; if it had been terminated as the defendant would have this court believe, then there is no evidential material to substantiate the contention.

4. THE APPLICABLE LAW

- 4.1. Order 113 Rule 1 of the Rules of the Supreme Court provides as follows:

"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant 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".

- 4.2. In *Paul Msatida v David Kwenda*²⁰ Katsala J remarked as follows on what the rule envisages:

"This rule envisages two scenarios;

- a) of a person who enters into occupation of land without licence or consent of the person entitled to possession of the land or any predecessor in title of his; and*
- b) of a person who has entered with licence or consent but remains in occupation of the land without licence or consent of the person entitled to possession of the land or any predecessor in title of his".*

5. ANALYSIS AND DETERMINATION THEREON

- 5.1. At the outset of my evaluation of the parties' evidence and arguments in light of the applicable law, let me register my profound gratitude for the parties' focused

¹⁷ [1990] 13 MLR 250 (HC)

¹⁸ Ibid.

¹⁹ n. 13 above.

²⁰ Civil Cause No. 638 of 2004 (PR) (unreported)

submissions directing the court to the law and case authorities which submissions shall render the court's task at hand fairly effortless than would have been the case in their absence. I must also underline that those submissions gained in force because of their economical and succinct nature.

- 5.2. Without keeping the parties in gratuitous suspense, let me react to the evidence and arguments presented in this matter by firmly making a pronouncement right away that, on a preponderance of probabilities, the plaintiff's application cannot succeed. I dismiss the plaintiff's action on the basis of my reasoning deployed hereunder.
- 5.3. To start with, it is of no contest that on 11th January, 1991 the Minister Responsible for Land Matters demised to the deceased (the plaintiff's predecessor in title) the disputed plot. It is also common cause that in November 2011 the disputed leasehold land was assigned to the plaintiff after he bought the same from the administratrix of the estate of the deceased. It is equally not in dispute that after several preliminary processes dating back from 24th August 2000, the defendant was on 24th June, 2011 duly offered a lease concerning the self-same disputed land.
- 5.4. Pausing here, I observe that there has been no suggestion from the plaintiff in any way, shape or form that the defendant fraudulently procured the offer of the lease. I am mindful of course that there has been a rather tepid assertion by the plaintiff's Counsel that the defendant was operating under a mistake in so far as she thought the disputed plot was vacant when it was in fact not.
- 5.5. All that said, if one absents any accusation of fraud or improper conduct on the part of the defendant, I do not think that the argument that the defendant was mistaken is sustainable. I so opine because if ever there was such a mistake, which I confidently doubt, then blame ought to be laid at the door(s) of Chief Nankumba, the District Commissioner for Mangochi and the Regional Commissioner of Lands and Valuation (South) as these officials surely were, at best, duty-bound to caution, stop or object to the defendant proceeding with her lease application or, at worst, inform and advise the defendant that the disputed plot had an owner and a subsisting lease.
- 5.6. Granted, the plaintiff has produced several documents indicating his interest in or ownership of the disputed premises. Be this as it may, I am acutely alive to the fact that the defendant has specifically raised the question that the deceased's lease may have been terminated for flouting the covenant relating to the period within which the deceased was supposed to have completed construction of buildings on the disputed premises. I recall and it is on record that Counsel for the plaintiff intensely countered this argument stating that it is bare and unsupported by evidence. With profound respect to Counsel for the plaintiff, my Court begs to differ. It is clear in my mind that the defendant has supplied cogent material to support her argument in this regard and, in the interest of clarity, she did so in the following manner:

- 5.7. Firstly the defendant, quite rightly, points out that according to the covenants in the deceased's lease, on 11th January 1991 the deceased (that is, the plaintiff's predecessor in title) covenanted with the Minister of the Malawi Government Responsible for Land Matters to complete erection of buildings by 30th April, 1992. Observably, the plaintiff's own averment that he was preparing to develop the disputed plot soon after he purchased it from the administratrix of the estate of the deceased necessarily renders it a fact that at the point the disputed leasehold land was being assigned to the plaintiff in November, 2011, it was still undeveloped. As a matter of further fact, the plaintiff's deposition that he was about to embark on developing the disputed land is consonant with the defendant's averment that when she was originating the processes of applying for a lease of the disputed plot, the land was derelict, as it were.
- 5.8. And so, irrespective of the Certificate of Official Search²¹ clearly depicting the epitome of title to be that the plaintiff herein owns the disputed plot and; further keeping in mind the covenant as stipulated in the deceased's lease regarding the period for completion of construction of buildings, I stand persuaded by the defendant's contention that the reason why the Regional Commissioner of Lands and Valuation (South) offered the defendant a lease of the disputed plot is because all reasonable deductions tend to lead to the conclusion that the deceased's lease was terminated for contravening the covenant on the period within which he was supposed to complete putting together buildings on the disputed land.
- 5.9. Secondly and reiterating what I have previously pointed out elsewhere above, it is profoundly remarkable that three tiers of government officers responsible for land matters, to wit, Chief Nankumba, the District Commissioner for Mangochi and the Regional Commissioner of Lands and Valuation (South), did not caution, stop or object to the defendant proceeding with her lease application by informing and advising her that the disputed plot had owners or was already leased. The fact that the defendant went past the said three layers of government machinery without being put on notice that the disputed plot was leased tends to, *prima facie*, signal to me that something was quite not right with the deceased's lease and this may have informed or prompted the Commissioner for Lands to proceed offering the defendant a lease concerning the disputed premises. These circumstances certainly require exploration or probing and are, in my considered view, the genesis of the disagreement between the plaintiff and the defendant thereby making this matter not to lend itself to a summary procedure under Order 113.

²¹ n. 13 above.

5.10. On the plaintiff's argument that what the defendant herein has is a mere offer of a lease unlike the alleged trespasser in the *Msamala case*²², I would respond by stating that, at first glance, this contention has some traction. However, the lease offer to the defendant (that is, **Exhibit "BM 6"**) repays scrupulous attention. In paragraph 3 thereof it is provided as follows:

"3. The lease will be prepared and you will be allowed into possession when I have received from you the sum of K18,753.00 in payment of the fees and duties set out in the attached statement".

5.11. Thus, bearing in mind that the defendant has produced a receipt²³ evidencing that she paid the requested sum of K18,753.00 for fees and duties, my considered thoughts are that the defendant is perfectly entitled to argue that the lease was complete in equity since having accepted the offer of a lease by furnishing consideration thereto, the defendant may surely enforce the grant of the lease by availing herself of the equitable maxim that *equity will deem done what ought to have been done*.

5.12. Admittedly, it is arguable that since the defendant paid the requested sum of K18,753.00 for fees and duties outside the 60 days period as set out in the lease offer, then going by the strict and express terms of the offer, it follows that the offer lapsed. However, just like there is evidence by the defendant tending to show that the deceased ostensibly appears to have failed to meet the covenant vis-à-vis construction of buildings on the disputed premises within the specified time, the aspect of payment outside the offer period is equally one which may call for scrutiny in a full trial.

5.13. At the risk of overkill, I wish to emphasize that the summary procedure under Order 113 is only to be resorted to, and can only properly be pursued in a case where there can be no answer to the claim for possession. Doubtless some answers may, so like questions, turn out to be so insubstantial or so transparent that they can be ignored altogether. The present case is, in my conscientious view, not a case where I have the liberty to ignore the demonstrably sound answers by the defendant of the circumstances under which she came to be in possession of the disputed land. The summary procedure under Order 113 can only be suitable for squatters and others without any genuine claim of right or who have since transformed into squatters²⁴. The defendant herein is not one such squatter. According to the evidence the defendant has presented in this case, she is not the person envisaged in the two scenarios set forth by Katsala J in the *Paul Msatida case*²⁵.

²² n. 17 above.

²³ n. 11 above.

²⁴ *Greater London Council v Jenkins* [1975] 1 W.L.R. 155

²⁵ n. 20 above.

5.14. In closing, I find it apposite to make reference to the editorial introduction provided by the learned authors of the White Book which is quite illuminating: *see 113/0/2 (1999 White Book)*. Therein the learned authors observe that the use of this procedure is to be discouraged where the plaintiff is aware of a real dispute with the occupier defendant. I respectfully concur. It cannot be doubted that in the within case there is a real dispute involving, for instance, the plaintiff and the administratrix of the estate of the deceased on the one hand or involving the defendant and those that offered her a lease in respect of the disputed land on the other hand. Furthermore, it could be the plaintiff battling it out in court against the defendant and the District Commissioner for Mangochi or the Regional Commissioner of Lands and Valuation (South). It could similarly be the defendant bringing a suit against the plaintiff and the District Commissioner for Mangochi or the Regional Commissioner of Lands and Valuation (South). Indeed looking at the history of the matter as exposed in this ruling, one can come up with a number of permutations in terms of the potential litigants to feature in any given trial.

5.15. It is for all I have reasoned above that I have dismissed the plaintiff's application. If the plaintiff be so minded, he is at liberty to recommence the action under an appropriate procedure. As to costs, these normally follow the event and are discretionary. In the exercise of this discretion, I award costs to the triumphant defendant to be taxed if not agreed. Order accordingly.

PRONOUNCED IN CHAMBERS AT CHICHIRI, BLANTYRE THIS 1ST DAY OF JULY, 2016



Tamanda C. Nyimba
ASSISTANT REGISTRAR