



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO 502 OF 2012

BETWEEN

JIMMY MAKUTU-----1ST PLAINTIFF

MARY MAKUTU-----2ND PLAINTIFF

AND

V. S. P. NYASULU-----DEFENDANT

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE

Khonyongwa, for the Plaintiffs

Kapire/Chagwamnjira, for the Defendant

Mthunzi (Mrs), Senior Court Reporter

Mr Itai, Court Interpreter

JUDGMENT

This matter initially commenced through an originating summons dated 25th September 2012. Later on through an order of the court dated 4th of March 2014, the matter was to proceed as if begun by way of writ. The plaintiffs are seeking for the following reliefs:

- 1) A declaration that Plot No. 22/CP/607 belongs to the Estate of F.E.S. Makutu.
- 2) A declaration that Mr Vincent Makutu did not at any material time own the property.
- 3) A declaration that Mr Vincent Makutu had no authority to deal with the house exclusively and could not effectively sell the same.
- 4) An order that the tenant/occupiers of the said house pay rentals to the beneficiaries of the Estate of F.E.S. Makutu.
- 5) An order that the defendant ceases possession of the said house.
- 6) A declaration that the Chiefs did not and could not authenticate the sale of the house as it is not customary land.
- 7) An order that the costs of the case be borne by the defendant.

There are two witnesses from the plaintiffs' side. The first witness (PW NO1) was Assan Makutu. He is a brother to Felix Makutu the deceased. He told the court that the deceased left behind four surviving children namely; Vincent, Grace, Jimmy and Mary. He also left a house on plot no 22/CP/607. Since the other three children were minors, the family chose Vincent Makutu to look after the house. In 2011, the entire family was shocked to learn that Vincent Makutu had sold the house to the defendant. The family immediately informed the defendant to halt any developments on the land but the defendant did not heed this call. The witness tendered in court the document for the house which was in his custody. It is P Ex No 1(a). It is the evidence of Assan Makutu that the letters of Limited grant were fraudulent after the matter herein had already been exposed in 2011 and the letters were only issued in 2012. The letters of Limited grant referred to the deceased as Alex Makutu yet the deceased was Felix Makutu and there were also lots of errors in the affidavit in support of the application of the letters of Limited Grant. The sale agreement therefore was a nullity the witness concluded.

Jimmy Makutu was PW No 2. He is one of the sons of the late Felix Makutu and a beneficiary to the Estate of his deceased father. He told the court that his father left behind a house on Plot No 22/CP/607. He was later amazed to hear that this house had been sold by his brother Vincent without their knowledge. After selling the house, Vincent used all the money alone.

The defence invited only one witness the defendant himself. He told the court that he purchased the house from Vincent Makutu a son to F.E. S. Makutu now the deceased. His elder cousin Kalulu did obtain letters of Probate being **Probate Cause No 642 of 2012**. A sale agreement was executed and he tendered it as D Ex 1(a). This sale was confirmed by the Chief of that area who knew the seller Vincent Makutu. Mr Nyasulu said that it was later discovered that the land in issue was a squatter and that both the deceased and the Plaintiffs had not regularized it with the city of Lilongwe. He thus decided to make a follow up with the city authorities and regularized the situation by paying what was required whereby the City of Lilongwe officially allocated the land to him. He tendered the documents to show this process of regularization and allocation of the land to him. The documents are DEx 1(b), DEx 1(c), DEx 1(d), DEx 1(e) and Dex 1(f). The Defendant therefore said that he was a bona fide purchaser for value without any notice of any overriding interest. The Defendant concludes his defence by saying that the Plaintiffs have no authority to act as they have no letters of administration to give them such authority.

I have looked at the matter from a very simple perspective and that is to say, at the time this land was sold to the defendant, who was the owner of this land? This question is very important as it can guide us to appreciate the matters before this court. My understanding of this matter is that before the deceased's demise, he was a squatter in Area 22 Chipasula. The city of Lilongwe through its undated letter which letter is now P Ex 1(a) wrote the deceased informing him that the City was regularizing squatters and that before that was done, the deceased was supposed to pay regularizing fees amounting to a total of Mk2,500. The fees was supposed to be paid within 30 days failing which the City of Lilongwe would auction the property. Certainly, there is no evidence on record from the plaintiffs to show that the fees was paid. My understanding therefore is that the deceased was not adopted as a squatter by the time he met his demise. This land therefore was not his although his dependents and survivors still believed that the land belonged to the deceased estate. In 2011, Vincent Makutu believing that the land was for his father went ahead to sell it to the defendant. There was a lot of discussion in the submissions by counsel for the plaintiffs on the issue of letters of

administration which were obtained by a cousin to Vincent Makutu one Michael Kalulu. I have to put it on record that since this land did not belong to the deceased F.E.S. Makutu who had failed to be adopted as a squatter, I find that the issue of these letters is no longer relevant. They would have been relevant had I found that this land belonged to the deceased. I therefore find that the sale transaction between Vincent Makutu and Mr Nyasulu dated 11th July 2011 was a mere sham. Even if the defendant had not paid that money to Vincent, he could still have approached the city on the status of the land in issue which land had not been regularized to belong to the father of Vincent. Unfortunately, both Vincent and Mr Nyasulu went ahead to transact in this land with a belief that Vincent was dealing with his father's land yet this land is under the jurisdiction of the City of Lilongwe and not even a Traditional Authority can sanction its sale.

I have also looked at the submissions by the plaintiffs' counsel on the issue of the defendant not being a bona fide purchaser. With due respect, having found that the deceased had no title to this land, I am unable to place any emphasis on these very beautiful submissions. I do not want to beat about in the bush but to categorically state that the evidence on record has shown that the deceased Mr F.E.S. Makutu did not have title to this land. The evidence shows that the land belonged to the City of Lilongwe. The defendant through his personal initiative regularized his squatter position. With regards to the sale agreement that the defendant had executed with Vincent Makutu, that automatically fell off as Makutu had no title to this land. The plaintiffs' family should

I therefore find that the defendant is the rightful title holder of plot no 22/CP/607 in Area 22. Let me also take this opportunity to state that the plaintiffs should have been more serious and prepared when instituting this matter. There were no letters of administration authorizing any one of them to act as they did as is required by Sections 16 and 43 of the Wills and Inheritance Act. The plaintiffs should have done their homework well by first ascertaining if the deceased had title to this land. Vincent Makutu who was entrusted to look after the land and staying in the small house which he eventually sold to the defendant has let the family down by not sharing the proceeds of sale. I am sure that had he shared the

proceeds to the entire family, things would not have reached this stage. Unfortunately, the defendant cannot saddle that responsibility.

I dismiss this matter with costs.

DELIVERED THIS 8th DAY OF APRIL 2016 AT LILONGWE

M.C.C. MKANDAWIRE

JUDGE