



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
LAND CAUSE NO. 12 OF 2015**



BETWEEN:

WIJAYARUPAGE ASOKA KUMARA DHANAPALA 1ST PLAINTIFF

-AND-

**WIJAYA RUPAGE ANURA JAYAWARDENA 1ST DEFENDANT
HAFEEZA JAYAWARDENA 2ND PLAINTIFF**

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Mwakhwawa, of Counsel, for the Plaintiff
Mr. Mambulasa, of Counsel, for the 1st Defendant
Mr. Makwinja, of Counsel, for the 2nd Defendant
Ms. A. Mpasu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

This is an appeal by the Plaintiff [hereinafter called the “Appellant”] from a decision of the learned Deputy Registrar delivered on 19th June, 2015 refusing to order summary possession of land in favour of the Appellant and dismissing the Appellant’s claim for summary possession under Order 113, r.1 of the Rules of Supreme Court (RSC).

The background to the appeal is as follows: On 5th March 2015, the Appellant took out originating summons [Hereinafter referred to as “Summons”] against the 1st Defendant [Hereinafter called the “1st Respondent”] and unknown persons under Order 113 of RSC for summary possession of land numbers CG 443/144 and CG 443/44, also known as Chigumula 1/129 and Chigumula 1/223, which comprise dwelling houses [Hereinafter referred to as the “Chigumula properties”]. The 2nd



Defendant [Hereinafter called the “2nd Respondent”] applied for and was granted leave to be joined as a defendant to these proceedings on 20th March 2015.

The Respondents are opposed to the Summons. They claim that the Summons is not suitable for determination under Order 113, r.1 of the RSC.

The facts are as contained in five affidavits, namely, an affidavit sworn by the Plaintiff [hereinafter referred to as the “Appellant’s affidavit”], an affidavit sworn by the 1st Defendant [hereinafter referred to as the “1st Defendant’s affidavit”], an affidavit sworn by 2nd Defendant [hereinafter referred to as the “2nd Defendant’s affidavit”] and an affidavit in reply sworn by the Appellant [hereinafter referred to as the “Appellant’s affidavit in reply”] and an affidavit sworn by Justice John Chirwa.

It is averred in the Appellant’s Affidavit that (a) the Appellant is a citizen of Sri Lanka and he is in Malawi as a businessman under Business Resident Permit (BRP) reference No. 46988, (b) the Appellant first came to Malawi around December 1995, (c) the Appellant has been the Managing Director of Techno Automotives Limited since its incorporation, (d) the 1st Defendant is a director of Techno Automotives Limited and he came to Malawi as the Appellant’s dependent, (e) the Appellant left Malawi temporarily due to personal circumstances and when leaving he left the 1st Defendant living at Chigumula properties, and (f) upon returning to Malawi, the 1st Respondent wrongfully refused the Appellant to enter Chigumula properties which is the Appellant’s dwelling house and he has been rendered without a home.

I pause to make the following observation. Firstly, the Appellant does not state when the 1st Respondent started living with him at the Chigumula properties. Secondly, the Appellant does not disclose when he left Malawi, where he went and when he returned to Malawi. Thirdly, there is no averment in the Appellant’s Affidavit to the effect that the Respondents were in continued occupation of Chigumula properties without the Appellant’s licence or consent.

The 1st Defendant’s affidavit, in so far as it is relevant to the question before this Court, reads:

- “5. *THAT it is not true that the Plaintiff left Malawi temporarily. On the contrary, he left for good and only returned in July 2014 after seven years (7) That I have been staying in these premises since March 2002 because I contributed to their construction then On 20th January 2012, the Plaintiff finally sold me the two plots at the sum of MK12,000,000.00. There are now produced and shown to me copies*

of two Sale Agreements exhibited hereto and marked "WRAJ 3" and "WRAJ 4".

6. **THAT** the initial payment to to the tune MK6,000,000.00 was paid through spare parts which the Plaintiff herein collected from my company in Sri Lanka in which I am a sole proprietor, namely, French Car International. The Plaintiff collected the spare parts in the presence of his wife and my young brother, Lalith Siriyananda, and young sister, Priyanka Nimali who have indicated their willingness to come to Malawi to testify in this matter to that effect.
7. **THAT** on 29th March 201, I gave instructions to HANACO General Trading in United Arab Emirates who had my funds, to pay the balance of USD5,000 to Colombo Motors, a sole proprietorship for the Plaintiff. There is now produced and shown to me a Remittance Copy exhibited hereto and marked "WRAJ 5".
8. **THAT** the said property on the premises was transferred to me at the time when I completed paying for them in March 2012, and therefore the Plaintiff's application has no basis in law and it is an abuse of the court process and it must be dismissed.
10. **THAT** I have actually been given consents by Malawi Housing Corporation to transfer the said property into my name and that of my wife and I exhibit hereto and mark the same "WRAJ 7" and "WRAJ 8".

The contents of the 2nd Defendant's affidavit are not materially different from those in the 1st Defendant's Affidavit.

The Appellant's Affidavit in Reply is in the following terms:

1. I have read what purports to be the affidavits of WIJAYARUPAGE ANURA JAYAWADENA and have this to say.
2. That WIJAYARUPAGE ANURA JAWAJADENA was my dependent in Malawi until the date of the purported citizenship.
3. I refer to paragraph 4 of the said affidavit and state that it is not true that I resigned from Techno Automotives Ltd as alleged and that I am still the Managing Director at the said company save that the defendant has since my return prevented me from going to business and I am taking up that matter separately with the High Court Commercial Division.
4. That the alleged letter of resignation is fake and I verily believe that the defendant attempted to crop and paste my signature and forged the signature of my wife.
5. I refer to exhibit 2 of the said affidavit and state that the said alleged meeting at which a resolution is alleged to have been made removing me as a director is also fake because Justice John Chirwa did not attend the meeting and has told me that his signature has been forged.
6. That Justice John Chirwa advised me to report the forgery of his signature to fiscal police and I have since reported the forgery.

7. *That the forgery notwithstanding a meeting of only 2 directors is unlawful and all resolution passed are void ab initio.*
8. *That on 20th March 2015 my wife duly transferred all her rights title and interest in and to the business of Techno Automotives Ltd to me. A copy of the affidavit of transfer is now produced and marked exhibit 'ADR 1'*
9. *I refer to paragraph 5 of the said affidavit and state that I did not leave the country for good as alleged. The defendant was my lawful dependent who was staying with me before I left the country and I left him to look after the property and the business of Techno Automotives Ltd.*
10. *That I never sold the property to the defendant as alleged and the sale agreements exhibited to his affidavit are fake and a forgery, as I did not sign any sale agreement with the defendant.*
11. *I refer to paragraph 6 of the defendant's affidavit and state that I never collected any money or spare parts from the defendant's alleged company in Sri Lanka. The said company was a brief case company that the defendant operated from my premises in Sri Lanka and it closed automatically when he came to live with me in Malawi.*
12. *That I am not aware of the transaction alleged in paragraph 7 of the defendant's affidavit save to say that even if one adds the alleged payment of through spare parts worth K6,000,00.00 and the alleged USSD 5,000.00 money transfer the same does not come to K12,000.00 alleged as the purchase price and all is simply made up by the defendant who in breath depones that the purchase price was K6,000,000.00 by his exhibit 'WRA 3' and 'WRA3 4'*
13. *I refer to paragraph 8 of the defendant's affidavit and repeat that I never sold the property to the defendant and have never transferred the same to him let alone anyone. The said property is still registered in my name.*
14. *I refer to paragraph 9 of the defendant's affidavit and state that I have no knowledge of the developments allegedly made on the property by the defendant. Any such developments if true are without my consent and therefore illegal.*
15. *I refer to paragraph 10 of the defendant's affidavit and state that I have no idea how the said consent was obtained from Malawi Housing Corporation to the defendant without my consent and without any agreement for the sale of the property. The said consent could only be obtained fraudently.*
16. *I refer to paragraph 11 of the defendant's affidavit and repeat that I have never sold my property.*
17. *That from the forgery of the signature of Justice Chirwa I verily believe that the defendant would do anything to grab my property.*
18. *I now refer to the affidavit of Hafeeza Jayawadena and have this to say:*

19. *I refer to paragraph 4 of the said affidavit and stated that I never sold my property as alleged or at all and the exhibit purporting to be a sale agreement is fake and has gorged signatures of myself and my wife.*
20. *I refer to paragraph 3, 4 and 5 and state that I have no knowledge of the alleged developments on my property and if true the same are without my consent and therefore unlawful.*
21. *I refer to paragraphs 6 and 7 of the said affidavit and state that I have no knowledge of how consent was obtained from Malawi Housing Corporation when I have never sold my property and the same must have been obtained fraudently.*
22. *I have never refused to sign any alleged transfer of lease because I have never sold my property and have at no time put up the property for sale.*
23. *That the deponent only came to live in my house in 2011 and her allegation that the property was jointly built is hearsay.*
24. *That the property is in my name and I am the sole owner entitled to such possession."*

Here again, it is noteworthy that the Appellant does not state (a) when the 1st Respondent started living with him at Chigumula properties, (b) when the Appellant left Malawi, where he went and when he returned to Malawi and (c) how and when the Respondents became in continued occupation of Chigumula properties without the Appellant's licence or consent.

The affidavit by Justice John Chirwa is brief. I might as well set out the substantive part thereof in full. This is what it is says:

- “3. *That I know the plaintiff in this matter from being his legal counsel before my appointment as a Judge of the High Court.*
4. *That before my appointment as Judge of the High Court I served on the board of Techno Automotives Ltd a company in which the plaintiff was Managing Director.*
5. *That I have read the affidavit of WIJAYARUPAGE ANURA JAYAWARDENA and have this to say.*
6. *That the exhibit marked “WRA 2” purporting to be a resolution allegedly removing the plaintiff as director and signed by me was never signed by me and the signature purporting to be mine is a forgery.*
7. *That the only document signed by me in the presence of my wife is my resignation from the Board of Techno Automotives Ltd which the defendant brought to my house.*

8. *That when the plaintiff brought the said exhibit to me and upon noticing that my signature was forged I advised the plaintiff to report the matter to the police.*"

None of the deponents was cross-examined.

I have carefully reviewed the affidavit evidence and the submissions by Counsel in this case. The parties, in my view, lost direction on the issue before this Court. Both the affidavits and the submissions dwelt very much on matters ranging from citizenship and residential status of the parties to directorship of Techno Automotives Limited and forgery of documents. Much as such matters and arguments thereon make interesting reading, the same to my mind have peripheral relevancy to the main issues for determination by a court in a claim under Order 113, r.1 of the RSC.

Order 113, r.1 of the RSC reads 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."

The scope of this provision was considered in **Bristol Corporation v. Persons Unknown [1974] 1 WLR 365** [Hereinafter referred to as the "Bristol Case"] and it was stated at page 367 to be thus:

"Looking at the words of that rule, it seems to me to be clear that the order covers two distinct states of fact. The first is that of some person who has entered into occupation of the land without licence or consent of the person entitled to possession or any predecessor in title of his, and secondly that of the person who has entered into occupation of the land with a licence from the person entitled to possession or any predecessor in title of his but who remains in such occupation without the licence or consent of the person entitled to possession or any predecessor in title. That that is the true construction appears to be perfectly clear from the use of the word "or" in the phrase "who entered into or remained in occupation," and if the rule did not cover the second state of affairs which I have mentioned, that is to say, of entry with licence and remaining in occupation without licence, then the words "or remained" would, so far as I could see, have no significant meaning at all" – Emphasis by underlining supplied

The present appeal stands or fails on whether or not the present matter falls within Order 113, r.1 of RSC. The Appellant does not deny that the Respondents entered into occupation of Chigumula properties with his consent: see paragraphs 7 and 8 of the Appellant's Affidavit and paragraph 23 of the Appellant's Affidavit in Reply. In

the circumstances, the Respondents are not covered under the first category of state of facts in terms of the classification contained in the **Bristol Case**.

The next issue to consider is whether the Respondents fall within the second category of state of facts in terms of the classification contained in the **Bristol Case**. Having already found that the Respondents entered into occupation with the consent of the Appellant, the only question to ask is whether they remained in occupation without the Appellant's licence or consent. I have read and read the Appellants affidavits and searched in vain for such evidence. In his first affidavit, the Appellant dwells on matters to do with him being a citizen of Sri Lanka, being in Malawi as a businessman, being the Managing Director of Techno Automotives Limited, his leaving Malawi temporarily and subsequently returning to Malawi. Only two paragraphs in the Appellant's Affidavit, namely, paragraphs 8 and 13, relate to possession of Chigumula properties. This is what the two paragraphs say:

- "8. *That I left Malawi temporarily due to personal circumstances and when I leaving I left the defendant living at my property comprising pieces of land numbers CG 443/144 and CG 443/44 also known as Title Number Chigumula 1/129 and Chigumula 1/223 because then he was in Malawi as my dependent. Now produced are copies of Transfer of leases title numbers Chigumula 1/129 and Chigumula 1/223 marked exhibit 'AD 1 (a) and 1 b'*
13. *That the defendant has wrongfully refused me entry to my property on which is my dwelling house and I have been rendered without a home."*

Even if the Court were to give paragraphs 8 and 13 a more liberal interpretation or construction, neither paragraph, to my mind, establishes that the Respondent remained in occupation of Chigumula properties without the Appellant's licence or consent. Whether or not the Appellant was refused entry to Chigumula properties or rendered homeless is not a relevant question in the context of Order 113, r.1 of the RSC. I am not prepared to accept or conclude without more that merely because the Appellant was refused entry, the Respondents were occupying Chigumula properties without the Appellant's licence or consent. I would have been inclined to take a different view on the matter were it that there was adduced evidence to show that the parties had agreed that upon the return of the Appellant to Malawi, the Respondents were to vacate Chigumula properties. There is no such evidence before me.

In any case, and perhaps more importantly, the paucity of information on this point merely confirms that the Summons did not meet the requirements of Order 113, r. 1 of RSC. In terms of Practice Note 111/1-8/6:

“at the time of the issue of the originating summons, a plaintiff must file an affidavit in support, in which he must state his interest in the land and the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises. (see r.3(a) and (b))”

There is another reason why the Summons has to fail. As already observed hereinbefore, the Appellant does not state in his affidavits when he left Malawi, where he went and when he returned to Malawi. On the other hand, the 1st Respondent claims that the Appellant was outside Malawi for seven years. The Appellant denies that he did not leave Malawi for good but does not state the period of his absence from Malawi. In the circumstances, it is my finding that the Respondent's occupation of Chigumula properties in March 2002 and that the Appellant left the Respondents in occupation of Chigumula properties for seven years.

At the time of commencing the present suit, the 1st Respondent had been in occupation of Chigumula properties for over 12 years. Twelve years is undoubtedly a long period of time. The preponderant legal view is that Order 113, r.1 of RSC is not meant to be utilized against a licensee who holds over after been in occupation of a piece of land for many years: See **Bristol Case**, supra:

“Let me say at once that this order would no doubt not be utilized and an order made under it in the case envisaged in the note, namely, where there has been grant of a licence for a substantial period and the licensee holds over after the determination of the licence”.

In these circumstances and by virtue of the foregoing, the Appellant has failed to satisfy the court on balance of probabilities that the Summons falls within Order 113, r.1 of RSC. Consequently, the appeal is dismissed in its entirety with costs.

Pronounced in Court this 22nd day of February 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda

JUDGE