



THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO.587 OF 2012

BETWEEN

Kenderson Kamuyambeni (*on behalf of Kelvin Kamuyambeni a minor*)..... Plaintiff

AND

Mr Willard Kazembe Defendant

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| CORAM: | <i>Madalitso Khoswe Chimwaza</i> | <i>Assistant Registrar</i> |
| | <i>R. Kapile,</i> | <i>Counsel for the plaintiff</i> |
| | <i>G. Liwimbi</i> | <i>Counsel for defendant</i> |
| | <i>C. Mpandaguta</i> | <i>Court Clerk</i> |

Ruling on Application under Order 14A RSC

This is a ruling on the summons taken out by the defendant pursuant to **Order 14A Rules of the Supreme Court (RSC)** for a determination of issues on a point of law. The defendant raised three questions to be determined namely:

1. Whether the defendant is a legal owner of the land contained in plot No.47/11085 by virtue of adverse possession?
2. Whether the Ministry of Lands did not have title or ownership of the land by virtue of section 6 of the Limitations Act (Cap 6:02) and could not therefore pass on ownership or title of the same to the plaintiff 12 years having expired since the defendant occupied the land.
3. Whether the plaintiff is a bonafide purchaser without notice.
4. Whether if the above questions of law are answered in favour of the defendant the defendant is entitled to damages and costs

The application is supported by an affidavit in which the defendant deposed that the matter was commenced by the plaintiff by way of miscellaneous summon seeking an injunction which was granted and an originating summons was filed which was seeking among other things declaration that the defendant be lawful owner of plot No. 47/4/1085 and a declaration that the defendant was in wrongful and unlawful occupation of the property.

The brief facts of the defendants case is that he came on this piece of registered land in or about 1999 and was cultivating it without hindrance. He wrote a letter to Regional Commissioner of Lands in 2007 informing him of his occupation of the land. Letter exhibited as **WK1**. He wrote another letter expressing interest to buy the piece of land in 2009 letter exhibited **WK2**. He subsequently built a fence, a quarters, dipped a well and planted trees on the plot such that by 2012 all these structures were already on the plot.

The defendant therefore claims to have been on the plot for more than 12 years by the time the plaintiff's alleged title arose and therefore he is entitled to ownership and or possession of the by virtue of adverse possession. The defendant further claims that he displayed the animus possidendi or intention to permanently possess the land by building permanent structures. He further claims that the plaintiff did not act with due diligence by failing or neglecting to conduct due search to ensure that the land in issue was not encumbered, therefore he was not a bona fide purchaser without notice. He further claims that section of 6 of the Limitations Act, proscribes the commencement of claims concerning registered land after the expiry of 12years of occupation and the plaintiffs claim is statute barred.

The summons is heavily opposed by the plaintiff's who raised preliminary objection to its being heard on the grounds that Justice Kamanga had already given directions that the matter should proceed as if it was commenced by writ of summons. The issue being raised by the defendant in the present application raise factual issues which the judge had already directed that they should be determined as if the action was commenced by way of a writ. The matter is pending a date for trial therefore the present proceedings are an abuse of court process. There were a lot of factual issues and there was need for parties to be cross examined on their affidavits.

The Law

Order 14A of the Rules of the Supreme Court states that:

- (1) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that:
 - (a) Such question is suitable for determination without a full trial of the action, and
 - (b) Such determination will finally determine (subject to any possible appeal) the entire cause or matter or any claim or issue therein.
- (2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just.
- (3) The court shall not determine any question under this order unless the parties have either:
 - (a) Had opportunity of being heard on the question or
 - (b) Consented to an order or judgment on such determination.

Reasoned Analysis of Law and Facts

This court has noted that the issues that counsel raise to be determined are exactly what the Judge had instructed that should come for trial so that both parties can testify and be subjected to cross examination on their evidence. The question whether the defendant had acquired property rights on the land by adverse possession is a question of both fact and law. The question whether the plaintiff was not a bonafide purchaser without notice can only be determined upon verifying all the facts surrounding the case through evidence and cross examination. That cannot be determined by looking at affidavit

evidence only. In any case the matter has already been set down for trial before a Judge and to entertain the matter would be preempting the trial that is already due.

I therefore dismiss this application with costs to the plaintiff because this application was not necessary in view of clear directions by the Judge. The substantive matter will proceed for hearing before a Judge as already set down accordingly.

Either party aggrieved by this ruling has the right to appeal.

Made in Chambers this 17th day of November, 2017.



Madalitso K. Chimwaza

ASSISTANT REGISTRAR