



THE REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL CAUSE NO.22 OF 2017

BETWEEN

Petulo Magombo ..... Plaintiff

and

Andrew Sukali..... Defendant

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CORAM:	Madalitso Khoswe Chimwaza	ASSISTANT REGISTRAR
	<i>Molly Nkosi</i>	<i>Counsel for the Plaintiff</i>
	Mpandaguta,	<i>Court Clerk</i>

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**Ruling on Summons for Summary Possession (Order 113 of RSC)**

**Introduction**

This is a ruling on a summons for summary possession of land filed by plaintiff under **Order 113 of Rules of the Supreme Court**. The application is supported by an affidavit sworn by the Plaintiff. The defendant has not opposed the application. The defendants were duly served with notice of hearing the summons but they were not present and no reason for such failure was given. The court proceeded to hear the application in their absence.

The land subject of the present proceedings is on plot No. 25/3/208 in the city of Lilongwe. The undisputed evidence is that this property was acquired by the plaintiff in 1974 through the Capital City Development Corporation and an offer letter is attached to the affidavit dated 7<sup>th</sup> November 1974. The offer letter is in the name of S.H Sukali of P.O. Box 91, Lilongwe and not Magombo.

In his affidavit the plaintiff Petulo Magombo said that he developed the plot and built a house in which his brother Mr. Samson Sukali came to stay for 3months as he came from Balaka to

work in Lilongwe. He said when his brother Mr. Sukali left he found that the house was occupied by tenants and he started collecting rentals until in 2011 when he sent his son to collect rentals on his behalf. The son was arrested by his brother's sons who reported him to police claiming that the houses on the plot belonged to their father Mr. Samson Sukali. The plaintiff said he commenced action in the Magistrates Court, but before the matter was concluded the house was sold. He is therefore claiming summary possession of the said plot. The summons are not opposed.

**Does this matter fall within the provisions of Order 113 of the RSC?**

**Order 113 of the RSC** is confined to the claim for possession of land which is occupied solely by a person or persons who entered or remained in occupation without the licence or consent of the person in possession or of any predecessor of his. **Order 113(1) states that:**

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

**Order 113(3) RSC** requires that an applicant must establish by affidavit the following in order to succeed:

- (a) His interest in the land
- (b) The circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises and
- (c) That he does not know the name of any person occupying the land who is not named in the summons.

This court has noted that the plaintiff tried to establish his interest on the land by claiming to have been allocated the plot by Capital City Development Corporation in 1974. However the said offer letter is not in the name of the plaintiff. His name PETULO MAGOMBO is not mentioned or appearing anywhere as the owner of the said plot.

Further the allocation letter in English is made to S.H. Sukali and is referring to plot No. 25/822 while the allocation letter in Chichewa is made to S. H Sukali and is referring to plot No. 25/3/208 written in ink. The documents relied upon by the plaintiff to assert his interest in the land are questionable because they are not referring to him and they are referring to two different plots.

This court is mindful of the fact that, a matter falls within the provisions of Order 113(1) if the plaintiff can show that the defendant entered in occupation of the property in issue without the licence or consent of the predecessor in title, or entered occupation with licence/consent but remained without licence/consent. This thinking is confirmed by the case of *In Bristol Corporation v Person unknown* [1974] 1 All ER 593 which was applied in the case of *Msamala v Thawani* [1990] 13 MLR 250 (HC). In that case it was held and I quote

"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 the 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 of the land 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... Obviously there never could be proceedings against someone who had entered but did not remain in occupation of the land."

The plaintiff's argument is falling within the second limb where he alleges that his brother Mr. Samson Sukali entered the land with his consent when he came to work in Lilongwe from Balaka but the remaining in occupation was without his licence or his consent.

Do the circumstances entitle the plaintiff to an Order of possession?

**Order 113 of the RSC** clearly empowers a plaintiff to use it against persons who entered or remained in occupation of land without a licence either the plaintiff's or his predecessor. But just like all other summary proceedings, it will be used only where there are no serious contentions as to the facts and law applicable to the facts. In the present case the plaintiff has established his interest through allocation letter which are unfortunately in different names and referring to different plot numbers. Further he claims that the house on the plot was sold which raises the issue of legality of the sale.

I find that these questions cannot be properly dealt with under summary possession proceedings. This court therefore directs that the matter be heard by a judge as if it was begun by writ of summons under **Order 28/8** Rules of the Supreme Court (RSC) and should proceed to full trial. The plaintiff should file pleadings within 14 days and the defendant should respond 14 days later after which the plaintiff shall obtain trial directions. Costs are in the cause.

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

Made in Chambers this 1<sup>st</sup> day of August, 2017



Madalitso K. Chimwaza

**ASSISTANT REGISTRAR**