

**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS LAND CAUSE NO. 53 OF 2016**

BETWEEN:

ESITA YASINI PLAINTIFF

-AND-

GEORGE YASINI DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Sauti, of Counsel, for the Applicant

Ms. Jumbe, of Counsel, for the Respondents

Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

The Plaintiff commenced the present proceedings by way of Expedited Originating Summons seeking the following declarations, orders or reliefs:

- “1. *An order declaring subdivision made by city council to be null and void.*
2. *An order directing commissioner for lands not to register subdivisions as requested by George Yasini.*
3. *An order that Mapanga 25 and 26 should be subdivided in equal proportions to the 5 Proprietors or to their estates as may be applicable.*
4. *An order directing to commissioner for lands to subdivide Mapanga 25 and 26 into 5 equal proportions and register the subdivisions into each of the proprietors’ names.*
5. *An order for costs.*

The Expedited Originating Summons contains grounds on which the Plaintiff seeks the above stated reliefs and these read as follows:

- “1. *The plaintiff is lawfully one of the joint proprietors of the land together with her 4 other siblings.*



2. *The city council under instruction from the Defendant made Subdivisions of the land. The Subdivisions of the said land have not been made formally and have not been fairly and equally done without the knowledge of the plaintiff.*
3. *The Defendant requested the commissioner for lands to register the said subdivisions.*”

The Expedited Originating Summons is supported by an affidavit sworn by the Plaintiff [hereinafter referred to the “Plaintiff’s Affidavit”]. The material part of the Plaintiff’s Affidavit provides as follows:

- “3. *The property mentioned above, became jointly registered in the names of Elizabeth, Esita, Joyce, Charles and George Yasini in or about 1997 as one big piece of land. However with the construction of Zomba road, the plot was divided into two and the title numbers Mapanga 25 and Mapanga 26 were assigned to each piece respectively. The title holders of the property went unchanged. There is now produced and shown to me a copy of the details of title exhibited hereto and marked “EY1” and “EY2”.*
4. *With time, two of the title holders in the name of Charles and Joyce, are now deceased.*
5. *On or about 17th July, 2015, Mr. George Yasini, wrote the Regional Commissioner for lands requesting for Land Certificate on Title Number Mapanga 26 which he claimed now belonged to him and that Mapanga 25 had been subdivided into two which he further intended to further subdivide it. The letter was copied to all the title holders including me. There is now produced and shown to me a copy of the said letter exhibited hereto and marked “EY3”.*
6. *I repeats contents of paragraph 5 above and state that this came as a shock to me not only that I was not consulted on any development to do with reallocation of changing of title holding of the plots, but also that the said letter was purportedly copied to other proprietors who are now deceased.*
7. *Upon my inquiries, it has transpired that there is communication from Lands Office that Mapanga 25 is being divided into the names of Charles, who is now deceased, and Elizabeth. All this is done without my knowledge as one of the proprietors and also the subdivision is dubious as there is no way the piece of land can be allocated to a dead person. There is now produced and shown to me copies of correspondences from Lands to this effect exhibited hereto and marked “EY4” and “EY5”.*
8. *From the letter exhibited as EY3, the demarcations are not being made in a fair manner. The fair and equitable way being that the plot, if anything, should be demarcated in equal proportions representing the five proprietors and that the land assigned to the estate of the deceased be given to the respective representatives of such estates.*

9. *Efforts to amicably subdivide the pieces of land have proved futile due to the breakdown of communication between the Defendant and myself.*
10. *I verily believe that this Court has jurisdiction to grant orders as pleaded in this summons.”*

The Defendant contests the action and he has filed an affidavit in opposition to the Expedited Originating Summons [hereinafter referred to as the “Defendant’s Affidavit”]. It is apposite to quote the Defendant’s Affidavit in full:

- “2. **THAT** *unless otherwise stated, all the matters I depone herein are matters from my personal knowledge which I have obtained by virtue of being one of the joint proprietors of the property titled Mapanga 25 and 26 and I verily believe the same to be true.*
3. **THAT** *I and my four siblings including the Applicant in this matter inherited from our late Father’s estate the piece of land previously known as Title Number Mapanga 26.*
4. **THAT** *when the Zomba road was being constructed it became inevitable to cut the said piece of land so as to give way for the said construction, hence the piece of land that was given to the Applicant and the rest of my siblings was subdivided and given a different Title number as Mapanga 25. There is now produced and shown to me two copies of the land certificates Company exhibited hereto and marked ‘GY 1’.*
5. **THAT** *since we were five in number, we agreed to share the piece of land equally which we did despite the said piece of land having two different title numbers.*
6. **THAT** *the Applicant was given her own piece of land which was between Joyce Yasin’s and Elizabeth Yasin’s piece of land. This was done in 1997. There is now produced and shown to me a copy of the said communication reflecting the said division marked ‘GY2’.*
7. **THAT** *all was well when every member of staff developed his or her own piece of land, until when the Applicant started encroaching in everyone’s piece of land.*
8. **THAT** *the Applicant started farming on my piece of land and grew chillies. This was stopped after I intervened and told her to stop.*
9. **THAT** *the Applicant started farming in my late brother’s (Charles Yasin) piece of land and grew maize in there without consulting. Upon being quarried the Applicant, she has not given any plausible explanation as to why she has taken that position. The Applicant continues to farm in that piece of land till now.*
10. **THAT** *then the Applicant encroached in Joyce Yasin’s piece of land and started growing sugarcane and she continues to grow the said sugarcane till now despite being questioned by the children of my late sister.*

11. **THAT** she has been cutting trees and bananas in the ploy of Joyce Yasin without any authority from the owners.
12. **THAT** in addition to growing sugarcane, the Applicant drilled a borehole in Joyce Yasin's piece of land which she draws water from till today.
13. **THAT** then the Applicant encroached in Elizabeth Yasin's piece of land which is about an acre in size, and she currently grows maize in there.
14. **THAT** currently she is residing in an eight bedroomed house which was left by our late father and refuses to leave as she states she owns the property.
15. **THAT** whilst all this has been happening, the Applicant and the rest of my siblings have been having problems with the City Council in payment of city rates such that at some point, we were sued by City of Blantyre for outstanding City rates. There is now produced and shown to me a copy of the demand letter from then Messrs Lawson and Company exhibited hereto and marked 'GY3'.
16. **THAT** considering the circumstances stated above and in a bid to find a lasting solution to this encroachment, but also to give the other family members their rightful inheritance from the deceased siblings, I wrote to the Regional Commissioner for Lands to inspect the property and subdivide the pieces of land and issue land certificates in the names of each individual rightful owner. The letter goes on to state that Mapanga 25 should be subdivided into the names of the three sisters namely Elizabeth Yasin, Joyce Yasin and the Applicant herself. There is now produced and shown to me a copy of the said letter exhibited hereto and marked 'GY4'.
17. **THAT** the re-inspection was done to ensure that every rightful owner was issued with a land certificate and also to place responsibility on each individual owner to settle his or her city rates as opposed to what is happening now.
18. **THAT** the Applicant through her letter dated 13th July 2016, did not oppose to me obtaining Mapanga Title Number 26, and for the other plot to be shared by the remaining four. There is now produced and shown to me a copy of the said letter written by the Applicant exhibited hereto and marked 'GY5'.
19. **THAT** the two pieces of land were then re-inspected by the City of Blantyre, and they were then verified and confirmed by the city of Blantyre Officials to have been properly demarcated. There is now produced and shown to me copy of the letter dated 14th April 2016 to that effect marked 'GY6' and 'GY7'.
20. **THAT** I repeat paragraph 19 above and state that the city of Blantyre who are experts in this process confirmed that there was no fraudulent activity in the demarcation process done earlier.
21. **THAT** since the demarcation process had not been finalized, the two plots were not beaconed pending finalization of the entire process.

22. ***THAT** it is therefore surprising, that the Applicant is against the subdivision now even after the initial agreement as she knows that the subdivision will go a long way to settle the unnecessary encroachment squabbles thereby leave her with no power over the properties which she was currently encroached.*
23. ***THAT** further, the subdivision will also put responsibility on each proprietor to settle city rates individually as opposed to what was happening before as no one was responsible for settlement of the city rates. There is now produced and shown to me a copy of the outstanding city rates invoices exhibited hereto and marked 'GY 7'.*
24. ***THAT** unless the Applicant shows that the subdivision was fraudulently done, I submit that the process was fair and was done with the Applicant's knowledge as evidenced above in exhibit 'GY 4' and 'GY5'*
25. ***THAT** all parties in the family are in agreement with the subdivision process except the Applicant.*
26. ***That** the Applicant's argument that there is no way a piece of land can be allocated to a dead person is invalid since the deceased brother (Charles Yasin) and deceased sister (Joyce Yasin) left children behind and they rightfully and legally inherit from the estate as per the wills inheritance Act.*
27. ***THAT** currently, the Applicant stays in our late father's house and it is prayed before this Court that the Applicant be ordered to move out of the said house since the house is part of the land estate that should be shared equally whilst finalizing the demarcation process.*
28. ***THAT** the Applicant's prayer if granted would be costly and time consuming on the part of all parties as there was just two plots remaining for the exercise to be finished as opposed to restarting the whole process.*
29. ***THAT** I repeat paragraph 28 above and state that should the exercise be restarted, this would be detrimental to all parties as city rates would continue to accumulate and would eventually become unmanageable to estate.*
30. ***THAT** I humbly pray that the Applicants prayer is ill- conceived and selfish as the Applicant does not consider the negative impact that his would have on the other members of the family.*
31. ***THAT** in view of the above facts, the Applicant does not come to this Honourable court with clean hands, however, it is in the interest of justice that this subdivision do proceed and registration in different names be issued.*
32. ***THAT** in view of the above, I humbly pray that the Applicant's prayer to declare the earlier subdivision null and void be dismissed.*
33. ***THAT** further I humbly pray for an order that the demarcation of Mapanga 25 and 26 as earlier stated by me do proceed for the benefit of all members."*

Counsel Sauti submitted that the property titled Mapanga 25 and Mapanga 26 [Hereinafter referred to as the “disputed property”] was given to the parties and three of their siblings [Hereinafter called the “beneficiaries”] by their late father as a gift and it was in the interests of justice that the disputed property be shared equally amongst the beneficiaries. He further submitted that the suggestion by the Defendant that the Court should not interfere with the disputed property as presently demarcated is an erroneous suggestion in that it will simply perpetuate the current injustice caused by the fact that the disputed property is not equitably demarcated. Counsel Sauti also wondered why the Defendant does not want the disputed property to be divided equally when he claims that the Plaintiff occupies a bigger portion of disputed property. Counsel Sauti concluded his submissions by inviting the Court to note that the Defendant agrees, in the Defendant’s Affidavit, that the conflicts rocking the disputed property can be addressed by the beneficiaries having separate titles to their respective equal proportions of the disputed property.

In response, Counsel Maganga submitted that are three grounds for the Defendant’s opposition to the Plaintiff’s claim. Firstly, she contended that GW5, GW6 and GW7 confirm that the subdivision of the disputed property was done in a transparent manner and with the full consent of all interested parties, including the Plaintiff. She, therefore, expressed surprise that the Plaintiff has now turned around to allege that the disputed property was fraudulently sub-divided.

Secondly, Counsel Maganga argued that re-starting the process of sub-division of the disputed property will have negative effect on all the beneficiaries in that (a) the disputed property would continue to attract city rates to unmanageable levels and the disputed property risks being sold by the Blantyre City Council and (b) the process is bound to be very expensive and it would delay the process that was already underway to subdivide Mapanga 25.

Thirdly, Counsel Maganga submitted that the Plaintiff does not have clean hands as she is the one that is benefiting most. In light of these matters, Counsel Maganga prayed that the Plaintiff’s action be dismissed and the Defendant should be allowed to continue with the subdivision of Mapanga 25 which had already commenced.

Neither deponent was cross-examined.

It is trite that a plaintiff has the burden of proving the elements of his or her lawsuit. In a civil case, like the present one, a plaintiff has to prove his or her case on a balance of probabilities. That means that he or she must prove by showing that something is more likely so than not: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**. It, therefore, follows that in the present case the

burden of proof is on the Plaintiff as the party who has asserted the affirmative to prove on a balance of probabilities its case against the Defendant.

I have carefully perused all documents on the Court file, including the affidavits, and listened to counsel's oral submissions. The Defendant admits:

- (a) being one of the joint proprietors of the disputed property which he and his other four siblings, including the Plaintiff, inherited from their late Father's estate; and
- (b) that when the Zomba road was being constructed, it became inevitable to cut the disputed property so as to give way for the said construction, hence the disputed property was subdivided.

The Defendant further alleges that since they were five joint proprietors in number, they agreed to share the disputed property equally which they did despite the disputed property having two different title numbers (see paragraph 5 of the Defendant's Affidavit). This allegation is not supported by his own affidavit evidence. For starters, there is GY2. This is a "To Whom It May Concern" letter dated 28th February 1997 signed by Charles Yasini and George Yasini which reads:

"We, Charles Yasini, George Yasini being joint proprietors of a piece of land under Land Certificates No. 25 and 26 at Mapanga on the Zomba road do hereby authorize you to divide the land into five individual plots so that the plots should bear five deed title numbers."

GY2 tells its own story: the piece of land under the two certificates is owned not by five persons but two persons only, namely, Charles Yasini and George Yasini. Further, the authority being given is for disputed property to be sub-divided into five individual plots. There is no suggestion that the five individual plots were to be of equal size.

Then there is GY4, a letter dated 17th July 2015 which is written by the Defendant and addressed to the Regional Commissioner for Lands. It contains a request for a lands certificate in respect of Mapanga 26 and paragraphs 2, 3 and 4 of the letter are relevant:

"Previously, it was One Big Plot till our late Father passed away then it was distributed to Us Five Children as per our Letter dated 28th July, 1997 as joint proprietors and subsequent Lands Certificate that was issued on 5th October 1989.

It was later subdivided to Two Title Numbers due to the construction of the Zomba Road. It then became Mapanga 25 and Mapanga 26 then Three Plots were created out of this

subdivision that is One for Charles Yasin MP162 under (Title number Mapanga 25) and the other one to George Yasini MP 126 under (Title number Mapanga 26) then the other big part remained in the name of our elder Sister Elizabeth MP 163 under same (Title number Mapanga 25).

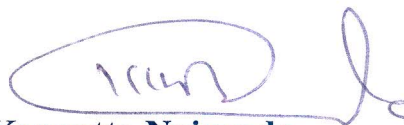
Plot MP163 in the name of Elizabeth is a big Plot which will be divided equally to our Three Sisters that is Elizabeth Yasin, Esita Yasin and Joyce Yasin and then each will have her own Land Certificate which will be done in due course when they are ready.”

It will be noted that although the Defendant requires MP 163 to be sub-divided equally, there is no evidence before the Court to the effect that the respective sizes of MP162 and MP 126 are one third of MP 163.

In light of the foregoing, I am satisfied that (a) the demarcations already made to, and/or proposed demarcations of, the disputed property were not, and/or are not being, fairly and equitably done and (b) the disputed property was unilaterally and disproportionately subdivided by the Defendant. Accordingly, the Plaintiff has succeeded in her action against the Defendant and the following orders are hereby granted:

- (a) an order declaring subdivision made by the Blantyre City Council to be null and void;
- (b) an order that the disputed property (Mapanga 25 and 26) should be subdivided in equal proportions to the five beneficiaries or to their estates, as the case may be;
- (d) an order directing to the Commissioner for Lands to sud-divide the disputed property (Mapanga 25 and 26) as ordered in paragraph (b) above and register the subdivisions into the names of each of the five beneficiaries or to their estates, as the case may be; and
- (d) an order for costs for the Plaintiff.

Pronounced in Court this 26th day of April 2017 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE