

IN THE HIGH COURT OF MALAWI

LILONGWE HIGH COURT

CIVIL CAUSE 85 OF 2017

BETWEEN:

BISHOP ABRAHAM SIMAMA-----1ST PLAINTIFF

SIMSOL OIL AND TRANSPORT LIMITED-----2ND PLAINTIFF

AND

PUMA ENERGY(MALAWI) LIMITED-----DEFENDANT

CORAM: THE HONOURABLE JUSTICE M.C.C. MKANDAWIRE

Wapona Kita, Counsel for the Plaintiffs

Patrice Nkhono, Counsel for the Defendant

Itai, Court Interpreter

JUDGMENT

This matter came before this court through an originating summons filed with the court on 12th of June 2017 and issued by the court on 13th June 2017. In the said originating summons, the plaintiff seeks the court's declarations, orders and reliefs as follows:

- a. A declaration that the 1st plaintiff is the owner of Plot NO: KK104 in Nkhotakota District.

The Plaintiff seeks the following reliefs:-

- a. An order of possession by the plaintiffs of Plot NO: KK104 in Nkhotakota District.
- b. An order of costs.

The originating summons is supported by an affidavit made by Bishop Abraham Simama dated 9th June 2017. The plaintiffs also filed skeleton arguments. The



defendant opposed the summons. The defendant filed an affidavit opposing the summons. The affidavit is made by Mr Joseph Chafumuka. The defendant has also filed skeleton arguments. On 21st July 2017, the plaintiff filed an affidavit in reply to the affidavit in opposition to the originating summons. There was also filed an affidavit in reply to the affidavit in opposition filed by Mr Ken Kandodo. On 25th July 2017, the plaintiff filed a supplementary affidavit. On 27th July 2017, the defendant filed a supplementary affidavit opposing the supplementary affidavit.

When the matter came for hearing on the 27th of July 2017, the parties agreed that the makers of the affidavits should be subjected to cross-examination by both sides.

It is imperative at this point to put down the evidence of each side as it came through the affidavits. The plaintiffs' case is as follows:-

1. The 1st plaintiff owns the 2nd plaintiff.
2. The plaintiffs have embarked on the business of operating fuel service stations throughout Malawi.
3. In February, 2017 Mr Timothy Kazombo approached the 1st plaintiff offering the sale of his Plot NO KK104 situated at Nkhotakota District. The plot has a filling station on it.
4. A search at the Deeds Registry confirmed that indeed Mr Timothy Kazombo was the owner of Plot NO: KK104. This Plot was assigned to Mr Kazombo by the previous owner Mtunthama Farming Limited on 8th November 2012 at a consideration of MK11, 000,000.00 and registered in the Deeds Registry as Deed NO: 86470. The 1st plaintiff tendered a copy of the Deed as BAS1.
5. That the official search did not reveal any registrable interest in the land by the defendant. A copy of the registration certificate in exhibited as BAS2.
6. The 1st plaintiff proceeded to buy the property from Mr Kazombo at Mk150,000,000.00 and an assignment of transfer of the land was executed on 28th February 2017 and registered on 2nd March, 2017 as Deed NO: 89760. The plaintiff tendered the copy of the Deed as BAS3.

7. On 7th March 2017 Timothy Kazombo wrote the defendant who are operating a filling station at this plot informing them about the change in ownership of the plot. The letter is BAS4.
8. On 7th March 2017, the 2nd plaintiff under the directions of the 1st plaintiff also wrote the defendant asking it to handover the property. The letter is BAS5.
9. On 9th March 2017, the defendant responded and informed the 2nd plaintiff that they hold a sub-lease over the plot which sub-lease was granted to them by Mtunthama Farming Limited on 3rd February 2013 for 30 years and that the said sub-lease was dully registered by the Deeds Registry on 7th October 2013. The defendant therefore declined to handover the property to the 2nd plaintiff. The letter is tendered as BAS6.
10. The 1st plaintiff say that since the sub-lease created by Mtunthama Farming Limited in favour of the deceased was created after the main lease had already been assigned to MrTimoth Kazombo by the said Mtunthama Farming Limited on 8th November 2012, it meant that the creation of the sub-lease on 3rd February 2013 was wrongful as Mtunthama Farming Limited had no Title to create the said sub-lease in favour of the defendant.
11. Having looked at the complexity of the matter, on 13th March 2017, the plaintiff wrote the Lands/Deeds Registrar seeking a clarification of the defendant's interest in the land. The letter is BAS7.
12. On 6th April 2017, the Deeds Registrar invited both Mtunthama Farming Limited and Mr Timothy Kazombo to a hearing which was to be heard on 10th April 2017. The letter of invitation is tendered as BAS8.
13. Following the meeting Mtunthama Farming Limited wrote the Regional Commissioner Lands in Lilongwe on 19th April 2017. In a nutshell, Mtunthama Farming Limited confessed having made a mistake since at the time when a sub-lease was made to the defendant, the same land had already been assigned to Mr Timothy Kazombo. The letter is exhibited as BAS9.
14. On 8th of May 2017, the Minister Responsible for Land Matters approved and determined that the 1st plaintiff is the true owner of Plot NO: KK104 in Nkhotakota District. The letter is marked exhibit BAS10.
15. On 16th May 2016 the plaintiff wrote the defendant through exhibit BAS11 to handover the plot.

16. As there has been no response to the above letter, the plaintiffs instituted these proceedings.

In opposing this application, the defendant's case is as follows:-

1. That PUMA the defendant was born out of succession of changes of names from Shell, BP and OILCOM Limited, Oil Company of Malawi (1978) and BP Malawi Limited.
2. By an agreement dated 31st of October 2006, Chayamba Holdings Limited (a company affiliated with the estate of the late Dr Kamuzu Banda and a previous government lessee of the subject property) granted BP Malawi Limited (PUMA'S immediate predecessor company) a lease of 10 years over the subject property running from 1st April 2006 to 31st March 2016 with an option to renew for a further 10 years on the same terms (except the option). The lease is tendered as exhibit JC7.
3. During 2013, PUMA was approached by Mtunthama Farming Limited (another one of the companies affiliated with the estate of the late Dr Kamuzu Banda) that it had become the proprietor of a 99 year government lease over the subject property and that they sought to offer a renewed lease to PUMA over the property. The defendant accepted the offer since it was also going to be for an extended lease of 30 years. A copy of the Deed NO 86782 being a 99 year Government lease granted to Mtunthama is tendered as JC8. The Deed is dated 22nd July 2013 effective from 1st June, 2013.
4. PUMA accepted the sub-lease at a global sum of Mk30,600,000.00 for the entire period. The parties entered into an agreement for the sub-lease effective 1st October 2013. The sub-lease agreement is JC9. The sub-lease was duly registered in the Deeds Registry as Deed NO: 86847. Proof of payment to Mtunthama is JC9(a).
5. From 2013, the defendant has enjoyed quiet possession of the property until 2017 when Mr Kazombo and the plaintiff wrote them through exhibits JC10 and JC11.
6. PUMA responded through JC12.
7. That the affidavit search for the plaintiff does not include Deed No: 86782 (the 99 year Government lease to Mtunthama Farming Limited). On the other hand PUMA had obtained an official search in respect of Deed NO:

86782 and it validates the fact that Mtunthama had the title to grant PUMA the 30 year sub-lease when it did. The official search certificate is exhibit JC12A.

8. That when the government Land Registrar invited the parties on how to resolve the problem herein, PUMA was not included as a party.
9. That in reference to the documentary evidence submitted by the 1st plaintiff, it is clear that Kazombo was granted a 99 year lease by government over 0.1521 of a hectare at Nkhotakota Boma from 1st November 2012. It is observed that Deed NO: 87146 which is the roof of Title in Mr Kazombo's Deed of assignment with the plaintiff dated 28th February 2017. Thus 0.1521 of a hectare equates to).376 of an acre. It is therefore not clear if this property is the same. It is also important to note that before 7th of March 2017, Mr rKazombo had never approached PUMA claiming ownership of the property or even rent. One would also have expected Mr Kazombo and the plaintiff to have first checked with PUMA before entering into an agreement in respect of the property herein.
10. After receiving the letter of demand from the 1st plaintiff, PUMA sought an audience with Mr Ken Kandodo of Mtunthama Farming Limited to find out what was happening. In the presence of Mrs Dzanjalimodzi and Timothy Kazombo, Mr Ken Kandodo communicated to PUMA an offer to sell Mtunthama Farming Limited's interest in the subject matter. PUMA however entered reservations to buying the property at MK225,000,000.00 yet the filling station was constructed by the predecessor to PUMA.
11. That notwithstanding, PUMA paid MK20,000,000.00 to Mtunthama Farming Limited as down payment as shown on exhibits JC13 and JC14.

The plaintiff made a reply to the defendant's affidavit in opposition. In a nutshell, the 1st plaintiff said:-

1. That there is no evidence to show that the service station at Plot NO: KK104 in Nkhotakota District was built by any of the defendant's predecessors.
2. That Chayamba Holdings had never owned the property in issue here and therefore the 10 year lease between Chayamba Holdings and the defendant was illegal. A search in the Deeds Registry does not show any interest on the land by Chayamba.

3. That on JC7 the lease of the filling station refers to lot number 15 whilst the property in issue is plot number KK104.
4. That the defendants are relying on the sub-lease yet the sub-lease gets its life from the Head Lease between the Minister Responsible for Land Matters to Mtunthama Farming Limited Deed NO: 86782 which is exhibit JC8.
5. That the evidence as gathered from BAS10 shows that DEED NO: 86782 had been cancelled which means that the sub-lease was also cancelled. It is submitted that the defendant should instead challenge the decision of the Deeds Registrar.
6. The 1st plaintiff tendered exhibit BAS1a which are email communication between him and the defendant but the communication shows that the defendant is unwilling to accept the offers by the plaintiff in order to settle the matter herein amicably.
7. That by 3rd of October 2013, the land in issue had already been sold by Mtunthama Farming Limited to Timothy Kazombo.
8. That the contents of the letter from Mtunthama Farming Limited authored by Mr Ken Kandodo dated 13th April 2017 were superseded by another letter from the same Mr Ken Kandodo dated 19th April, 2017 attached as exhibit BAS 9.
9. That there was no payment from the defendant to the plaintiff as per exhibit JC14 but just an advice of payment which could be stopped at any time.
10. That the decision of the Land Registrar still stands as it has not been challenged.

There was also filed an affidavit in reply to the affidavit in opposition to the originating summons. The affidavit was made by Mr Ken Kandodo. It says:-

1. He is the Managing Director of Mtunthama Farming Limited since 2016. That Mtunthama Farming Limited is the previous owner of Title NO: KK104 in Nkhotakota District. Mr Ken Kandodo retracted exhibit JC13 saying that at the time he authored it, he did not have the facts at hand. That on 8th November 2012 Mtunthama Farming Limited had assigned Plot No KK104 in Nkhotakota to Mr Timothy Kazombo.

2. That after 8th November Mtunthama Farming Limited had nothing to do with Plot No KK104. It is because of this that on 19th of April 2017 Mr Kandodo authored another letter BAS9 retracting JC13 as it was discovered that at the time Mtunthama Farming Limited was executing the sub-lease it had no right to do so since the property had already been sold and transferred to Mr Timothy Kazombo.
3. That Mrs Nsaliwa was the Managing Director of Mtunthama Farming Limited at the material time and she is the one who signed on both the assignment and the sub-lease to the defendant.

The defendant through Mr Joseph Chafumuka filed an affidavit in which he says:-

1. That the plaintiffs should not rely on documents which were issued on "Without Prejudice" basis.
2. Mr Chafumuka described in details the series of meetings which the 1st plaintiff and the defendant had in trying to resolve the matter herein.
3. In a nutshell MR Chafumuka said that the defendant made an offer of Mk150,000,000 in order to resolve the matter out of court, but this was not a sign that the defendant was admitting liability.

The court has looked at all the affidavit evidence. After both sides were subjected to a very rigorous cross-examination, there are several issues that came on the surface which led this court to come to the conclusion of this matter.

I am satisfied from the evidence that Mtunthama Farming Limited is at the centre of this case. It is my finding that in 2012, Plot No KK104 in Nkhotakota District was assigned to Timothy Kazombo under Title Deed No: 86470. Although the defendant raised some issues with this assignment, it is however clear and admitted by the Managing Director of Mtunthama Farming Limited that they had indeed assigned the said property to Mr Timothy Kazombo. It is clear from the evidence that Mtunthama Farming Limited did not inform the defendant about this development. This was a very serious omission by Mtunthama because as a sitting tenant, the defendant should have been amongst the first to be updated on this development. The duty was indeed on Mtunthama Farming Limited to inform the defendant especially that there was a binding contract between a sister company to Mtunthama and the defendant. In 2013, the same Mtunthama Farming Limited entered into a sub-lease of 30 years with the defendant yet this

is the same property that they had assigned to Mr Timothy Kazombo in 2012. How they could have done that really baffles my mind. At the time when Mtunthama Farming Limited was sub-leasing the property to the defendant, it had to legal title and right to the said property. This has been admitted by Mr Kandodo through his own letter BAS 9. There is no other better evidence than this coming from the Managing Director of Mtunthama. It would appear that there was a lot of confusion in the way this Mtunthama Farming Limited was operating. The picture I get from all this is that the left hand of Mtunthana Farming Limited did not know what the right hand was doing.

In February 2017, it is when Mr Kazombo assigned the property to the 1st Plaintiff. At that time, Mr Timothy Kazombo was very much entitled to assign the property as he was the owner of the said property. The defendant raised a concern as to why Mr Timothy Kazombo did not bother them since 2012 and only came on the scene in 2017. Whilst this is a very genuine question, only Mr Timothy Kazombo can answer it. Unfortunately he is not a party to these proceedings. What is however clear is that by assigning KK104 to Mr Timothy Kazombo, it means that Mtunthama Farming Limited had surrendered its 99 year lease which the Government of Malawi had given it. It is from this 99 year lease that Mtunthama Farming Limited had created the 30 year sub-lease with the defendant. This is clear from exhibits JC8 and JC9. After discovering what mess it had created, Mtunthama Farming Limited even went further by withdrawing its interest in the Nkhotakota property KK104. It requested the Minister responsible for Lands to consolidate the two Deeds into one and allow the new Title Holder Timothy Kazombo to discuss with the defendant (PUMA) on the way forward. The Minister accepted the surrender and the Registered Proprietor became the 1st plaintiff. After the Minister Responsible for Land Matters had accepted Mtunthama Farming Limited to have the lease cancelled, the Minister pursuant to section 11 of the Lands Act accepted the surrender of lease on Deed 86782. The action by the Minister Responsible for Land Matters meant that the sub-lease by the defendant had no legal basis on which to be anchored. The defendant did not challenge the decision of the Minister. Since the main lease was cancelled, there is no way the sub-lease could have existed on its own. The case of **Metcash Trading Africa vs Clothing City Trading Plastics (Pvt) Ltd (t/a Crazy Plastics** Case NO. 12/28298 (South Africa High Court) is good authority on this point.

I take it that as things stand in this matter, Mtunthama Farming Limited are the architects of the confusion that has gone on in this matter. They certainly owe the defendant an explanation. The defendant has all the right to bring a legal suit against them in entering into a lease agreement with them for 30 years yet they had already assigned the property to Timothy Kazombo. I have also noted that the defendants have already instituted Judicial Review Proceedings in Judicial Review Number 50 of 2017 in which the defendant has dragged the Commissioner Lands to account for its actions in the property saga herein.

I have looked at the issue that was raised by the defendant as to whether the plot that the plaintiff bought is the same property that the filling station occupied by the defendant is situated. I however note that as a court, I was not particularly called upon to make a declaration on this. I am however mindful of the fact that the defendant as per the evidence before me was a mere tenant on this land on which the filling station is. I therefore find that it would be mere adventure for the court to be labour itself with issues of plot size and demarcations as if these were matters in issue. Moreover, the affidavit evidence is very clear especially exhibits BAS4 and BAS5 that what the 1st plaintiff bought included the land where the filling station is situated. So despite the land size issue, there is no doubt that the filling station is on that same land we are talking about in this case. The court also took a close look at the certificates of official search which are exhibits BAS 2 for the plaintiff and JC12(a) for the defendant. On both certificates, the sub-lease Deed does not appear. One therefore wonders as to whether the defendant had complied with section 13 of the Deeds Registration Act. This would therefore render the documents null and void in terms of section 28 of the Deeds Registration Act. Thus the issue of the 1st plaintiff not consulting the defendant does not really hold water here. I therefore declare that the 1st plaintiff is the owner of Plot No: KK104 in Nkhotakota District. Having found that, I order that the plaintiff should gain possession of his property Plot NO: KK104 in Nkhotakota District. The defendant to pay costs of these proceedings.

DELIVERED THIS

DAY OF MARCH 2018 AT LILONGWE

M.C.C. MKANDAWIRE

JUDGE

