



JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 1936 OF 2007

BETWEEN:

THE REGISTERED TRUSTEES OF MALAWI CONGRESS PARTYPLAINTIFF

AND

PRESS PROPERTIES LIMITED.....DEFENDANT

CORAM:

K. BANDA, ASSISTANT REGISTRAR

Mr. W.Kita, Counsel for the Plaintiff

Mr. D.Njobvu, Counsel For The Defendant

Ms. Ngoma Court Clerk

RULING

The Defendant filed an application by way of summons, under Order 14A of the Rules of the Supreme Court (herein after referred to as "RSC"), to dispose of this matter on points of law upon determining the question of law of whether the Plaintiff is entitled to commence an action against the Defendant for orders for registration of prescriptive titles under Section 134 of the Registered Land Act and section 6 of the Limitation Act. The Defendant affirms that the question on the points of law is answered in the negative. The Plaintiff, on the other-hand, contends that the Defendant's have suppressed material facts to this courts in that the application to dispose this

matter on a point of law is *res judicata* and an abuse of the court process and should therefore be dismissed. They also argue that the Defendant is not being honest to say they intend to use the doctrine of adverse possession as sword when in actual sense it was invoked as a shield.

That said, under Order 14A there are two first considerations namely: (a) whether the case comes within the orders and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under order 14.

Under (a), the procedure under order 14A requires that; (i) The defendant give notice of intention to defend; (ii) The question of law or construction be suitable for determination without a full trial of the action; (iii) The determination will be final as to the entire cause or matter or any claim or issue therein; (iv) The party had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination.

And under (b), for Order 14 to be used as a summary process, the following should be established first: (i) the defendant must have given notice of intention to defend (ii) the statement of claim must have been served on the defendant and (iii) the affidavit in support of the application must have complied with rule 2. Rule 2 requires that (i) affidavit must verify the facts and (ii) it must contain a statement of the deponent's belief that there is no defence to the claim or part thereof of the claim. With respect to this, as a court we observe that requirements of Order 14 listed above have been satisfied.

In respect of Order 14A, the defendant herein gave notice of intention to defend and in fact did serve its defence. That aside, the parties appeared before this court and therefore had the opportunity to be heard. And as for (c) the determination of the question in this application would finally determine the entire claim against the defendant. The only requirement that remains to be considered is that under (b) and that is to examine whether the question of law or construction herein is suitable for determination without full trial of the action. This court is very sure that only if this question is answered in the positive, only then can this court proceed to determine the question. And if the outcome of the examination be in the negative, then this court will not proceed any further.

That said, generally the test of whether a question is suitable for determination without a full trial of the action is whether all the necessary material facts relating to the subject matter of the question

have been duly proved or admitted. Such that the court is not being called upon to hear evidence or make own findings of fact but only to consider the facts as proved or admitted to determine the question raised before it. Basically the facts will be contained in the supporting affidavit evidence deposing to all the material facts relating to the question of law or construction to be determined and equally affidavit evidence in answer which confirms, adopts or supplements the affidavit in support. Essentially therefore affidavit evidence in answer should not traverse or challenge or contradict such facts as deposed to by the plaintiff. See. Paragraph 14A/2/8 of RSC. This is premised on the ground that Order 14A is a new provision and an extension of Order 14 in the Rules of the Supreme Court (RSC) such that the similar requirement of “no disputes between the parties as to the necessary material facts” under order 14 applies such that in *Tilling v Whiteman [1980] AC 1*, their lordships, Wilberforce and Scarman, agreed that:

“...The first step for the court therefore is to find the facts and determine whether the parties admit or approve the material facts after which the court can proceed to examine the preliminary points of law. For the courts to start with the latter will only allow that the judge reaches his own hypothetical facts and thus resulting in more legal costs and time to be taken in the courts...”

It must also be stated that under Order 14A the facts to be considered are the proved or admitted facts, material to the subject matter of the question. And by extension if there is no admissions in the pleadings or otherwise, then the facts will be proved by affidavit evidence in support or answer.

Reverting to the issue before this court, that is as to whether the question of law as put herein is a question suitable for determination without a full trial of the action, we would rather refer to the facts as covered in the affidavits of the parties as the pleadings seem highly contentious. The purpose is to establish whether all the necessary material facts relating to the subject matter of the question have been duly proved or admitted. At this point, we are not being called upon to hear evidence or make our own findings of fact but only to consider the facts as proved or admitted to determine the question raised before us.

The Defendant's Affidavit.

The Defendant filed an affidavit in support of the application sworn in by **HLAZO NYIRENDA**, the Operations Manager for the Defendant. It is deposed from paragraph 6 of the Defendant's affidavit as follows.

“Title to the land in dispute

6. The property described as plot number B4 /055 and B4/056 in the statement of claim was sold by African Lakes Corporation to the Defendant in consideration of K3,644.35. The transfer of land under the Registered Land Act was affected on 3rd February 1976. There is now produced to me a copy of the transfer of land exhibited hereto marked **"HN4"**.

7. The land described as Title Number 2400 was purchased by the Defendant from Larji Kurji in consideration of K15,800.00. The conveyance of the property from Larji Kurji to the defendant was made on 19th November 1975 there is now produced and shown to me a copy of the conveyance document exhibited hereto and marked **"HN5"**.

8. Title Number 2400 was subsequently registered under the Registered Land Act and a search at the land registry reveals that. There is now produced and shown to me a copy of the certificate of official search marked **"HN6"**.

9. The plaintiff admits that the Defendant has the title to the land in question and that is clear from paragraph 4 of the amended statement of claim which states that "...the Defendant was holding several properties among which were the building known as the plaintiff's Blantyre Clock Tower Offices that are standing on title number Likabula 2400 of plot number BC114 formerly TP 3410 and the building known as the Plaintiff's Lilongwe Old Town Offices standing on plot number B4/055 and B4/056".

Plaintiff's claim

10. The plaintiff contends that it has dispossessed the Defendant, the title holder of the land in dispute, through adverse possession and it seeks an order for the registration of the title in the land. In essence, the Plaintiff is approaching the court as an alleged encroacher on land and suing the owner of the title of land for the title to be passed to it.

11. On 8th December 2013, the plaintiff filed with the court skeleton arguments in which it is asking the court for an order that it be registered as the owner of the land in dispute on

the basis of section 134 of the Registered Land Act and also section 6 of the Limitation Act. There is now produced to me a copy of the said skeleton arguments exhibited and marked as "HN7".

12. I verily believe that the real issue in this case is whether or not the plaintiff is entitled, through this action, to the orders for registration of prescriptive titles under section 134 of the Registered Land Act and section 6 of the Limitation Act (which is what is being claimed by the plaintiff as can be seen from the statement of claim and the Skeleton Arguments).

13. It is my firm belief that the determination of this question will finally dispose of the entire case.

WHEREFORE it is my humble prayer that the within action be disposed of on points of law and be dismissed with costs to the Defendant."

The Plaintiff's affidavit.

The Plaintiff filed an affidavit in opposition to the application. It was sworn by **RHINO CHIPHIKO** (Member of Parliament) of Malawi Congress Party. It is deponed from paragraph 4 of the Plaintiff's affidavit as follows:

"4. THAT the Defendant is guilty of suppressing material facts in making its summons to dispose the matter on a point of law which facts call for a dismissal of the summons.

5. THAT for the summons, it is clear that the defendant is asking the court to determine that the Plaintiff was not entitled to commence the action against the defendant for orders for registration of prescriptive titles under S.134 of the Registered Land Act.

6. THAT what the Defendant is not telling the court is that it once brought such an application to dismiss the action on the same basis and that application was dismissed by the court. I attach and exhibit a copy of the Ruling of Her Honour, Dorothy nyaKaunda Kamanga (as she was that) marked **RC1**.

7. THAT as can be seen from page 8 of the Ruling exhibit **RC1** herein, the court already made the following finding: **"An assessment of the writ of summons and statement of claim does show that such a claim is reasonable**

cause of action. The court will look at the facts to determine whether or not the plaintiff acquired prescriptive title to the pieces of Land in issue to entitle the plaintiff to the relief sought”.

*8. THAT bringing the same action (albeit under a different procedure rule) for the determination of the same legal issue before a court of the same jurisdiction as the one that made the earlier determination is **res judicata** and the application must be dismissed **ex debito justitiae**.*

9. THAT the Defendant is also guilty of suppressing material facts to the court in that in his application, he has only exhibited copy of the amended statement of claim and a copy of the amended defence.

*10. THAT as the court will observe, the Defendant in his defence also puts up a Counter-claim. To this Counter-claim, the Plaintiff entered a defence. I attach and exhibit copy of the Defence to the Counter-Claim which has not been exhibited by the Defendant marked **RC2**.*

11. THAT as can be clearly seen from the Defence to the Counter-claim, the Plaintiff pleaded; “the Plaintiff avers that it has acquired the said properties by virtue of the doctrine of adverse possession.”

12. THAT thus going by his pleadings, the doctrine of adverse possession is being invoked not as a cause of action but as a defence to the counter claim.

13. THAT this being the case, the Defendant’s application on dismissing the case on the ground that adverse possession cannot be used as a sword but as a shield is misguided because there is in any event, a pleading by the Plaintiff using adverse possession as shield to the Defendant’s counter claim.

*14. THAT it must also be brought to the attention of the court that there is an order of injunction subsisting until the final determination of this matter and disposing this matter on a point of law by the Registrar will have the effect discharging the order of injunction which was granted by the judge and that would be grossly irregular. I attach and exhibit a copy of the said order of injunction marked **RC3**.*

15. THAT again, it must be brought to the attention of the court that the 30th of April, 2013, the parties herein executed a Consent Order for Directions where it was agreed among other things that the matter should proceed for trial before a Judge of the High

*Court on a date to be fixed by the court. I attach and exhibit a copy of the Consent Order for directions marked **RC4**".*

*16. **THAT** the present application which is not about trial of the matter and which does not form part of the consent order has the effect of setting aside the Consent Order which can be done by fresh action.*

....

***WHEREFORE** , I humbly pray to the honourable court to dismiss the Defendant's summons for disposal of action on points of law with costs and further pray that the matter be specifically set down full a full trail (sic) as per the consent order for Directions."*

On a proper examination of the pleadings and the affidavits of both parties on court file, the court forms the following views:

Firstly on the facts as put in the defendants affidavit in support, the defendants through paragraphs 6,7 and 8, and exhibits attached, have proved prime facie that they hold title to the land in question. Through the facts in paragraph 9, they have sought to convince the court that the plaintiff has admitted to this fact as reflected in its pleadings and specifically according to paragraph 4. This court had a look at the said paragraph 4 of the statement of claim. The said paragraph states as follows;

4. During the period that the plaintiff was a ruling party the defendant was holding several properties among which were the buildings known as the plaintiffs Blantyre Clock Tower offices that are standing on title number Likabula 2400 or plot number BC114 formerly TP3410 and the building known as the plaintiffs Lilongwe Old Town Offices standing on plot number B4/055 and B4/056.

With due respect, the way the actual statement is phrased and the context in which it is put in the plaintiff's statement of claim, we express our reservation to call it an admission. Paragraph no. 4, is not a lone standing paragraph. It is a building block laying foundation for another statement as observed from the statement of claim as a whole. As such, we declines to take the statement extract as a fact of admission as alluded to by the defendant in its affidavit for doing so would essentially be putting unintended words in the mouth of the plaintiff. This should however not in any sense be interpreted as finding of fact on our own. It is what it is.

That aside, we also note that paragraph no.4 is an extract from the pleadings and not affidavit evidence in answer as provided by the affidavit of the plaintiff. And we must add that we have examined the pleadings in their entirety, and it is our observation that the pleadings are highly contested and therefore cannot be relied on. And therefore as alluded earlier, when the pleadings are in contention, it is the affidavit evidence in answer that we look to. And in that case, the affidavit evidence in answer should not traverse or challenge or contradict such facts as deposed to by the plaintiff. Now reverting to and examining paragraph no.4 that is purportedly said to make admission, and the same being in light of the affidavit evidence of the plaintiff, we find no pointer to the suggestion of the defendant that the same was an admission. In short, the facts as put in both affidavit evidence of the plaintiff in answer and that of the defendant in support, do not give complete information for one to confidently state that there is proof of admission or actual admission of facts by one of the parties or either of them.

That aside, we refer to the facts in paragraphs numbered 10,11 and 12 of the plaintiffs affidavit evidence. In these paragraphs, the plaintiff raises issues of suppression of material facts. Specifically in paragraph no.10 it is deposed that the Defendant in his defence had put up a Counter-claim to which the Plaintiff entered a defence. To prove this, the same was attached and exhibit before the court as **RC2**. In agreement with the plaintiff, we note the same was not exhibited by the defendant in its affidavit in support. As to what it is and its relevancy; it is a defence to counter claim by the defendant. It invokes the doctrine of adverse possession, the very essence of the application herein, in a way contradicting the defendant's evidence that the same was being used as a sword and not shield. Without commenting, this is an example indicating that facts in the plaintiff's affidavit evidence contradict the defendants affidavit in support. This also covers the facts in paragraphs 11 and 12. Essentially therefore, they could be more examples but for the sake of expediency. And in passing there is also an issue of the matter herein being res judicata as put in the affidavit in answer, all the above and this issue, hinges on the issue of suppression of material facts by the defendant.

That said, however without addressing the question of whether the matter is indeed res judicata or not as raised by the plaintiff, and only considering the basic requirements of Order 14A rule 1(a), where the facts as provided in the affidavit evidence in answer contradict the affidavit evidence in support of the application, the outcome is that such question is not suitable for determination without full trial. And so without addressing our mind to the other issues raised as the same would only be an academic exercise in futility, this court hereby find for the plaintiff in that it is not

possible on the affidavit evidence available to establish whether all the necessary material facts relating to the subject matter of the question have been duly proved or admitted. We repeat that we were mindful that the purpose at this point was not to hear evidence or make our own findings of fact, but only to consider the facts as proved or admitted to determine the question raised before us. The defendant's application is therefore dismissed with costs. It has failed to satisfy the basic requirements of order 14A . The matter should therefor proceed to trial.

Ordered in chambers this 18th day of September, 2018 here at Chichiri, Blantyre.



K BANDA

ASSISTANT REGISTRAR

ANCILLARY ORDER

This court takes note that there was an application to be added as a party by Lilongwe City Mall and the same was made to stand till the ruling herein. This court orders that the Lilongwe City Mall can now pursue the matter. However for the sake of such proceedings, this court will no longer be seized of the application. The same is referred to the Registrar for allocation of another officer to handle it.

Ordered in chambers this 18th day of September, 2018 here at Chichiri, Blantyre.



K BANDA

ASSISTANT REGISTRAR