

JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE No. 3283 OF 2006

BETWEEN:

GLENS WATERWAYS LIMITED

(operating as MALAWI LAKE SERVICES LIMITED) PLAINTIFF

AND

D. L CHAIMA

1ST DEFENDANT

P.M LIMAU

2ND DEFENDANT

B. E MAGOMBO

3RD DEFENDANT

A.K.G NKHOMA

4TH DEFENDANT

A.M.C SAKALA

5TH DEFENDANT

B.B CHIMOTO

6TH DEFENDANT

A KOMWA

7TH DEFENDANT

H MVULA

8TH DEFENDANT

J MALEMBO

9TH DEFENDANT

DM SINGA

10TH DEFENDANT

K KAUNDA

11TH DEFENDANT

H ANAFI C VALETA

12TH DEFENDANT

H ANAFI

13TH DEFENDANT

RULING

The plaintiff herein brought an action for recovery of property under Order 113 of the Rules of the Supreme Court. The plaintiff is seeking to recover property (houses) whose numbers are F 19, MLS/4/S/2, F 2, E 1, E 6, E 8 MLS/4/S/10, MLS/4/5, 53 A, 46 A, and B9 situate in Monkey Bay on the ground that they are entitled to possession and that the persons in occupation are in occupation without license or consent. The matter was first heard in 2005 by the Second Grade Magistrates Court in Monkey Bay who was of the view that the defendants occupied the property without license or consent and ordered that they vacate the houses within 7 days. In 2006 the, the plaintiff commenced an originating summons in the High Court under Order 113 of the RSC seeking to summarily recove possession of the houses.

This is the ruling made following the hearing which was set down before the late Honourable Justice Manyungwa. I was assigned to prepare and deliver the ruling following the demise of the Honourable Judge.

In terms of the evidence there is filed in support of the application an affidavit sworn by Mr. Anton Botes, the General Manager of Malawi Lake Services, the plaintiff company and an affidavit in opposition which was sworn by Mr. Nkhata, the legal practitioner for the defendants.

The factual background leading up to the present action as appears in the affidavits are as follows: the defendants were at some point employees of Malawi Lake Services Ltd (hereinafter MLS), the predecessor to the present plaintiff, Glen's Waterways Ltd (GWL). While in the employ of MLS the defendants were allocated and entitled to occupy the institutional houses in issue. Sometime in or around February 2002 the government of Malawi, acting through the Privatisation Commission, granted a concession for the operation of MLS to Glen's Waterways Ltd (GWL) and proceeded to terminate the employment contracts of all MLS employees, the defendants inclusive, with effect from the 1st of February 2002. The defendants were informed that GWL would subsequently make its own decision about the recruitment or retention of staff previously employed by MLS. The contracts under which the defendants had been engaged with MLS provided that all employees would be repatriated if they left MLS other than by resignation. The plaintiff did indeed recruit its own staff for the running of MLS. In its recruitment however, the plaintiff also recruited a substantial number of former employees of MLS, including the defendants. The defendants then ceased to be employees of the plaintiff for various reasons on diverse dates. As the plaintiff provided housing for the employees the termination of the defendant's contract of employment necessitated that they vacate the houses they once occupied. The plaintiff's concerted efforts to amicably evict the defendants did not materialise because of the defendants' refusal to comply. Resultantly, the plaintiff claimed for summary possession of the houses so that it can re – allocate them to its present employees.

The General Manager of the plaintiff company, in his affidavit states that the defendants in the present matter were at one time employees of MLS and were assigned houses by virtue of their employment. He also stated that the defendants ceased to be employees of MLS by various reasons and on diverse times and it was required that they vacate the houses they were occupying. The deponent also states that when he noted that the ex – employees, their dependants, agents and servants continued to stay in the houses, he asked them individually to vacate the houses but they did not comply. He also avers that when the defendants refused to comply he referred the matter to the Second Grade Magistrate at Monkey – bay so that he could mediate the matter and that he made his ruling on the mediation session ordering the ex – employees to vacate the houses in 7 days. In the premises the plaintiff has failed

to amicably ask the defendants to vacate the said houses. The deponent contends that the defendants unless restrained by this court will continue staying in these houses thereby hampering the management of MLS who are desirous to assign these houses to its present employees. The plaintiff claims that the continued stay of the defendants in the houses is certainly without the license and/or consent of MLS. The plaintiff prays to this court to grant an order for summary possession of the properties in question with costs to the plaintiff.

The defendants in their affidavit in opposition have conceded that they were all at some point employees of MLS, the predecessor to the present plaintiff, GWL. That while employed by MLS the defendants were allocated and entitled to occupy the houses and that following a privatization process the plaintiff terminated their employment contracts. A sample of the 'standard form' letter of termination that the defendants received upon termination is produced and marked 'MJ 1'. That the defendants were informed that GWL would subsequently make its own decision about the recruitment or retention of staff previously employed by MLS. The contract(s) which the defendants had been engaged with MLS provided that all employees would be repatriated if they left MLS's service other than by resignation and the said conditions of service are marked 'MJ 2', particularly the clause 11.6, which spells out the nature of the repatriation obligation.

The defendants also state that the plaintiff did indeed recruit its own staff for running MLS and that during the re – engagement/ re – employment by GWL the issue of their repatriation was still outstanding. That the plaintiff in its offer of re – employment to the defendants stated that it would not be responsible for repatriation claims or any matters related thereto in all cases where the concerned employee, who had been re – engaged, had yet to be confirmed in his/her position. The standard letter issued to the defendants is marked MJ 3. The defendants also state that after having worked for the plaintiff for varying periods of time, they were at different times confirmed in their different positions and the plaintiff communicated the fact of confirmation to the defendants. Sample letters of confirmation written to the defendants are marked MJ4. The defendants claim that by confirming the defendants herein the plaintiff assumed the obligation with regards to repatriation as stipulated by the conditions on which it engaged the defendants. Furthermore, the defendant states that the plaintiff is fully aware that the real dispute is not about mere refusal by the defendants to vacate the houses they are occupying but more accurately about the plaintiff's failure to honour the obligation to duly repatriate the defendants. The defendants reiterate that they will willingly vacate the premises being claimed the moment the plaintiff sorts out the issue of their repatriation. The defendants oppose the plaintiff's Order 113 of the RSC application and state that the plaintiff clearly knows that the true dispute between it and the defendant's is not really about the mere occupation of the houses. The defendants also state that Order 113 of the RSC

is inherently a summary procedure for the resolution of matters where material facts in a case are largely uncontested.

Order 113/1 of the RSC provides that where a person claims possession of land which is occupied solely by a person or persons not being a tenant or tenants holding over the termination of tenancy who entered into or remained in occupation without his consent or that any predecessor may be brought by originating summons in accordance with this order. This court is of the view that the issues arising from the affidavits point at 'sticky issues' of this matter and "it is important that if a summary order is to be issued, the court should be fully satisfied that the said competing affidavits do not leave any sticky issues hanging, but that they be agreeable with each other in all material aspects": *Peter Fachi and Timothy S. Chirwa v Mrs. John and six others*, Civil cause no. 148 of 2010 HC/PR (unreported). The procedure for summary possession of land is appropriate where there is no dispute and where the existence of a serious dispute is apparent to a plaintiff he should not use this procedure and if he does, the action may be struck out: *Malawi Congress Party (MCP) v Pastor Makande of Kachere Assemblies of God and Persons Unknown*, (2012) Land Cause No. 56 (HC) (unreported). It is also noted that Order 113/1 of the RSC is applied strictly to the following scenarios:

- (a) Where the person in occupation are tenants
- (b) Where the parties in occupation are tenants holding over after the termination of tenancy;

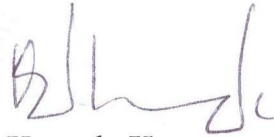
The question raised by the present applicant is whether or not the parties neatly fit those categories? The answer is no as the affidavits herein contain a serious dispute over the issue of repatriation. Which issue can only be appropriately addressed and determined through a trial where evidence which goes beyond the present affidavits will be proffered. Under the present circumstances the relief sought of granting summary possession of land to the plaintiff is inappropriate. This court finds that this is not an appropriate case to employ the procedure under Order 113 of the Rules of the Supreme Court which is limited to the circumstances mentioned in the said order. It is clear from the affidavits filed by the parties to the present action which reveals conflicting evidence from the parties herein that there is a serious dispute to be resolved between the parties which is in regard to fulfilling the alleged obligation to repatriate the defendant. The application for summary possession of property in Order 113 RSC is not appropriate in the circumstances obtaining in the present case and the plaintiff's action herein should be and is hereby dismissed.

It is further noted that this matter is an abuse of the process of the court as it ought to be *res judicata* since the subordinate court was moved to hear and make determination on the same subject matter and did proceed to render a judgment

which has not been appealed against by the parties and what remains is its enforcement.

The costs occasioned by this application are awarded to the defendants.

Delivered in open court this 26th of September 2018 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

Case Information:

The late Hon Justice Manyungwa
Mr. Majamanda
Mr. Nkhata
Mrs. Malani/ Ms. Million

Presiding Judge.
Counsel for the plaintiff.
Counsel for the Defendant.
Court Clerks.