



IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NUMBER 733 OF 2015

BETWEEN:

KACHIKUNGU INVESTMENTS-----PLAINTIFF

AND

LILONGWE CITY COUNCIL-----1ST DEFENDANT

KIPA INVESTMENTS

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE

Kita, Counsel for the Plaintiff

Kondowe (Mrs), Counsel for the 2nd Defendant

Itai, Court Interpreter

RULING

This matter commenced by way of originating summons dated 2nd June 2015. On 15th June 2015 the court entered an order in favour of the plaintiff that the Land Register for Title No. Mkomachi 49/118 in the city of Lilongwe be rectified by removing Kipa Investments and replacing Kachikungu Investments as the leasehold proprietor. There seems to be two court orders on the court file. There is one dated 19th June 2015 and another one dated 23rd June 2015. It is not very clear how the same court had issued two orders bearing two different dates. On 9th of July 2015, there was a notice of appeal filed by the defendants. On 10th July 2015 the 1st defendant sought leave to appeal out of time and the court dully granted the leave. On 13th of January 2017, the second defendant appointed Konsewa Law Consulting to represent it. The second defendant was served with the notice of appointment of legal practitioner on 13th January 2017 the same day it was filed with the court. On 25th of April 2017 counsel for the second defendant filed a summons for the order to set aside/ revoke the order dated 23rd

June 2015 and to rehear the originating summons pending the filing of an application to add the Attorney-General as a party and for leave to file and serve an affidavit in opposition to the originating summons out of time based on the ground of irregularity. The application is supported by an affidavit sworn by Mr Mahomed Yusuf Kundecha. On 13th June 2017, the plaintiff's counsel filed a notice to raise a preliminary objection pursuant to Order 3 and 6 of the Rules of the Supreme Court. The matter was set down for hearing on the 10th of October 2017. On this day, counsel Kita for the plaintiff was out of the country to Zambia and the matter was later set down for the 22nd of November 2017. On this day, counsel for the plaintiff argued that a check on the file will show that the defendants had appealed against the order made by the court and that as things stand now, the appeal was still on record. In response, counsel for the 2nd defendant said that the matter the plaintiff's counsel was raising was not properly before this court as it had not been put in the notice for preliminary objection. Counsel for the defendant further argued that the appeal that counsel was talking about was lodged by the 1st defendant and not the 2nd defendant.

I have looked at the notice filed by the plaintiff to raise a preliminary objection. It is indeed true that the issue raised herein was not included in the said notice. I also noted that the plaintiff did not even file an affidavit opposing the application as well as skeleton arguments. That said, the documentation on the file which I am entitled to peruse as a court gave me some anxious moments. As already pointed out, an ex-parte notice of motion for leave to appeal was filed on 9th of July 2015. In this document, the 2nd defendant is mentioned and included as an appellant. The skeleton arguments were also filed on behalf of the defendants and not only the 1st defendant. To crown it all, the notice of appeal on page 8 has a column of Legal practitioner and service address. It is clear that the 1st and 2nd defendants were both represented in this notice of appeal by Mr Yasin Maoni, who had signed as legal practitioner for the defendants. As a court of record, although the issue was not specifically raised in the notice, but where a court of law sees something strange, it can use its inherent powers to make an appropriate order or direction. I find that the 2nd defendant was one of the appellants in this matter. The appeal has not been withdrawn so it still stands. It was incumbent upon counsel for the 2nd defendant upon being appointed as counsel to ascertain the true status of the matter. The 2nd defendant should not have jumped on a totally

different application yet there was still an appeal on record. If this is allowed, it would lead to abuse of the court processes. I will therefore not determine the application made by the 2nd defendant. The 2nd defendant should sort out the issue of the appeal first. If the defendant is not interested to pursue the appeal, it should withdraw it. It is only thereafter that it can properly lodge its application and give the plaintiff an opportunity to respond.

I therefore dismiss this application with costs.

MADE THIS DAY OF JANUARY 2018 AT LILONGWE

M.C.C MKANDAWIRE

JUDGE