



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
Land Cause No. 59 of 2013

FLORENCE NDALAMA

versus

MWENELUPEMBE MHANGO & Co. as
ADMINISTRATORS OF MALAWI RAILWAYS LIMITED,
& RWASA PASCAL t/a PASCAL INVESTMENT

RULING

nyaKaunda Kamanga, J.,

One the reliefs that the claimant is seeking in this civil action is ‘the cancellation of the sale of the old UTM depot from the 1st defendant to the 2nd defendant for illegality for non-compliance with section 24A of the Land Act’. On 27th April 2018 the claimant filed a summons seeking an order of stay of the civil proceedings herein pending the determination of the criminal proceedings against the second defendant which were commenced under Criminal Case No. 2 of 2017, High Court, Lilongwe District Registry. The claimant’s avers this in paragraph 5 of sworn statement in support of the summons by stating that

‘...there is pending matter before the High Court, Lilongwe District Registry, in which among others the 2nd defendant is answering charges in Criminal Cause No. 2 of 2017 relating to (i) fraudulently uttering false citizenship application forms, (ii) influencing a public officer to use that office to his advantage and relation to obtaining his Malawian citizenship. Exhibited hereto marked as “VJ 1a and VJ 1b” is a copy of the charge sheet in the said matter and a letter from the Director General of the Anti-

Corruption Bureau dated 19th April 2018 confirming the existence of the said criminal matter.’

Exhibit marked VJ1a is a charge sheet which was issued on 27th July 2017, and contains eight accused persons are Uladi Mussa, David Henry Kwanjana, Esili Kubwimana, Peter Katasya, Pascal Rwaswa, Joseph Kabagambe, Fulgence Nshiyimiyimana and Egide Hakizimana. The second defendant herein appears as the fifth accused person. The charge sheet contains 15 counts and the three counts which the second defendant has to answer to are the following: counts 3, on knowingly and fraudulently uttering a false official business residence permit application form contrary to s 360 as read with s 358 of the Penal Code; count 5, on knowingly and fraudulently uttering a false official Malawi citizenship application forms contrary to s to s 360 as read with s 358 of the Penal Code and count 14, on influencing a public officer to use his public office for advantage contrary to s 25B(2) of the Corrupt Practices Act.

The claimant contends that the decision in the criminal will have a strong and serious bearing on deciding whether the second defendant had the capacity to hold and acquire land in Malawi in accordance with the provision of section 24C of the Land Act. It is the view of the claimant that the main action herein is not a civil action that can be decided without impinging on the question of fact to be decided in the criminal proceedings. In support of her arguments the claimant rely the rule in *Smith v Selwyn* (1914) 3KB 98 and on the cases of *Jefferson v Bhetcha* [1979] 1WLR 898, *Akcine Bendrove Bankas Snoras v Antonov* (2103) EWHC 131, *McDaphrain Chithuzeni Bango v Attorney General* and *Malawi Telecommunications Limited*, Civil Cause no. 532 of 2012, *Glazebrook v Housing* [2000] UR 180 and *Roberts Construction Co. v Yache Transport* Civil Cause no. 290 of 1980.

On the other hand, the second defendant denies that there was any illegality in the sale of the land in question and contends that at the time of the said sale the second defendant was a holder of a Malawi passport having attained Malawian citizenship through naturalization. The second defendant filed a sworn statement in opposition to this summons averring that the claimant has failed to discharge the onus of proof of fact to the requisite standard of proof that the second defendant was a non-Malawian at the time he purchased the land in issue. The second

defendant asserts that that the claimant is neither a complainant in criminal case no. 2 of 2017 nor a witness to those criminal proceedings. It is the view of counsel for the second defendant that the proceedings in the present action and those in criminal case no. 2 of 2017 do not have a direct bearing on each other and that the claimant who has closed her case and, according to the legal practitioner for the second defendant, has failed to prove the fact in issue should not be allowed to infinitely keep searching for evidence to support her case. The second defendant also has written at great length on the delays in this civil action which he attributes to the claimant and the fact that he parted with K8million when purchasing the land. According to the second defendant the justice of the case in the present matter demands that the court dismisses the application for stay of the proceedings so that the matter can be concluded. The second defendant contends that this civil action can be decided without impinging on the question of fact to be decided in the criminal proceedings and that there is no good ground for stay of the civil proceedings. In support of their arguments the second defendant rely on two cases that have also been cited by the claimant that of *Jefferson Limited v Bhetcha* [1979] 2ALL ER 1108 *McDaphrain Chithuzeni Bango v Attorney General* and *Malawi Telecommunications Limited*, Civil Cause no. 532 of 2012 and the case of *Malawi Distilleries Limited v S. Chilima* Civil Cause no. 2869 of 2002.

This court has noted the arguments that have been raised by both the claimant and the second defendant and is of the considered view that in the absent of any authority to back the second defendant assertions regarding the allegation that the claimant herein is not complainant in the criminal matter in the magistrate's court, this court is of the opinion that criminal investigations and prosecution do not require that the complainant be a third party, such as the claimant, and consequently such argument is not relevant to the present summons. Neither is the aspect that the claimant is not a witness in the concurrent criminal matter. Further, the aspect about the second defendant paying K8million to purchase the land in issue is really something that he should raise with the first defendant and not the claimant. It is noted that the first defendant have elected not to make any response to the present summons.

One of the issues the court will have to decide in the present civil case is whether the sale of the land by the first defendant to the second defendant had complied with the relevant provisions under the Land Act. While in the criminal matter the second defendant has been charged with offences relating to the fraudulent issuance and obtaining of a Malawi passport and citizenship. This is where the concurrent criminal proceedings that are before the High Court in Lilongwe ‘become extremely pertinent to the civil proceedings in the present case’: *Chiumia v Southern Bottlers Ltd* [1990] 13 MLR 114 (HC). For one to be eligible for various citizen related benefits, such as land, aliens must comply with certain requirements under laws. Legal consequences follow, if there is prove of immigration related fraud and this has a bearing upon an alien’s eligibility to enter or remain in Malawi and benefit or be ineligible for certain other immigration related benefits. This court is of the view that whatever decision will be made in the criminal matter will have a bearing on this civil matter and this court will have to take judicial notice of it, without necessary requiring the claimant to re-open the case as the second defendant fears. Accordingly, the rule in *Smith v Selwyn* (1914) 3KB 98 is applicable an order of stay is appropriate, as it would not be proper to proceed with the instant civil case and give judgment that could lead to the creation of an anomalous situation as well prejudice to either party.

One case that I find persuasive is that of *Chiumia v Southern Bottlers Ltd* [1990] 13 MLR 114 (HC). In the abovementioned case the proceedings had reached an advanced level than the present civil matter, in that evidence was led on behalf of both parties and the trial was reaching its end, in that the judge was about to render his judgment, when the court learnt, for the first time, that the plaintiff was the accused on a charge of embezzlement in the Resident Magistrate’s Court in Blantyre. In *Chiumia v Southern Bottlers Ltd* [1990] 13 MLR 114 (HC) the court decided that it is wrong and premature to give judgment in civil case where decision in concurrent criminal case has to be made on the same facts and a stay was a proper order.

Having regard to the nature of charges that the second defendant is answering to the Criminal Court and considering the manner in which the two concurrent proceedings relate to each other the balance of justice in this case lies in favour of staying the proceedings in this civil court, as I think it would be wrong

and premature to proceed with receiving evidence in this civil action and render judgment on the merits before the criminal trial has been concluded.

I exercise my discretion and order that the civil proceedings herein be stayed until the disposal of the criminal matter. Once the criminal proceedings have been disposed of the second defendant should furnish this court with a copy of the judgment in the criminal proceedings within 21 days of its delivery. The costs of summons will be determined after the conclusion of this civil action.

Dated this 31st day of May 2018 at Chichiri, Blantyre



Dorothy nyaKaunda Kamanga
JUDGE

Case Information :
Date of hearing : 30th May 2018.
Mr. Jere/ Mr. Nkhata : Counsel for the Claimant.
Mr. Nthewa / Mr. Chipeta : Counsel for the second defendant.
First Defendant : Absent.
Mrs. Pindani : Chief Court Reporter.
Ms. Million : Court Clerk.