

**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 54 OF 2018**

BETWEEN

ABDUL GAFFAR ISMAIL MALIDA CLAIMANT

AND

MONSOOR RASHID KASIM DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Salimu, of Counsel, for the Claimant

Mrs. Jessie Chilimapunga, Court Clerk

RULING

Kenyatta Nyirenda, J.

On 19th February 2018, the Claimant issued a summons against the Defendant and the statement of case reads as follows:

- “1 *The Claimant is the registered proprietor, under the Registered Land Act, of Title number Limbe Central – 134 as co-tenant with our Abdul Rashid Mahommed Kassam in shares of 44.4% and 55.5% respectively.*

- 2 *The Claimant pleads that in the year 2001 the defendant travelled to Malawi from United Kingdom and as shall be demonstrated at trial fraudulently conveyed titles Limbe Central – 94 and Limbe Central – 134 to Abdul Rashid Mahommed. The deeds for conveyance fraudulently purported that I (sic) signed while at time of the said fraud I (sic) was in England.*

- 3. *The Claimant pleads that in the year 2008 he applied to court to have a reflection of the land Register and shall be demonstrated at trial the court reversed the defendant’s fraudulent conveyance. The Claimant’s application was, inter alia, supported by Sworn Statement of Mr. Khuze Kapeta, SC whom the defendant had duped into preparing the deeds of conveyance in issue.*

4. *The Claimant pleads that as things turned out the defendant was at it again in 2010 when he fraudulently conveyed Title Number Central – 94 and Limbe Central – 134 into his name. The claimant over and above getting the order of rectification in 2008 had also the same year registered cautions in respect of the titles forbidding any transactions vis-a vis the same year without his knowledge.*

Particulars of fraud

- 4.1 *The Claimant repeats the 4th paragraph hereof and pleads that he was never notified of the dislodging of the said cautions nor was he served with any court process appealing against the substantive order of rectification granted to him in 2008.*
- 4.2 *The defendant purportedly sold Title Limbe Central – 94 to one Abdul Majid Sattar for a measly MK15,000,000 in the year 2016 while the plot had an estimated market value of in excess of MK100,000,000.*
- 4.3 *As shall be demonstrated at trial the deed of conveyance from Monsoor to seller is replete with other pointers to fraudulent transactions:*
- 4.3.1 *It was prepared by a firm not licenced by the Malawi Law Society*
- 4.3.2 *Sattar signed the deed before a lawyer who was, that year (2016), not licenced.*
- 4.3.3 *Monsoor did not execute the deed of conveyance it as per section 104 and 105 of the Registered Land Act in respect of authentication of documents signed outside Malawi.*
5. **IN THE PREMISES** *the Claimant claims from defendants:*
- 5.1 *damages on the footing of aggravated damages for fraudulent conversion.*
- 5.2 *general damages for fraudulent conversion.*
- 5.3 *costs of these proceedings.”*

The action herein comes in the heels of the determination of the case of **Abdul Gaffar Ismail Malida v. Monsoor Rashid Kasim, HC/PR Civil Cause No 333 of 2017** [hereinafter referred to as the “earlier case”]. The earlier case was also commenced by way of summons and the relevant part of the summons was couched in the following terms:

“RELIEF

1. *The Claimant claims against the defendant damages on the footing of aggravated damages for fraudulent conversion.*
2. *The Claimant claims from the Court an order rectifying the Land Registrar so that Title Number Limbe Central – 134 reverts back to its true owners, namely the*

plaintiff and Mr. Mahommed Kassam or the personal representatives of his deceased estate.

3. *The plaintiff claims for a permanent injunction restraining the defendant from ever conveying Title Number Limbe Central – 134 to any third party or at all.*
4. *The plaintiff claims costs of these proceedings.”*

No response/defence having been filed by the Defendant to the earlier case, the Claimant on 8th February 2018 entered a default judgement which is worded as follows:

“IT IS THIS DAY ADJUDGED *that the Land Register be rectified so that Title number Limbe Central – 134 reverts to its true owners: the plaintiff and Mr. Mohammed Kassam or the personal representative of his deceased estate; damages are awarded to the Claimant on the footing of aggravated damages for fraudulent conversion.”*

On the same day, that is, 8th February 2018, the Claimant proceeded to obtain an Order of Rectification of the Land Register formal judgement whose contents have to be quoted in full:

“UPON *the Claimant herein making an express claim in his summons for the relief of reflection of the Land Register that in respect of Title number Limbe Central – 134 it should revert back to the status quo introduced by the order of rectification of 5th December. 2008.*

AND *this court having granted the claimant a default judgment effectively granted the reliefs sought by the claimant in his summons.*

IT IS HEREBY *Ordered that ownership of Title Number Limbe Central – 134 should revert back to the claimant and his joint owner as per the order of rectification of 5th December, 2008*

IT IS FURTHER *ordered that:*

- i) *The claimant is awarded damages on the footing of aggravated damages for fraudulent conversion to be assessed.*
- ii) *The claimant is granted a permanent injunction against the defendant restraining the defendant by himself, his servants or agents from ever conveying Title Number Limbe Central – 134 himself or to any third parties.*
- iii) *The claimant is awarded costs of these proceedings.”*

It might also not be out of order to mention that in the earlier case the Claimant obtained an Order of Freezing Injunction whose last paragraph is worded as follows:

***“IT IS HEREBY** Ordered that the defendant be restrained from in any way dealing with Title number Limbe Central, being plot number LC 94S pending the determination of the substantive action herein or until a further Order of the Court.”* – Emphasis by underlining supplied

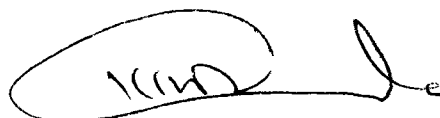
I have thoroughly examined the two cases and I have great difficulties in how they can be distinguished. The law is clear that a matter that has been adjudicated in a prior action cannot be litigated a second time. The following dicta in the case of **Barrow v. Bankside Agency Ltd (1996)1 WLR 257** at 260 is apposite:

“The rule in Henderson v. Henderson (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.”

To my mind, the two cases are both based on the same facts and on the same cause of action, to wit, that the Defendant fraudulently conveyed titles Limbe Central 134, also known as plot number LC 94S, to Abdul Rashid Mahommed. The Claimant cannot be allowed to keep coming to court to advance claims or arguments which he could very well have put forward for determination in one cause of action.

In light of the foregoing, the present action is an abuse of court process. It will, accordingly, not be entertained. In this regard, the attention of the Registrar is drawn to Order 5, rule 13, of the Courts (High Court) ((Civil Procedure) Rules.

Pronounced in Chambers this 28th day of February 2018 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE