



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

LAND CAUSE NO. 93 OF 2011

BETWEEN

CHINYAMA MACFARLANE TAUMBE PHIRI PLAINTIFF

AND

BLANTYRE PRINTING AND PUBLISHING CO. LTD DEFENDANT

CORAM: HON. JUSTICE R. MBVUNDULA

Matumbi & Kapulula, Counsel for the Plaintiff

Mpaka, Counsel for the Defendant

Mpasu, Official Interpreter

JUDGMENT

The following facts presented by the plaintiff are not disputed.

The plaintiff in or about 1977 acquired a residential property, Plot No. BE 7, Stephen Road, Mandala, in the City of Blantyre, and held under Title No. Blantyre East 21, for his own use and occupation, which he enjoyed until sometime in 1991 when the then political regime forcibly seized it, allegedly on account of his being a member of the religion known as the Jehovah's Witnesses, which the then government had outlawed. The property was duly recorded in the Blantyre Land Registry as owned by the plaintiff under Deed No. 46405.

After the forcible seizure of the property the then President of the Republic caused the property to be occupied by Malawi Congress Party affiliates, the Malawi Congress Party then being the ruling and only party allowed to exist and operate in the country. Subsequently, it is stated, the property was given to the defendant to form part of its assets. The defendant let out the property to two tenants in succession before, in 2008, a Mrs Khembo and her husband became its next tenants. Mrs Khembo was at that time an employee of the defendant.

In 2010 Mr and Mrs Khembo sought to buy the property and when a title search was carried out at the Land Registry the Certificate of Search showed that the property belonged to the plaintiff. Mr and Mrs Khembo alerted the plaintiff of the fact that the property had remained in his name despite the defendant's possession. The plaintiff then took out steps to recover the property as its lawful owner. Mr and Mrs Khembo however remained in the property until somewhere between October and December 2011 when Mrs Khembo's contract with the defendant was terminated and her family required to vacate the property.

The plaintiff asks this court to order and declare that the plaintiff is the rightful owner of the property and that an order of injunction be issued restraining the defendant from exercising power, control and possession over the property.

The defendant opposes the plaintiff's claim on three grounds:

1. That the plaintiff's claim or title to the property was defeated by the defendant's adverse possession of the property, the defendant "having been" in an open and peaceable possession of the same for a period of over 20 years from the time the plaintiff's was dispossessed of the same.
2. That the defendant acquired title over the property by prescription it having been in an open and peaceable possession of the same for a period of over 12 years from 18th May 1994.
3. That the plaintiff's claim is statute barred by reason of the provisions of section 6 of the Limitation Act

At the hearing of the substantive matter, which was commenced by an originating summons under the Rules of the Supreme Court, it transpired that the defendant had not yet made a response to the matters raised in the originating summons. In his

address to the court counsel for the defendant informed the court that he was going to rely on an affidavit (of 4th April 2012) which the defendant had relied upon in an application to discharge an interlocutory injunction earlier on granted in favour of the plaintiff and that thereafter the parties be allowed to file submissions to complete the paperwork. The contents of the said affidavit will be referred to in due course.

Of relevance, the deponent of the affidavit aforesaid, Mr Leonnard W.B. Chikadya, Managing Director of the defendant, states, firstly, in paragraph 3, that the defendant is the owner of the property because the defendant had, at the time of making the affidavit, been in possession thereof for a period of over 20 years.

Secondly, in paragraph 22 of the affidavit, Mr Chikadya asserts that the plaintiff's title to the property got defeated by the defendant's adverse possession of the same when the defendant "remained" in an open and peaceable possession thereof for a period of 20 years since 1991 when the plaintiff was dispossessed of the property by the government.

In paragraph 25 Mr Chikadya states that he believes that the defendant, in any case, acquired title to the property by prescription having been in an open and peaceable possession of the same for a period of more than 12 years from 18th May 1994.

As mentioned earlier, having elected to rely on the contents of the abovementioned affidavit of Mr Chikadya, counsel for the defendant also undertook to file final submissions, but for reasons undisclosed to the court this was not done. Therefore, no legal arguments have been placed before the court to support the factual assertions made by the defendant pertaining to limitation of the plaintiff's claim or the acquisition by prescription or adverse possession of the property the defendant or any other assertion by the defendant in response to the claims made by the plaintiff in the originating summons. On the other hand the plaintiff's counsel did file final submissions.

I now consider the issues. There are two of them as follows:

1. Whether the plaintiff's action is statute-barred; and

2. Whether the plaintiff's ownership of the property was defeated by the defendant's adverse possession of the land or by prescription.

Issue 1: *Whether the plaintiff's action is statute-barred*

In the affidavit relied upon by the defendant, i.e. the affidavit (of 4th April 2012) which the defendant had relied upon in an application to discharge an interlocutory injunction, Mr Chikadya questions, in paragraph 23, why the plaintiff did not commence proceedings to recover possession of the property immediately after the change of government in 1994, he having claimed that he could not do so earlier because he was traumatised with the way the property had been confiscated from him. The deponent also questions why the plaintiff did not pursue his claim through the National Compensation Tribunal created under the Constitution whose mandate was to make reparations for atrocities committed by the government up to 1994. In regard to this the claimant deposed that all long until only sometime in January 2011 he was laboring under the belief that the property had ceased to be his, on account of its seizure by the government, until sometime in that same month when he was informed by Mrs Khembo that they had discovered that the property was still in his name. This came about because Mrs Khembo, intending to buy the property from the defendant, had carried out a search at the Land Registry, thereby discovering that the property was still registered in his name, hence informing the plaintiff about the position.

Section 6 of the Limitation Act provides as follows:

“6. Limitation of actions to recover land

No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 21 (1) is also material. It provides:

“21. Extension of limitation period in case of disability

- (1) If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from

the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired: ...”

It is submitted for the plaintiff that the plaintiff’s action is not statute-barred on account of the fact that during the presidential tenure of the then President Dr Hastings Kamuzu Banda the political situation in Malawi was such that it was precarious and prohibitive to institute a legal action against the government in matters where the government seized someone’s property without just cause. Therefore, it is submitted, on account of the political climate then, the plaintiff could not seek redress from the courts even though he desperately desired to reclaim his property as evidenced by the fact that once informed by Mrs Khembo that the property was still registered in his name he took steps to recover it.

The case of *Aboobaker t/a General Electronics v Attorney General* Civil Cause No 964 of 1994, dealt with a similar situation to that of the plaintiff where Kumitsonyo J stated as follows:

“It would appear to me, however, that what really needs to be determined as a preliminary point of law is whether the action is statute-barred. Counsel for the plaintiff submitted that the action was not statute-barred because the Plaintiff suffered a disability. I agree with Counsel on this point. The political climate in Malawi during the reign of the former Government was such that it was not only prohibitive but in fact dangerous and risky to those who might have attempted to take the Government to Court in matters like the present where the allegation is that the Government forfeited property without just cause. It was an atmosphere where nobody could question a wrong done by Government. There was in my view a disabling atmosphere created by the Government itself ...”

I find no reason to disagree with the foregoing reasoning. The plaintiff in the present case was in the same situation as the one in *Aboobaker*. I therefore find that for as long as the government of Dr Banda subsisted the plaintiff was under such a disability as was envisaged under section 21 of the Limitation Act and therefore time did not run prior to the end of Dr Banda’s rule.

In his affidavit Mr Chikadya questions why the plaintiff did not commence proceedings to recover the property immediately after change of government in 1994, be it in court or before the National Compensation Tribunal. Mr Chikadya suggests no answer to the question he poses on the matter. It would appear, however, that by this question Mr Chikadya seeks to assert that since the disability occasioned by the risk of suing the government then had come to an end, then the plaintiff should have instituted the present action within six years of the relevant date in 1994, in accordance with section 21 of the Limitation Act, and not as late as 2011, i.e. seventeen years later. If that be the suggestion I would disagree.

In my opinion the plaintiff's disability cannot fairly be confined to the fears that constrained him from instituting a claim against the government during the reign of Dr Banda. I am of the view that the issue of his disability must be considered in the light of the full circumstances of his case. If an objective and fair view of his circumstances must be taken, one must find it unavoidable to arrive at the conclusion that once the plaintiff's property had been confiscated, his mind labored under the impression that he had permanently lost possession of it and that that impression continued to belabour him, despite the change of government, until that fortuitous occasion when Mrs Khembo (who apparently knew the plaintiff) seeking to buy the property, discovered that the same was still in his name, and informed him about it. In my view it is at that moment in January 2011, when he was so informed, that the plaintiff's disability envisaged under section 21 of the Limitation Act, came to an end. It is then that time for him to institute the present proceedings began to run. The plaintiff commenced the proceedings in December 2011, well within the six year extension under the Limitation Act. In view of these considerations I find that the present action not to be statute-barred.

Issue 2: *Whether the plaintiff's ownership of the property was defeated by the defendant's adverse possession of the land or prescription.*

The relevant statutory provision is section 134 (1) of the Registered Land Act which provides that:

“(1) The ownership of land may be acquired by peaceable, open and uninterrupted possession without permission of any person lawfully entitled to such possession for a period of twelve years:

Provided that no person shall so acquire the ownership of customary or public land.

(2) Any person who claims to have acquired the ownership of land by virtue of subsection (1) may apply to the Registrar for registration as proprietor thereof.”

For one to acquire ownership of land pursuant to this provision three elements must obtain, namely a) peaceable acquisition, b) open possession, and c) uninterrupted possession. It is submitted by counsel for the plaintiff that the first element i.e. peaceable acquisition is absent in the circumstances of this case in that the acquisition from the plaintiff by the government was not peaceable, but hostile, as the grounds for the said acquisition were unlawful. It is submitted that they were unlawful in that they violated section 2 (1) (iv) of the then Constitution of the Republic (the 1966 Constitution) which prohibited the arbitrary deprivation of property. The section provided in part that no person should be deprived of his property without payment of a fair compensation, and only where the public interest so required. The plaintiff also invokes Article 17 of the Universal Declaration of Human Rights, which form part of Malawi law where the arbitrary deprivation of property is prohibited.

I am in full agreement that the plaintiff lost possession of his property in circumstance that cannot be described as peaceable. And not only were the said circumstances not peaceable in nature but they were also unlawful, being in violation of the constitutional provision cited as well as Article 17 of the Universal Declaration of Human Rights. No person may benefit from an unlawful act. Therefore the act of dispossessing the plaintiff of his property being unlawful, both the government and any succeeding possessor (other than the plaintiff) would be tainted with the illegality and be precluded from claiming under section 134 (1) of the Registered Land Act. The government having acquired possession unlawfully, the government was incapable of granting lawful possession to any person. In his affidavit Mr Chikadya that the plaintiff’s right to possession of the property was defeated by the defendant’s remaining or having been in an open and peaceable possession for so long. It seems to me that he missed the point as section 134 (1) of the Limitation Act

refers to peaceable, open and uninterrupted *acquisition*. So long as the acquisition did not meet that test at acquisition of the property 134 (1) cannot be relied on. I therefore find that the acquisition of the property by the government having not been peaceable or lawful the defendant's possession thereof lacks legal foundation.

Accordingly, I order that the defendant should, within 30 days of the date hereof surrender the property to the plaintiff.

I also order the defendant to bear the plaintiff's costs.

Delivered at Blantyre this 11th day of November 2020.


R. Mbvundula
JUDGE