



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 132 OF 2021
(Before Honourable Justice Msiska)

BETWEEN

GIRLS SHINE CHRISTIAN ACADEMY LIMITED..... CLAIMANT

AND

NDAFULUMIRA AND 24 OTHERS.....DEFENDANT

CORAM : HON. JUSTICE WILLIAM YAKUWAWA MSISKA
:
: Mr. James, of Counsel for the Claimant
:
: Ms. Mwenelupembe, of Counsel for the Defendant
:
: Mr. Matope Court Interpret

RULING

This matter was commenced on 26th February, 2021. The Claimant is a company limited by guarantee. The Claimant in its summons seeks a number of reliefs among others;

- (i) an order of permanent injunction restraining the defendants either by themselves or through their agents, employees, or acting howsoever, from either entering, occupying, possessing or working on the land, interfering in any way with the business of the school or doing anything on land situated at Mkanda Village, T/A Malili in Lilongwe District belonging to the claimant;
- (ii) a finding and an order of declaration that the land herein belongs to the Claimant both in law and equity;
- (iii) declaration that the Defendants are liable for trespass and consequential order for damages for trespass;
- (iv) declaration that the Defendants' conduct amounts to arbitrary deprivation of the Claimant's property and a violation of the Claimant's rights to peaceful and quite enjoyment of property; and
- (v) an order evicting the Defendants from the land and directing them to deliver possession to the Claimant.

According to the statement of claim, in 2015 before the Claimant was formed, the Directors and Guarantors founded a Christian Ministry in the name of Shine Ministry with a view to preaching the word of God. Apart from the Ministry, the Directors or Guarantors requested land from Chiefs of the area on which land they could build a school for girls. It was their intention that the school would be admitting girls from the surrounding communities at highly subsidized conditions as a way of empowering girls from the those communities.

In March, 2016 Group Village Headman Mkanda offered the Claimant's Directors and/or Guarantors land on which was operated Shine Ministry and later the Ministry built a school and the business of the school was later registered as a

company limited by guarantee in the name of Girls Shine Christian Academy Limited and operating the school as Girls Shine Christian Academy.

The school operated and existed peacefully until October, 2020 when the Defendants demanded to be paid K27,000,000 as purchase price and compensation for land claiming that it belonged to their ancestors.

The Defendants entered the school area on which the Claimant used to grow maize for sustenance of the boarding student. The Defendants went further to grow crops on all the land and also to offer for sale parts of the land to third parties. For that reason, the Defendants trespassed on the land and also interfered with the Claimant's quiet and peaceful possession of property for which the Claimant suffered and continue to suffer loss and damage.

The Claimant also applied for an order of interlocutory injunction to restrain the Defendants from doing the things already stated above pending the hearing and determination of the substantive proceeding. The application was supported by a sworn statement jointly made by Tiyanjane Sharon Dzilankhulani, Blessings Chibambo, Alfred Midson Dzilankhulani and Fales Banda, directors of the Claimant. In the joint sworn statement, the deponents have substantively repeated what is contained in the statement of claim.

The application for an order of interlocutory injunction without notice came before me on 2nd March, 2021. I granted an order of injunction to be valid for 14 days pending the hearing of the application *inter-partes*.

The hearing of the application *inter-partes* was scheduled for 29th March, 2021. In the meantime, the Defendants filed a joint sworn statement in opposition. They averred that they are residents of Mkanda Village and beneficial owners of the land in issue comprising 19 acres of arable land. It is not disputed that the Directors or Guarantors of the Claimant were carrying out charity work in six villages namely Mkanda, Namalango, Chingoloma, Kaduwa, Bingu and Chayera. The charity works included the initiative of assisting children in form of school sponsorship. Unknown to the Defendants, Group Village Headman(GVH) Mkanda gave some land to the Directors or Guarantors of the Claimant to construct a school. This land was reserved and earmarked for farming to be distributed among the families in the village. In 2017, the Defendants noticed some construction activities were taking place on the land. The representatives of the Claimant were approached and the Defendants specifically spoke with Mr. Blessings Chibambo one of the directors of the Claimant who stated that the Claimant did not buy the land but that it was given to them for construction of a school.

According to the Defendants, a meeting was called and in attendance were the claimants representatives, six chiefs of the area and the Defendants. At that meeting, the representatives of the Claimant were informed that it was not possible for them to take possession of the 19 acres of land as that would eventually leave villagers landless with no place for farming. As a compromise, the Claimant's representatives were asked to pay for the land to enable the Defendants look for farm land elsewhere or surrender possession of the land to the villagers.

The representatives of the Claimant opted to buy the land at K22,000,000 but that payment could be done in instalments starting in April, 2021 and to be concluded in a period of three years. The Defendants were least pleased with this suggestion

and proposed that the representatives of the Claimants should only buy the 2 or 3 acres of land on which the school is located and not the whole 19 acres. The Defendants disputed that they disturbed educational activities at the school noting that the place where farming activities were taking place are very far from school premises.

The Defendants insist that the Claimant and its representatives do not have authority whatsoever to occupy the land having been fraudulently obtained from GVH Mkanda. It is the Defendants prayer that the Court should restrain the Claimant either by itself, or through its agents or employees from expanding the school premises until further order; restraining the Claimant either by itself or its agents of employees from cultivating the land (other than the land which the school is located) or in any way interfering with the farming activities of the Defendants.

The Defendants also filed skeleton arguments in support. When the matter came for hearing on 29th March, 2021, Counsel for the Claimant sought an adjournment as the sworn statement in opposition and the skeleton arguments were served on him within less than 48 hours of the normal working days as required by the rules of procedure. It was his argument that it would be appropriate to give the Claimant through its representatives time to respond to allegations in the sworn statement in opposition. It was further argument by Counsel that the adjournment would offer him the opportunity to properly respond to the legal arguments raised in the skeleton arguments.

In response, Counsel for the Defendants confirmed that the Claimant was served with the sworn statement in opposition on 25th March, 2021 in as much as the Defendants did not object to the request for adjournment, Counsel raised a

preliminary objection on whether or not the Claimant is the right party to the proceeding herein. It was the argument by Counsel that the documents on record indicate that the Claimant is a company limited by guarantee incorporated on 12th February, 2019 and the land in issue was purportedly transferred to Shine Ministry under a Land Transfer Agreement form dated 19th March, 2016 being BC1. It is not clear whether or not Shine Ministry is an NGO, company or has any type of legal status. Counsel also argued that though the Claimant has alluded to the fact that it took over the transfer of land upon its incorporation on 12th February, 2019, it has failed to bring any evidence before Court in accordance with section 44 of Companies Act which requires that contracts entered into before incorporation (pre-incorporation contracts) must be ratified by the company following incorporation if it is to benefit from such a contract. It was also the argument by Counsel that section 44(4) specifically states that if a pre-incorporation contract has not been ratified by a company or validated by the Court, the company may not enforce it or take a benefit of it. Before Court is a Claimant who is trying to enforce a contract that pre-dates its incorporation without first ratifying the contract. Since there is no evidence of ratification, the Claimant is not a right party to make a claim in court. It was not privy to the contract as it never existed then.

Due to the importance of the matter to the Claimant, Counsel for the Claimant was given the opportunity to respond to the submission on preliminary objection through written submission. The request was necessitated by the fact that the resolution of the preliminary objection will determine the future and life of the proceeding. It was on that understanding that this Court granted the adjournment.

On 30th March, 2021, the Claimant filed a sworn statement in opposition to the preliminary objection. The sworn statement is made by Blessings Chibambo in

which he states that the Claimant was paying a debt for stationery obtained in the names of Shine Ministry as the invoices were issued in that name. He then sought legal advice on what would be legal implications of paying the debt in the name of Shine Ministry. He was advised by lawyers that the Directors should pass a resolution adopting and ratifying all contracts, assets and liabilities that belonged to Shine Ministry. Following the advice, on 17th June, 2020 a resolution was passed by the Directors adopting all assets and liabilities that used to belong to Shine Ministry and also ratifying all contracts.

He further averred that the printed copies of the resolution of 17th June 2020 were lost on 13th July 2020 together with other items and documents of the claimant when the vehicle was burgled into at Bwalolanjobvu in Lilongwe. Nevertheless, he managed to retrieve from a flash disk a scanned copy of the resolution which was exhibited as BC1. According to the Claimant, it did not consider the issue of land as a contract noting the land already passed on to the Claimant with no outstanding obligation on either party. In fact, the Claimant was in the process of obtaining a lease from the Government.

If anything, the only ratification that the Claimant has done is to pass a resolution to adopt the land as an asset. The Claimant prays that this Court through these proceedings should proceed to validate the contract if it finds the agreement on the land in issue comes within the meaning of pre-incorporation contract.

From the submission of Counsel James as discerned from the skeleton arguments, he argued, firstly, that sustaining the preliminary objection will be prejudicial to right to an effective remedy under section 41(3) of the Constitution. It is his argument that constitutional provisions ought to be given the widest scope

when being interpreted. For that reason, the right to an effective remedy carries with it the duty on the part of the Court to ensure that matters are dealt with unwavering attention to the substantive issues and decision made on merit.

Secondly, Counsel submitted that the transfer of land from GVH Mkanda to Shine Ministry is not a contract under section 44 of the Companies Act for the reasons that the obligations of the parties were fully discharged and therefore a contract ceased to exist. The transaction between GVH Mkanda and Shine Ministry was one-off. It was fully and duly executed when land was passed on to Shine Ministry. Therefore, no contractual obligation subsisted on the part of the GVH Mkanda.

Thirdly, it was further submission by Counsel that the resolution dated 5th March, 2020 amounted to ratification of the contract by the Claimant. It was his argument that ratification of contracts or adoption of pre-existing assets by a company does not have any particular form. In support he cited the case of *Dhirn Thakrar v. Faisal Okhai & Internet Malawi Limited, Commercial Cause No. 89 of 2010* where Katsala J, as he then was stated that,

“Contracts entered into before a company is in existence bind the persons that conclude such contracts. That is the general rule. However, such contracts can be adopted by the company once the company comes into existence. The adoption can be expressly signified or may be by conduct or action on the part of the company. The adoption must be made within a reasonable time after incorporation. Obviously, what is reasonable time is a question of fact to be determined on the circumstances of each case. Once adopted, the company assumes the rights and obligation under the contract and the

person that initially made the contracts ceases to be bound by the contract, of course subject to any order that the Court may make.”

By adopting the assets, it follows that the Directors ratified all the contracts connected with the existence of the assets and liabilities.

The fourth line of argument by Counsel was that if the Court finds that there was a contract between GVH Mkanda and the representatives of the Claimant, then the Court should validate that contract. Counsel relied on a maxim in equity, that the equity considers done that which ought to be done. The case of *Siku Transport v. Chiosa Mwitiya Civil Cause NO. 3041 of 2006* was cited as authority. In the present proceeding, according to Counsel, at equity the land in issue belongs to the Claimant and not to Shine Ministry. It is his submission that if the Court finds that there is a contract subsisting between Shine Ministry (now defunct) and GVH Mkanda with respect to the land and such contract was not ratified by the Directors of the Claimant through the resolution of 5th March, 2019, the Court should ratify and validate such contract.

Counsel also submitted that the Court under the Civil Procedure Rules, is called upon to engender and give effect to the overriding objective of the rules by dealing with matters justly and fairly, without giving undue regard to technicality. He urged the Court to allow the matter to be decided on merit and not dismissing it on thin technical argument as is the case in the present proceeding.

Lastly, Counsel submitted that sustaining the preliminary objection will smack of judicial inconsistency. The reason is that this matter was previously commenced in the name of Shine Ministry. The Court dismissed the matter because Shine

Ministry was not a proper party as it was later incorporated as Girls Shine Christian Academy Limited. If the proceeding is dismissed again on the ground that the Claimant did not ratify a contract that was entered into by Shine Ministry, the Court will be pushing the Claimant around under the guise of inconsistent language.

The Court has considered the submissions and has formed the view that some of the arguments against the preliminary objection can best be described as misleading and a distortion of the position of the law. For example, I fail to understand and, if not comprehend how a preliminary objection being what it is, and based on a point of law could be said to be prejudicial to the right to an effective remedy. It should be noted that the whole section 41 of the Constitution deals with the right to access justice. Section 41(3) is an integral component of the right to access justice. Questioning the suitability of a party to a judicial proceeding would be the last thing in law to qualify as being prejudicial or a violation to the right to an effective remedy under section 41(3) let alone the right to access justice.

Similarly, I am also left wondering and I fail to appreciate how the maxim of equity which reads '*equity considers done that which ought to be done*' can be called in aid of the Claimant. I doubt its applicability in the present application. I am therefore convinced that I should not belabour myself addressing my mind on such issues in the ruling.

In my considered view, the main issue for determination is whether or not the Claimant ratified the contract entered into prior to its incorporation between GVH Mkanda and Shine Ministry. If not whether or not the court can validate the pre-incorporation contract.

Under section 32 of the Companies Act, the legal effects of incorporation are that a company becomes a body corporate with the name by which it is registered and

continues in existence until it is removed from the register of companies. The Act, does not define the words "body corporate". In the understanding of this Court, a "body corporate" is understood in law to mean a person or group of persons which has had by the process of registration or incorporation under law, conferred on it a separate identity from the members comprising it. A body corporate has separate legal existence from the members. As a legal person, the company can sue and be sued, enter into contracts and become liable on those transactions. This, in effect, is a restatement of the elementary principle of company law as developed by the cases of *Salmon v Salmon and Company [1897] AC 22*; *Macaura v. Northern Assurance Company [1925] AC 619* and indorsed with approval in *Yanu Yanu Bus Company Limited v Mbewe 10 MLR 377*. In the latter case Villiera J. said:

"It is a matter of trite company law that on incorporation, a company becomes a separate legal personality capable of owning property in its corporate name and also capable of suing and being sued."

This, therefore, means that until the company has been incorporated, it cannot contract or enter into any other relationship under law. Even upon incorporation, the company cannot be made liable or be entitled to benefit under contracts which were purportedly made on its behalf prior to its incorporation unless it ratifies such a contract. Section 44 of the Companies Act is in point. It states as follows: -

- 1) *"Notwithstanding any enactment or rule of law, a pre-incorporation contract may be ratified within such period as may be specified in the contract, or if not specified, then within a reasonable time after the incorporation of the company in the name of which, or on behalf of which it has been made.*
- 2) *A contract that is ratified is as valid and enforceable as if the company had been a party to the contract when it was made.*

- 3) *A pre-incorporation contract may be ratified by a company in the same manner as a contract may be entered into on behalf of a company under Act.*
- 4) *For the avoidance of doubt, if a pre-incorporation contract has not been ratified by a company, or validated by the Court, the company may not enforce it or take the benefit of it."*

"Pre-incorporation contract" is defined under section 2 as meaning a contract purporting to be made by a company before its incorporation; or a contract made by a person on behalf of a company before and in contemplation of its corporation.

The importance of section 44 is that ratification of a pre-incorporation contract may be done within such period as may be specified in the pre-incorporation contract. If the period of ratification of a pre-incorporation contract is not specified, then the pre-incorporation contract may be ratified within a reasonable time. Obviously, what is reasonable time is a question of fact to be determined on the circumstances of each case. The effect of ratification of a pre-incorporation contract is that the company assumes the rights and obligations under the contract and the person that initially made the contract ceases or is no longer bound by the contract, of course, subject to any order that the Court may make. *see Dhirn Thakar v. Faisal Okhai and Internet Malawi Limited Commercial Cause No. 89 of 2010.*

According to section 44(3), a pre-incorporation contract may be ratified by a company in the same manner as a contract may be entered into on behalf of a company. It should, however, be acknowledged that there is lack of precision about how a company may ratify a contract, especially where the contract need not be in writing. For example, there is no express statutory requirement for communication of ratification, although doubtless that would be prudent in commercial terms. There

is also no any guidance in the Act as to whether ratification may be implied by conduct. The Court is of the firm view that the use of board resolutions for purposes of ratification of pre-incorporation contracts is ideal. This is because in the scheme of the law, decisions of the company are made by the board by way of resolutions.

It is also clear from section 44 that a party to a pre-incorporation contract that has not been ratified after incorporation of a company may also apply to Court for validation of the contract. In other words, a party who is desirous to benefit from a pre-incorporation contract that has not been ratified may ask the Court to give legal force or declare that the pre-incorporation contract is valid as between the parties.

Applying the foregoing legal principles to the facts in the present proceedings, it is abundantly clear that Shine Ministry was party to the land transfer agreement and as the architect behind Girls Shine Christian Academy Limited never complied with the requirements set out in section 44. Even exhibit BC1 which is a Resolution of the Board of Directors purported to be ratifying the land transfer agreement does not help matters. I have looked at Exhibit BC 1 and the relevant part reads-

***“Therefore, after discussions the Board of Directors resolved that:
All assets of Shine Ministries must be transferred to Girls Shine Academy Limited. The Assets shall include: 16 Acres of land that was given to Shine Ministries for the construction of the school”***

Admittedly, no reference is made to a transfer of any contract or agreement let alone to the land transfer agreement. Exhibit BC1 talks of transfer of assets and not a transfer of the pre-incorporation contract with respect to the land in issue. This

Court is convinced, therefore, that the land transfer agreement was not ratified in accordance with section 44(1) of the Companies Act. As such it follows that the Claimant would not be the correct party to the present proceeding because without ratification of the contract, it cannot derive any benefit from it since it was not a party to that contract.

That as it may, it should be recalled that this Court was asked that in the event it holds that the pre-incorporation contract (land transfer agreement) was not ratified, it should proceed to validate the land transfer agreement to enable the Claimant enforce it or take the benefit of it. This request was made in light of section 44(4) which is to the effect that if a pre-incorporation contract has not been ratified by the company, or validated by the Court, the company is prevented to enforce such contract or take any benefit of it.

In the normal course of things or events, the Claimant ought to have lodged a formal application to this Court for the purposes of validation of the pre-incorporation contract. However, as it is, the issue of pre-incorporation contract is already before this Court and this Court is of the view that it should resolve this issue without insisting on a separate application on the part of the Claimant for the validation of the pre-incorporation contract. This course of action will save costs and is in keeping with the overriding objective of the CPR under O.1 Rule 5. This Court is therefore satisfied that this is a proper case in which it should validate the pre-incorporation contract to enable the Claimant take any benefit from it. The phrase "*take any benefit from it*" should be interpreted broadly and purposefully. It is the view of this Court that commencing and maintaining Court proceedings is a benefit that could follow, and ultimately flow from the validation of the pre-incorporation contract.

In the light of all what has been said above, this Court, therefore, orders that the pre-incorporation contract in the form a land transfer agreement is validated and therefore enforceable by the Claimant. Henceforth, the Claimant shall be a correct party to the proceedings. It is so ordered.

Costs are a matter of discretion of the Court. Save for the validation of the contract, the Defendants were successful on the main issue of the preliminary objection. For that reason, I exercise my discretion in favour of the Defendants and award costs occasioned in the resolution of the preliminary objection to the Defendants.

MADE in Chambers this 9th day of June 2021 at Lilongwe.



William Y. Msiska

JUDGE