



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO 599 OF 2018

BETWEEN:

EXPORT TRADING COMPANY LIMITED.....CLAIMANT

AND

KAPINGA CHIKAONEKA.....1st DEFENDANT

JOSEPHY KAFANSIYANJI.....2nd DEFENDANT

AE ELECTRICAL MANUFACTURING (LILONGWE) LIMITED.....3rd DEFENDANT

DEEDS REGISTRAR.....THIRD PARTY

CORAM: THE HONOURABLE JUSTICE CHINANGWA

Mabutwa,

Counsel for the Claimant

Zapinga

Counsel for the 1st & 2nd Defendant

Messers Mvalo & Tembo,

Counsel for the 3rd Defendant

Nyirenda Ms.,

Court Clerk

JUDGEMENT

Introduction

1. The claimant seeks

- a) an order of injunction restraining the defendants, their servants or agents from holding or doing anything on the property known as title number 16/1/33 in Chitipi area in the City of Lilongwe.

- b) a declaration that the property known as title number Chitipi 16/1/33 in Lilongwe belongs to the Claimants;
 - c) damages against the 3rd defendant for trespass and
 - d) costs of the action.
2. The claims were disputed by the defendnats.

Brief Facts of the Matter

3. A narration of the facts is important at this stage as the matter was later adjudicated on a point of law. The brief facts of the matter are that Rashida Mustafa Sama acquired a piece of land from the 1st defendant. This piece of land became Title Number Chitipi 16/1/33 when title was issued to her on 22nd September 2005. On 6th November 2010, the claimant purchased property Title Number Chitipi 16/1/33 from Rashida Mustafa Sama. On 20th March 2011, title to the said land was registered from Rashida Mustafa to the claimant. The claimant never sold the land nor surrendered title and possession to any person including the defendnats herein. Later on, it was discovered that the 1st defendant had sold the same piece of land to the 2nd defendant who in turn sold it to the 3rd defendant. The 2nd defendnats title was issued in the year 2014 bearing title number Chitipi 16/1/305, that is 3 years after the claimant had already obtained title.

Agreed Facts

4. By an order dated 15th July 2019, the claimants and 1st, 2nd, 3rd defendants agreed on factual issues. The agreement reads as follows:

The claimant and the defendnats agree with the factual issues hereunder set out:

- 1. *The pieces of land known as Chitipi 16/1/33 and Chitipi 16/1/305 are one and the same;*
- 2. *The sale agreements for the said pieces of land known as Chitipi 16/1/33 and Chitipi 16/1/305 are not in dispute;*
- 3. *Both title deeds for the two pieces of land known as Chitipi 16/1/33 and Chitipi 16/1/305 are authentic and;*
- 4. *The process for the registration of the two title deeds is not in dispute.*

LEGAL ISSUE AGREED ON BY THE CLAIMANT AND DEFENDANTS

The claimant and defendnats agree on the legal issue hereunder set out:

- 1. The third party is best placed to explain and resolve the anomaly which is before the court, which may include the Malawi Government represented by the Third Party compensating any party who was misled by the Third Party.*

Dated the 15th day of July 2019

Signed Legal Practitioners for Claimant

Signed Legal Practitioners for the 1st and 2nd defendant

Signed Legal Practitioners for the 3rd defendant

Signed Presiding Judge

5. Following the above the court merely heard the evidence of the Third Party represented by Mr Muhammad Soleimani who was Deputy Commissioner of Lands at the time the property in question was being registered. He was to give evidence regarding the legal issue before the court.

The Evidence

6. In his evidence he stated that during his tenure, the dispute herein was brought to his attention as Deputy Commissioner for Lands and to the attention of the Commissioner of Lands. When his office conducted investigations into the matter, it was realized that the sketch plans in the title documents for pieces of land known as Chitipi 16/1/33 and Chitipi 16/1/305 refer to the same piece of land. He offered no explanation as to how this would have happened. He added that when he discussed the matter with Mr Palinka Commissioner for Lands, it was agreed that liability for the error should be admitted and this was communicated to the legal practitioners for the parties herein. He further added that title documents for pieces of land known as Chitipi 16/1/33 was created before title documents for Chitipi 16/1/305 were created and that both title documents known as Chitipi 16/1/33 and Chitipi 16/1/305 were authentic.

Issues for Determination

7. Arising from the agreed order this court has to decide who is the owner of the property in question and which party is to indemnify the 3rd defendant?

Analysis of Law and Evidence

8. In **Tikafika Estate Limited & Kachale (female) v Ashani** [1998] MLR 424 (HC) the general principle *qui prior est tempore potior est* meaning that he who has a prior registered title has a superior title was applied. In this case Mr Muhamad Soleimani, Deputy Commissioner for Lands, advised the court that the claimants title was registered first. He had no explanation as to how the same piece of land would have two different titles. The defendants did not produce any contrary evidence of the same. It is interesting to note in the 3rd defendants skeletal arguments where it is argued in clause 4.8 at page 6 that '*this matter is not merely about whose title documents were registered first but rather whose title documents bear the correct title number for the land in question*'. This court finds it hard to appreciate this argument especially were the parties in their agreed order and the third Party did agree and confirm that the title documents for the property number Chitipi 16/1/33 and Chitipi 16/1/305 are authentic and for the same piece of land. This means all the information written on the title documents was confirmed as correct. The 3rd defendants has argued as to why the claimants did not develop the land immediately after possessing title as quickly as they did. This court understands from the facts that the land in question was initially customary land. The application for registration with the Ministry of Lands made the land private land. The question is what are the rules that govern private land and what happens if one does not follow the rules. This issue was not in contention before the court. In addition, the 3rd defendant argued that they have better title because they obtained a Certificate of Official Search dated 30th November 2015 which confirmed to them that the land belonged to the 2nd defendant and that it had no inhibitions; cautions and restrictions. Now this argument would make sense if the land register had a record of all the certificates. As the court notes that the same piece of land had three Land Certificates issued to it with two different title numbers. The first Land Certificate issued to the claimants on 31st March 2011 bearing title number Chitipi 16/1/33; the second Land Certificate issued on 26th November 2014 to the 2nd defendant bearing title number 16/1/305 and the third Land Certificate issued on 21st December 2016 to the 3rd defendant

bearing title number Chitipi 16/1/305. How this happened is a mystery as the Mr Muhammad Soleimani, the Deputy Commissioner of Lands did not know. At this point neither of the parties can be blamed as they are not the ones responsible for entering the names of the proprietor in the Register. Much as the 3rd defendant carried out a diligent search the point is a valid title to the same land existed at the time of their purchase. Much as the court sympathizes with the 3rd defendant but a blind eye cannot be given to the legal principal defendant *qui prior est tempore potior est*. According to this principle the claimant has title to the property in question.

9. On the second question regarding who should compensate the 3rd defendnats? The 3rd defendnats had constructed on the land when the claimant showed up to claim the land. It is this courts view that had all the three Land Certificates been registered diligently for one piece of land, had the deed plans been drawn out carefully for this one piece of land this matter would have been avoided. The Certificate of Search would have shown who the owner of the land was. In addition, the Third Party through Mr Muhammad Soleimani who as then Deputy Commissioner of Lands confirmed in court that they admit liability and the Malawi Government is supposed to compensate the 3rd defendant for the error occasioned. This is in line with section 140 of the Registered Land Act.
10. Regarding the claim on damages for trespass, this court finds that the 3rd defendants' entry into the land in question was as a result of a sale which was premised on an error in the Lands Register as explained in the foregoing paragraph. Condemning the 3rd defendant would be unjust. The claim fails
11. Regarding costs, it is trite that costs are awarded in the discretion of the court. Each party is to bear its own costs.

Finding

12. It is hereby ordered that :

- a) the defendants, their servants or agents are restrained from holding or doing anything on the property known as title number 16/1/33 in Chitipi area in the City of Lilongwe.
- b) property known as title number Chitipi 16/1/33 in Lilongwe belongs to the Claimants;
- c) The Land Register is to be corrected to reflect that title number Chitipi 16/1/33 and Chitipi 16/1/305 are one and the same.

- d) The Land Registrar is to record in the land register that the Claimant is the absolute proprietor of Chitipi 16/1/33 or Chitipi 16/1/305
- e) damages against the 3rd defendant for trespass fail.
- f) The Malawi Government is to indemnify the 3rd defendant.
- g) Each party is to bear its own costs of the action.

Pronounced this 23rd day of September 2021 at LILONGWE

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a horizontal line and a loop.

R.M CHIANNNGWA

JUDGE