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IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 48 OF 2017

BETWEEN:

SELINA ZAINABU KANKHULUNGO.....CLAIMANT

AND

KETTIE TIYANJANE KANKHULUNGO.....1ST DEFENDANT

BEUGM MARRIAM MANNAN.....2ND DEFENDANT

CORUM: CHINANGWA R.M JUDGE

Silungwe Counsel for the Claimant

Kita Counsel for the Defendants

Nyirenda Court Clerk

JUDGEMENT

1. Introduction

The plaintiff prays for the following declarations:

- a. A declaration that the registration of 1st Defendant as the owner of property Title Number Alimaunde 12/27 was wrongful and therefore void *ab initio*.
- b. A declaration that the Plaintiff has overriding interest in the said property Title Number Alimaunde 12/27, it being a matrimonial house between the Plaintiff and her late husband.
- c. A declaration that the purported sale of the property Title Number Alimaunde 12/27 between the 1st defendant and the 2nd defendant was wrongful and therefore void *ab initio*.
- d. An order cancelling the purported sale agreement between the 1st defendant and the 2nd defendant.

- e. An order cancelling the transfer and registration of title in the property Title Number Alimaunde 12/27 to and in the name of the 1st defendant, and the rectification of the land register accordingly.
- f. An order that the property Title Number Alimaunde 12/27 be registered in the name of the plaintiff.
- g. An order that the defendants should pay costs of this action
- h. Any other order that the court deem fit.

In evidence both parties filed witness statements, which have been summarized below. This court appreciates the research done by both Counsel.

2. The Evidence

a) Claimants Evidence

The claimant married Mr. Owen Macdonald Kankhulungo, on 25th day of November 1994 under the Marriage Act. After the celebration of the marriage the couple lived in area 12 in House Title Number Alimaunde 12/27 in the city of Lilongwe, which is the subject matter of this dispute. The claimant argues that through a joint business style W & E Management Services the property in question amongst other properties was purchased and registered in the name of her husband. In the year 2000, the claimants husband deserted the marriage leaving the claimant in the property in question to date. The claimant made several improvements to the house by extending the master bedroom to make it en-suite, fixing burglar bars to the whole house, converting the garage into a home office, enlarging septic tank, applying plaster and paint to the exterior, wiring the boys quarter for electricity, erecting a two-bedroom en-suite guest house and hiring a landscape expert who converted the dusty grounds surrounding the house into a nice beautiful garden planted with flowers and various fruit trees, among other improvements.

On 29th January 2008, some people inspected the house in the absence of the claimant and later she received a letter ordering her to vacate the house for being an illegal tenant the house having been sold. The claimant then had a caution dated 12th February 2008 registered on account that she jointly owned the home being a matrimonial home. The claimant also learnt that the house was transferred to Kettie Tiyanjane Kankhulungo, the 1st defendant, a daughter to her husband from

his previous marriage without my knowledge. In addition, the claimant also learnt that a Trust Settlement was made in the year 2005 known as Colorado Investment Trust which included house Title number Alimaunde 12/27. The claimant alerted the court on a host of cases involving the parties herein and property in question.

b) Respondents Evidence

The 1st defendant argues that the registration of property Title Number Alimaunde 12/27 was given to me as a gift by her father who was registered owner of the same. She adds that the claimant has no overriding interest in property Title Number Alimaunde 12/27 because before the claimant's occupation of the house the 1st defendant was living the same house with her mother, deceased father (husband to claimant) and her siblings and the claimant made no substantial contribution towards the purchase of the house. She further adds that the sale of property Title Number Alimaunde 12/27 was not wrongful because it was done with the 1st defendant's full knowledge and consent as the registered owner. The 1st defendant argues that it would be unfair and wrongful to cancel the sale agreement which was made 9 years ago and especially when one of the main players is now deceased. In addition, she argues that it would also be very unfair and illegal to register the property in the name of the Plaintiff who neither purchased nor substantially contributed to the purchase of the same.

The 2nd defendant did not testify but brought in a witness named Mahafuzur Rahman. He stated that the 2nd Defendant herein is my mother. He processed everything on her behalf. He argues that the house was bought by the 1st Defendant's father using a Public Service Home Ownership Loan Scheme. Payments were made through salary deductions and were concluded in September, 2001 as per the letter from Ministry of Lands to Mr. O.M Kankhulungo dated the 28th September, 2001. In or around the year 2008 the 1st Defendant sold the 2nd defendant Title No. Alimaunde 12/27 at a price of K9,500,000.00. By a letter of Consent signed by the 1st Defendant authorizing her father to sell the property, it was sold to the 2nd defendant. Consent to transfer the house was issued by the Commissioner of Lands on the 7th of March, 2008. On 6th of June 2008 K1,955,000.00 was deposited into the 1st defendant's father's, Mr. Owen Kankhulungo, account No: 031000004734, at Nedbank, Capital City Branch and sums of K45,000, K40,200 and K212,000. A balance of K7,500,000.00 is yet to be paid to the 1st Defendant once the Transfer of Lease documents are executed.

The 2nd defendant argues that she is a bonafide purchaser of Title N0. 12/27 as the claimant's interest was not registered on the Land Registry. In addition, it is argued that the 1st Defendant is under a legal obligation to complete the transaction by transferring the Title to the 2nd Defendant and the 2nd Defendant is ready and willing to pay the balance upon execution of the Transfer of Lease documents.

3. Issue for Determination

This court ought to determine:

- a) Whether the 2nd defendant is a bonafide purchaser of Property No. Alimaunde 12 / 27?
- b) Whether the transfer of Property No. Alimaunde 12/27 from Owen Kankhulungo to 1st defendant was valid?
- c) Whether the claimant can claim ownership of Property No. Alimaunde 12/27 on account of it being a matrimonial home?

4. Analysis of Law and Evidence

a) Is the 2nd defendant a bonafide purchaser?

In **NBS Bank v Mkada and others** [2011] MLR 223 (HC) the court held that 'to qualify as a bona fide purchaser for value without notice one must satisfy three requirements: that they must have given consideration in money or money's worth; they must have had no notice, actual or implied, of interests affecting title to the property and they will be bound by equitable interests of which they may in fact be ignorant but whose existence they would have discovered had they acted as a prudent person of business, placed in similar circumstances'. In addition, the Zambian Supreme Court of Appeal in **Joyce Ndavuka Gondwe v Christine Ziwolile Ngwira**, Appeal Case No 37 of 2015, the court held that by the purchaser failing to enquire from the occupant of the house when the purchaser went to view the house the purchaser was not a bonafide purchaser for value without notice. The court emphasised that: 'In purchasing real properties parties are expected to approach such transactions with much more serious inquiries to establish whether or not the property in question has encumbrances. Buying real property is not as casual as buying household goods or other personal property' see: <https://zambialii.org/node/13162/revisions/13621/view>. Section 27 (f) of the Registered Land Act states that, 'Unless the contrary is expressed in the register,

all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where inquiry is made of such person and the rights are not disclosed'. This goes on to score the point that enquiries from an occupant of a property are key in the purchase of land.

In this case the 2nd defendant whose transactions in this matter were carried out by her son (witness in this matter), stated in cross examination, 'when buying the house, I was told that the mother was staying in the house. I was not told if she was real or step mother. I went to see the property. At that time the owner was not there. The land search on the property was in the name of the 1st defendant as she was the owner. There was no need to meet the tenant'. This is the very point that the law is stressing as important. The enquires made by the 2nd respondent fell short. This court agrees with the decisions above that when one is purchasing real property serious enquires ought to be made. In this case the 2nd respondent only made an enquiry with the purported owner and on the land register and did not make enquires with the occupants of the house. By not making enquiries with the occupants of the house who had an equitable interest and through whom the 2nd respondent would have found as having an equitable interest if he had made an enquiry with them, the 2nd respondent is not a bonafide purchaser.

b) Was the transfer from Owen Kankhulungo to the 1st defendant valid?

As earlier stated the property in question was bought under a home ownership scheme by Owen Kankhulungo, husband and father to the claimant and 1st defendant respectively. The claimant has lived in the property during the subsistence of her marriage from 1995 to date. On the face of things one may look at the transfer of the property from Owen Kankhulungo to the 1st defendant as a simple and straight forward matter. A father can legally give a property to his child. Question is, was the property at the time of transfer wholly owned by Owen Kankhulungo. There are silent issues from the sequence of events to note which question the legality of the transfer. These are

- i) 25th November 1994, the claimant got married to Owen Kankhulungo on

- ii) In 2000, Owen Kankhulungo stops occupying Plot No. 12/27 and leaves claimant and child of the union in occupation of the house.
- iii) 28th September 2001 from Ministry of Lands to Owen Kankhulungo advises Owen Kankhulungo that the mortgage on Plot No 12/27 has been fully discharged.
- iv) 31st December 2001, Transfer of Lease from Owen Kankhulungo to 1st defendant
- v) 1st May 2005, Colorado Investment Trust made in which Owen Kankhulungo and Macdonald Kankhulungo Jnr were trustees and 1st defendant was one of the beneficiaries and Plot No 12/27 was one of the properties under the trust.
- vi) 16 January 2008, 1st defendant gives consent to Colorado Investment Trustees, Owen Kankhulungo to sale Plot No 12/27 and proceeds of the sale to be attached to Colorado Investment Trustees.
- vii) 12 February 2008, Caution over Plot No. 12 /27 registered
- viii) 7th March 2008, Consent to Transfer Lease from 1st defendant to 2nd defendant issued by Assistant Chief Land Registrar
- ix) 13th March 2008, claimant advised to vacate Plot No.12 /27.
- x) 6th of June 2008 K1,955,000.00 was deposited into Owen Kankhulungo bank account.

At this juncture it is important to analyse these events. After the house was bought in the name of Owen Kankhulungo a transfer to the 1st defendant was made in 2001. Then, a transfer of the said property was made to Colorado Investment Trust in 2005. Then, the property was sold to the 2nd defendant in 2008 by the 1st defendant through Owen Kankhulungo. It is this courts view that at the time the property was being sold to 2nd defendant it was the trust that owned the property and it should have been the trust making an offer and transferring the said property if at all to the 2nd defendant. At this point the 1st defendant had no authority as owner to sale the property. This raises issues of fraud on the part of the sellers.

The above having been said, the events captured above were gathered from the documents presented before the court. It has not been disputed that the claimant was a wife to Owen Kankhulungo; that the claimant has lived on Plot No. 12 /27 from around 1995 to date; Plot No. 12/7 was bought in the name of Owen Kankhulungo. It is argued by the defendants that the claimant did not contribute financially to the acquisition of the house as such the claimant cannot claim ownership. It was held in **Lorraine B Khamisa v Shabir Charles Khamisa** [2012] MLR

241 (HC) that in the social climate currently prevailing in Malawi as well as considering the provision with regard to equality, non-discrimination and those protecting the rights of women, it is not an acceptable argument that just because the wife did not financially contribute in the family then she loses her beneficial interest in matrimonial property. It is this courts view that by the fact that the claimant was married to Owen Kankhulungo, that the house was bought during the subsistence of their marriage, that the claimant has since lived in the property since the early years of her marriage to date and that the claimant has improved the house, the claimant acquired a beneficial interest in Plot No. 12/27. It is repugnant to justice to remove a wife from her matrimonial home by sale or change of title of a property without the wife's consent. By having a beneficial interest in the property; being an occupant of the property; and there being no consent from the claimant on the transfer of the Plot No.12/27 the transfer of the property to the 1st defendant was unlawful. Owen Kankhulungo could not have rightfully given out a property which had a beneficial interest on it being matrimonial property. The decisions provided by the defence can thus be distinguished on this account. The court finds that the transfer of property from Owen Kankhulungo to the 1st defendant was unlawful.

c) Can the claimant claim the property?

It is this courts view that the claimant cannot claim total ownership on Plot 12/27. As found in the preceding part, the claimant has a beneficial interest in the property Plot No. 12 /27 jointly with Owen Kankhulungo, now deceased being a matrimonial home. Now, since the passing of Owen Kankhulungo, the share of Owen Kankhulungo on Plot No. 12/27 became part of the deceased estate and subject to distribution testate or intestate.

Litigation History of this matter

The court was alerted on various matters before the courts involving the property and parties to this matter these being:

- i) Matrimonial Cause Number 10 of 2008 on divorce proceedings between claimant and Owen Kankhulungo
- ii) Civil Cause Number 202 of 2015 on removal of caution between 2nd defendant and 1st defendant; claimant and Macdonald Kankhulungo

- iii) Civil Cause Number 2398 of 2008 on removal of caution between 1st defendant and claimant and Owen Kankhulungo
- iv) Civil Cause Number 250 of 2008 on an application for an injunction between claimant and Owen Kankhulungo and others
- v) Civil Cause Number 1309 of 2008 on an application for a declaratory order that claimant has no interest in properties under Colorado Investment Trust between Owen Kankhulungo and the claimant
- vi) Civil Cause number 1383 of 2008 on application for a declaration that the claimant has no interest in Plot No. 12/27 between 1st defendant and claimant
- vii) Civil Cause Number 48 of 2017 being the present matter.

It is unfortunate to note that the courts were inundated with 7 matters involving the same parties and property. It is high time as an institution a mechanism was devised for tracking such files which are an abuse of the court system; put pressure on few judges and resources in the institution to say the least. By order of this court the above matters were consolidated.

5. Finding

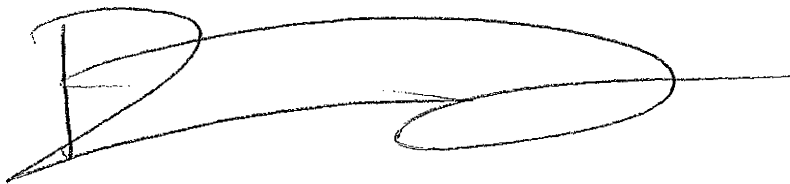
This court thus makes the following declarations:

- a) The registration of 1st Defendant as the owner of property Title Number Alimaunde 12/27 was wrongful and therefore void *ab initio* their being a beneficial interest.
- b) The claimant does have a beneficial interest in the Title Number Alimaunde 12/27, it being a matrimonial house between the Plaintiff and her late husband, Owen Kankhulungo.
- c) The sale of the property Title Number Alimaunde 12/27 between the 1st defendant and the 2nd defendant was wrongful and therefore void *ab initio*, as the 1st defendant's title to the property was wrongful.
- d) The sale agreement between the 1st defendant and the 2nd defendant is nullified.
- e) The transfer and registration of title in the property Title Number Alimaunde 12/27 to and in the name of the 1st defendant should be rectified and registration be made in the name of Owen Kankhulungo.

This court further dismisses the prayer for:

- f) An order that the property Title Number Alimaunde 12/27 be registered in the name of the plaintiff, Owen Kankhulungo has a share in the property having contributed to its purchase.
- g) An order that the defendants should pay costs of this action as the complexity of the matter did warrant the parties to seek redress in the court.
- h) Any other order that the court deem fit as the parties have to make specific claims according to law and not leave the court to decisions on matters which have not been adjudicated upon.

Pronounced this 23rd day of April 2021 at LILONGWE

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a long horizontal stroke that loops back to the right.

**R.M CHINANGWA
JUDGE**