



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NUMBER 8 OF 2002**

BETWEEN:

FRANCIS CLARENCE MBEPULA.....APPELLANT

AND

ATTORNEY GENERAL.....RESPONDENT

CORUM : JUSTICE R.M CHINANGWA

Liwimbi Counsel for the Claimant

M. Lenga Counsel for the Respondents

Nyirenda Court Clerk

JUDGEMENT

1. Introduction

The claimant commenced this action for a determination on the following:

- i) Whether the defendant is justified to withhold consent for the plaintiff to purchase house No. 9/25 in the Area 9 in the city of Lilongwe.
- ii) Whether the defendant is justified to disallow the plaintiff from occupying the house referred to in the preceding paragraph on the basis of application of a policy to a matter that had been retrospectively determined.

- iii) Whether the plaintiff is not entitled to damages should defendant's acts be unjustified in questions (i) and (ii) above; and,
- iv) Whether the defendant should not be condemned to costs of these proceedings.

On 21st July 2005, the parties executed a consent order in the following terms:

- a) That the defendant gives consent to the plaintiff to purchase the house in issue;
- b) That pending the conclusion of all processes leading to the purchase, the plaintiff is to have quiet enjoyment and uninterrupted occupation of the house;
- c) That the issue of damages, rentals, value and costs to be reserved for further agreement between the parties

On 30 May 2017, an order for damages amounting to Mk13,320,837.05 was made against the respondents for failure to execute the above consent order. This court became seized of the matter and directed that the parties attempt an out of court settlement, failure of which the matter would proceed with court mediation. The matter remained unresolved and court mediation was terminated on 10th March 2020. The matter proceeded for trial whereupon the claimant prays for an order that the respondent confirm and accept the offer that the said house be purchased by the claimant at the value of **MK800,000.00** and costs of this action. On the other hand the respondent claims the following: the sum of **MK8,792,500.00** as rental arrears as of March, 2020; total rental arrears from the month of April, 2010 up to time of determination of this matter; interests on all sums due at 2% above National Bank of Malawi lending rate from the date the amount as due for payment to the actual date of payment; legal collection costs in all sums due and an order evicting and locking out the claimant from house number 9/25.

Both parties filed their witness statements and below is a reprint of the same.

2. The Evidence

a) Claimants Evidence

The claimant was the only witness. He stated as follows:

2. THAT I am a retired Civil Servant having worked for the Government of the Republic of Malawi, the defendant's client, for various ministries, departments and agencies and holding various positions till my retirement on 31st March, 2006.
3. THAT in or about the year 1999 while working for the defendant I applied for the purchase of a house No. 9/25 situated in Area 9 in the city of Lilongwe under the Public Service Home Ownership Scheme that then prevailed in the defendant's service and exhibited is a copy of the said application as FCM 1.
4. THAT on 20th July, 2000, the defendant approved and accepted the said application and I exhibit a copy of the same as FCM 2 hereto.
5. THAT following the approval in FCM 2, on 1st September, 1999, the defendant valued the house at the price of MK800,000.00 (Eight hundred thousand kwacha) and attached hereto and marked FCM 3 is a copy of the valuation.
6. THAT due to the reasons unknown to me, the defendant had since the approval and valuation in FCM 2 and 3 hereto and without any reason and or justification refused, ad neglected to formally offer me the house at the price at which it was valued or indeed at any price.
7. THAT having failed to convince the defendant to resolve the matter, I commenced the present action in 2002 but also continue to make attempts to have it amicably resolved.
8. THAT I am aware that the defendant by letter of 20th April, 2005, advised its client ministry to settle this matter in the following manner;
 - a) Settling all outstanding rentals till the said date
 - b) Having the purchase price of the house at MK800,000.000 as valued by the said client ministry
 - c) That failure of complying with the terms in (a) and (b) herein, the house would revert to the client ministry.

The said letter is attached and exhibited hereto as FCM 4.

9. THAT by a Consent Order of 21st July, 2005 we reduced all the relevant matters that were meant to resolve the matter and I exhibit a copy thereof as FCM 5.

10. THAT I am aware that following the defendant's letter in FCM 4 and the subsequent Order in FCM 5 herein, on 17th August, 2005, the defendant's client ministry agreed with the defendant's advice in the letter in FCM 4 and the same was reduced in writing and I exhibit a copy of the said letter as FCM 6 hereto.
11. THAT I refer to the letters exhibited hereto and marked FCM 5 and 6 state that despite that the same were not copied to me, I managed to access both of them as firstly, at all materials times I used to work within the ministry responsible for lands as Principal Accountant (P7) and the said documents were neither confidential nor restricted in terms of their access and they are for all practical purposes public documents.
12. THAT despite the Order in FCM 4 and the confirmation in FCM 6, the defendant never took any step to facilitate the finalization of all process to enable me purchase the house including making a formal offer per FCM 6.
13. THAT on 30th May, 2018 this Court made an order for assessment of damages that took into consideration the rentals I have paid to the defendant and awarded me the sum of MK13,320,837.05 (Thirteen million three hundred twenty thousand and eight hundred thirty seven kwacha five tambala). And exhibit a copy of the ruling as FCM 7 hereto.
14. THAT I am advised that the only way I would have been able to purchase the house after making an offer that was accepted by the defendant was for the defendant to value the property and confirm with me the price at which my offer was accepted.
15. THAT I refer to paragraphs 5,8,9 and 10 herein and contend that in as far as am concerned all the relevant processes were taken including the offer and acceptance and all that remained was for the defendant to confirm acceptance in writing with the purchase price per the valuation and confirmation in FCM 3,5 and 6 hereto.
16. THAT I repeat the preceding paragraph and contend that the defendant is responsible for the failure of the conclusion of the transaction herein over which I never had any control.
17. THAT on the totality of the facts and circumstances herein, I contend that this Honourable Court makes and order that the defendant confirms acceptance of my offer to purchase the house at the sum of MK800,000.00 as valued per FCM 3 hereto.
18. THAT I am aware that the defendant disputes to confirm acceptance for me purchase the house at the said valued price of MK800,000.00 and contends that the same be at the current market value that was at MK69,400,000.00 as of 25th March, 2019 per FCM 8 herein.

19. THAT I am of the view that in the circumstances, it would neither be fair nor just for the defendant to re-value the property and offer it at the current market value.

3. Respondents Evidence

The respondent had one witness. Through a witness statement Mr Kingstas Mkandawire, stated as follows:

1. The statement is based on facts that I had personally perceived and also personally gathered through my general conduct of this matter as the Acting Chief Housing Officer and I believe the same to be true to the best of my knowledge and recollection.
2. On 13th July, 1999, the Claimant applied to purchase a house number 9/25 under Home Ownership Scheme which prevailed at that time.
3. On 20th July, 2000, the Ministry of Lands allocated the house to the claimant but did not accept the Claimant's offer to purchase the house. I produce a copy of the allocation letter marked exhibit **KM 1**.
4. Despite the claimant making his intention to purchase the house clear, the house was not offered for sale to him, and in 2002 the claimant commenced the present legal proceedings against the defendant seeking the following determinations:
 - a) Whether the defendant is justified in withholding consent for the claimant to purchase house No. 9/25 in area 9 in the city of Lilongwe.
 - b) Whether the defendant is justified to disallow the claimant from occupying the house on the basis of application of a policy that had been retrospectively determined;
 - c) Whether the claimant is not entitled to damages should the defendant's act be unjustified in questions (a) and (b).
 - d) Whether the defendant should not be condemned to costs of these proceedings.

5. On 21st July, 2005 the defendant reached out to the claimant and a Consent Order was drawn by the parties. The terms of the Consent Order were that the defendant would give consent to the Claimant to purchase the said property
6. It was also a term of the Consent Order that the Claimant would be entitled to quiet enjoyment and uninterrupted occupation of the said house pending conclusion of all processes leading to the said purchase, I produce a copy of the Consent Order marked Exhibit **KM 2**.
7. It is very clear from the said Consent Order that the issue damages, rentals, value of the house and costs of the action were reserved by the parties for further agreement.
8. What followed after signing of the Consent Order was a long drawn out process with various twists and turns along the way. To begin with, the defendant did not finalize the processes leading to the purchase of the house as such the house could not be offered to the Claimant.
9. On 30th May, 2017, the Court assessed damages at **MK13,320,837.05** and ordered the defendant to pay the same to the claimant. As I testify, I have not been able to find the basis for the damages since no purchase price was ever determined, the house was not offered to the Claimant and the claimant owes the Ministry of Lands rent for the period of his occupation.
10. Nevertheless, the damages were fully paid by the defendant on 4th December, 2018.
11. Thereafter, the defendant took no action for three months until 25th March, 2019, when it decided to offer the house for sale to the Claimant at revalued price of **MK64,400,000.00**. The offer was valid for a period of thirty (30) working days. I produce a copy of the offer letter marked Exhibit **KM 3**.
12. Unfortunately, by a letter dated 29th March, 2019, the Claimant rejected the defendant's offer and made a counter-offer of **MK800,000.00**.

13. By a letter dated 2nd April, 2019, the defendant told the claimant that it could not sell its property at the price at which it was valued in 1999 as that did not make any business or commercial sense. I produce a copy of the said letter marked Exhibited **KM 4**.
14. Since the claimant's counter-offer of **MK800,000.00** was rejected by the defendant, the intended contract for the sale of the said property was not concluded.
15. The Claimant has always been under a legal obligation to pay rent on which he had perennially defaulted. As of March, 2020, the Claimant has accumulated rental arrears amounting to **MK8,792,500.00**. I produce a table showing outstanding arrears marked **Exhibit KM 3**.
16. In view of this veritable breach, the claimant comes before this court with unclean hands and it would be unconscionable for him to demand specific performance of an agreement that never was when he is in breach of his tenancy agreement relating to the same house.
17. I have been advised by my Counsel and I believe the advice to be true that the Consent Order being relied on by the claimant is a court agreement to agree on damages, value of the house and costs of the action and in law it is not enforceable agreement.

4. Issue for Determination

The claimants main prayer is for an order that the respondent confirm and accept the offer that house number 9/25 be purchased by the claimant at the value of **MK800,000.00** and costs of this action. Thus this court ought to determine whether the claimant can be offered and purchase house number 9 /25 at **MK800,000.00**.

5. Analysis of Law and Evidence

As stated in the preceding paragraph, this matter is mainly about purchase of a house. The determination of this matter centers around the correspondence that was between the parties herein. The matter being about a purchase of a house, am drawn to the law of contract. The question is was there a valid contract on the sale of the house between the parties herein? The burden of proof lies on the party making an assertion in civil cases. The claimant has no clear contract per se. This

court would have to read between the lines of the different documents which the claimant has presented before the court.

FCM1 is an application for purchase of house from the claimant to Ministry of Lands dated 13th July 1999.

FCM2 is a letter from Ministry of Lands allocating house no9/25 to the claimant as a tenant dated 20th July 2000

FCM3 is a valuation report from National Property Advisory Service to Ministry of Lands advising that house no 9/25 value is MK800,000.00 received by Ministry of Lands on 1st September 1999

FCM4 is a letter from the Attorney General Chambers to Ministry of Lands dated 20th April 2005. In the said letter the Attorney General advised that the claimant pay rentals due; claimant be allowed to buy the house at MK800,000 and failing of the said conditions would mean the house reverts to government unconditionally.

It should be noted up unto this point, there was no contract of sale of house no 9/25, as the claimant's request to purchase the house through FCM1 had not been approved nor communicated to the claimant by the Ministry of Lands, who was the other party to the would be contract. It is worth noting that FCM3 and FCM4 were internal communications within government to which the claimant was not privy to and thus cannot claim the same to be the basis of his claim. If at all the claimant came across the same documents which he did, the same is akin to an invitation to treat, as no specific offer was made to the claimant.

FCM5 is a consent order which has been reproduced above in the introductory part of this judgement. It is trite law that a consent order is a judgement at law and is binding on the parties as a legally valid contract binds parties. Now in this consent order the following observations can be made:

- There was no offer of the house at MK800,000
- The claimant was allowed to purchase the house after all processes were concluded. These processes were not timed nor disclosed.
- The parties were to agree on how to address issue of rent, value etc.

As can be noted this consent order leaves a lot to be desired. This court can only borrow the comments of Lord Denning in the case of *Siebe Gorman Ltd v Pheupac Ltd* [1982] 1 WLR 185 at 189–190 as quoted **National Bank of Malawi v Sumuka Enterprises Ltd and another** [1991] 14 MLR 360 (HC) in the case of:

There are two meanings to the words 'by consent.' That was observed by Lord Green MR in Chandless Chandless v Nicholson. One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order may be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used."

In this case the latter definition of the consent order applies. The parties were simply not objecting on how to proceed with the matter as the consent order cannot be treated as a contract in law as it does not meet all the requirements of a valid contract such as consideration; offer and acceptance just to mention a few. The consent order agreed by the parties on 21st July 2005 was in the courts view a no objection order. For all intents and purposes this agreement drew the parties back to the drawing board as they were to agree on purchase price and rentals, amongst other issues. Again at this point there was no contract to purchase the house nor sale agreement.

FCM 6 is a letter dated 17th August 2005 from Ministry of Lands in response to the Attorneys Generals letter in FCM 4. The Ministry had agreed to settle the matter as proposed by the Attorney General. This court observes that this was an internal memo within government and the claimant was not privy to it. The communication to be binding on the respondent had to come from the Ministry to the claimant. In addition there was no roadmap outlined on how the same would be achieved.

Later came FCM7 an order in assessment of damages was made in which the claimant was paid damages amounting to mk13,320,837.05 for failure of government to implement the consent order dated 21st July 2005 which said that the parties would agree on rentals and all processes leading to

the purchase. Again at this point, no sale agreement or processes leading to the purchase were agreed.

It was only on 25th March 2019 through FCM8 that the Ministry of Lands communicated an offer to procure the house at Mk69,400,000.00. This now is the crux of this determination. Should the offer be maintained at Mk800,000.00 which was not communicated to the claimant; which was as a result of internal discussions in government? It is this courts view and is emphatically stated that by the consent order of 21st July 2005 all earlier processes as communicated in FCM2, FCM3 and FCM4 were cancelled. By the consent order of 21st July 2005, the parties had agreed that the purchase will await all processes leading to the purchase (what these were was undisclosed) and that value, damages, rentals and costs will await further agreement. It is this courts firm belief that the respondent being the owner of the house by making an offer on the value of the house they had finalized all processes leading to the purchase. The decision making process was however slow as the application was made in 1999 and only responded to in the year 2019. That being the case this court finds that the offer to purchase house no 9/25 as communicated in the letter dated 25th March 2019 was valid. Unfortunately, the offer had lapsed as the offer was valid for 30days. This court appreciates how long the matter has taken having been commenced in the year 2002. Equity would demand that the respondent

- a) Re-offer house number 9/25 to the claimant within 30 days.
- b) The claimant respond to the offer within 30days
- c) Whereupon the offer is not accepted the respondent is at liberty to evict the claimant and take possession of the house being the legal owner of the house.

Now regarding the issue of rentals as counterclaimed by the respondents this court finds that at the time the claimant entered the house he was advised to pay rentals through FCM 3. Again the respondents through a no objection consent order the parties stated they would agree on the rentals. The respondents, through Ministry of Lands took time to do the same. As such it is unequitable to claim interest and statutory collection costs on the rentals. If anything the rentals alone are due as the claimant entered the house on a clear understanding that he was to pay rentals. Equity would demand that rentals be paid as the house does not belong to a person nor to government but is held on trust by the Malawi Government for the People of Malawi. By not paying rentals the claimant would be unjustly enriched and deprive Malawians of this income. The parties are to agree on the

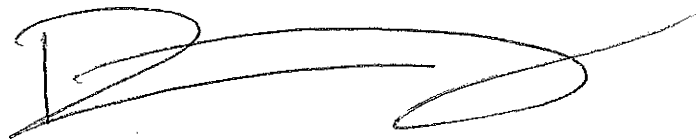
payment terms. If they fail within 30 days the Assistant Registrar is to make a determination on the same.

Regarding costs of the action, this court is aware that costs are awarded at the discretion of the court. It is undeniable fact that this matter has dragged for years. The respondent failed to make timely decision and communicate the same to the claimant on his application to purchase the house number 9/25. The claimant treated the respondents kindly and in the process the matter delayed in prosecution. Each party ill bear its own costs having contributed to the delay.

6. Finding

This court finds that the claimants claim to purchase the house at a price of MK800,000.00 fails. The respondent is to re-offer house number 9/25 to the claimant within 30 days. The claimant is to respond to the offer within 30 days. If the offer is not accepted, the respondent do take possession of the house. On the issue of rentals, the claimant is to pay the rentals due. The parties are to agree on the payment terms within 30 days. If the same fails, the matter will proceed on assessment before the Assistant Registrar. Each party is to bear is own costs as each party contributed to the delay of the matter being prosecuted in court. The claim for interest and collection charges fails.

Pronounced this 15th day of March 2021 at LILONGWE



R.M CHINANGWA

JUDGE