The Republic of Malawi

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 16 OF 2020

BETWEEN

FRANK JAILOS CHISAKALIMI ..... CLAIMANT

AND

KHOLOWA NSAIWARA ..... 1ST DEFENDANT

MACFORD MWALE..... 2ND DEFENDANT

JAMES CHAUMA ..... 3RD DEFENDANT

CHRISTOPHER FASTEN ..... 4TH DEFENDANT

PAUL (SURNAME IS UNKNOWN) ..... 5TH DEFENDANT

LENISA MANYOWA ..... 6TH DEFENDANT

MALINGA SALIWENI ..... 7TH DEFENDANT

JIMMY MANYOWA ..... 8TH DEFENDANT

MUSSA JAFARI ..... 9TH DEFENDANT

CORAM : **HONOURABLE JUSTICE W.Y. MSISKA**

: Mr. Soko, of Counsel for the Claimant

: Ms Ng'oma, of Counsel for the Defendant

: Mr. H.L. Matope, Court Clerk

RULING

This is a ruling arising from an application to set aside judgment filed by the defendants on 24th September 2020 pursuant to Order 12 rule 21 and order 10 rule 1 of the Court (High Court) (Civil Procedure) Rules 2017 (CPR 2017). From the face of the application, it is premised on the ground that the Defendants have a defence on the merits to the claim by the Claimant. The application is supported by a Sworn Statement made by the 3rd Defendant and a supplementary sworn statement made by Counsel Maziko Nyirenda.

In his sworn statement, the 3rd Defendant avers that the piece of land in question is part of the deceased estate of late Elliot Sendeza Banda who acquired it in 1986 for agricultural purposes and for the interest of the village. That since that time the village community has been using the piece of land without interference from anyone. The use of the piece of land as such continued even more than twenty years after the death of Elliot Sendeza Banda and that more than 300 households are benefiting from the piece of land. He further avers that the Claimant bought the land in question from Nephan Elliot who had no right of ownership at the time the sale was done nor is he the administrator of the estate of Elliot Sendeza Banda. The 3rd Defendant in his sworn statement also states that the sale was illegal as the seller and the Claimant through fraudulent and dubious ways managed to sell the land to each other and subsequently started the process of changing ownership, which resulted in an offer from Regional Lands office for the Centre.

Lastly, he acknowledged that on 26th May 2020 they were served with a summons but they delayed to file a defence. They also received an enforcement order on 2nd July, 2020 following a default judgment that was issued on 20th June, 2020

In the supplementary sworn statement, Counsel Maziko Nyirenda states that at the time the disputed land was being sold to the claimant, the lease had already expired and never renewed meaning land reverted to public land therefore Nephan Elliot had neither right of ownership nor the right to sell. As a result, the

purported sale of the land in question was illegal. He went further to aver that Ministry of Lands has acknowledged that the piece of land in question was erroneously offered to the Claimant through a letter dated 27th April, 2020. A copy of the letter has been attached to the supplementary sworn statement as "MN I."

Furthermore, Counsel Maziko Nyirenda averred that the Ministry of Lands has since revoked the offer of lease to the Claimant through letter dated 22nd March, 2021 a copy of which has also been attached to the supplementary sworn statement marked "MN 2."

In her submissions Counsel Ngoma was brief. She adopted both the sworn statement and supplementary sworn statement in support of the application and the skeleton arguments. Counsel Ngoma emphasized that the application be granted and that the judgment entered be set aside on the ground that the defendants have a meritorious defence.

The Claimant has opposed the application to have the judgment set aside. In his sworn statement in opposition, the Claimant, adopted his sworn statement and that of Nephan Elliot made on 20th October, 2020 in support of his application to set aside the order staying execution obtained by the Defendants. In his sworn statement in support of the application to vacate an order of stay, Nephan Elliot stated that his late father was leasehold owner of 49.60 hectares of land situated at Kazyoka Village. This land was exclusively held and used by his father for his tobacco farming until his death in 1996. At no point has the land been used by the community until his death. A copy of the lease was exhibited as NE 1. The lease was for a period of 21 years.

He averred that after the death of his father, the defendants tried to evict him and his siblings from the land to the extent that the matter was brought before Customary Law Court of Group Village Headman Mphanda and Traditional Authority Dambe. At both occasions, the matter was ruled in favour of his family.

Much as it is true that the defendants have been using the land after the death of his father, such use has been punctuated with violence and force which the deponent and his siblings have always opposed and the issue of the land by the defendants can properly be described as trespass.

That on 17th March, 2017, in consultation, and with the agreement of his siblings, the land was sold to the Claimant at the price of K13,000 000. However, when legal advice was sought on how to finalize the transaction by way of change of ownership, the deponent and the Claimant were informed that the purported sale of land was a nullity since the lease expired in February 2008 after it had ran the term of 21 years. It was the advice of counsel that in those circumstances, the Claimant was at liberty to apply for a lease from the Government since the land in question was upon expiry of the lease public land.

Following the application for lease by the Claimant, the land was offered to him as a new lease. For that reason, it was the conviction by the deponent that the defendants never had any legal interest in the land as it was private land which belonged to his late father and that upon expiry of the 21 years it reverted to the Government as public land. Therefore, the defendant had no right to claim let alone to settle on the land.

The Claimant in his sworn statement in support of the application to vacate the order of stay stated that upon legal advice from Counsel, on how to proceed with processing of title, he applied to Government through Mchinji District Council for a lease of land. Consequently, he was offered the lease for the land on 27th April, 2020. The offer letter was exhibited as FJC 1. The Claimant proceeded to pay all the charges in accordance with the stipulations of the letter of offer. Receipts as proof of payment for the charges were also exhibited as evidence in FJC 2. It is the further argument of the Claimant that based on the letter of offer, he was entitled to possession of the land. He also averred that the Defendants have no right to the land and therefore no legal interest to protect. As such, they are encroachers on the land and they should be evicted. He pointed

out that the offer of lease only related to bare land which is to be used for agricultural purposes. In fact, it does not extend to the land where there is a cemetery or school. The land offered to the Claimant is subject to a cadastral survey which has not taken place due to the violence of the Defendants.

The Claimant maintains that the land in issue was after the expiry of the lease in 2008 public land and therefore it did not form part of the deceased estate of Elliot Sendeza Banda. For that reason, the Defendants are illegal squatters on public land which squatting does not give the Defendants any legal right to protect in the proceeding.

The Claimant also filed a notice raising preliminary objections as follows-

1. That the application to set aside default judgment is incompetently before court as it was filed outside the time that the Court had ordered on 24th September, 2020.
2. That the document made by one James Chauma to wit "an affidavit" is alien to our civil procedure and is further not provided for under the Courts (High Court) (Civil Procedure) Rules 2017 and should be struck out.
3. That if the aforesaid document purports to be a sworn statement, then it is defective because it does not comply with Order 18 rule 7 (5) (c) and (d) of the Civil Procedure Rules.
4. That in any event, the aforementioned document can neither pass for a sworn statement or an "affidavit" for want of valid oath, the oath thereof having been administered by an unauthorized person in terms of section 4 of Oaths, Affirmations and Declarations Act.
5. That the sworn statement of Mr. Maziko Nyirenda of 23rd March 2021 is irregular for not having complied with Order 18 rule 7 (5) (c) and (d) of the Civil Procedure Rules.
6. That the documents annexed to the Sworn Statement have been attached when they ought to have been exhibited as required under Order 18 rule 14 of the Civil Procedure Rules.

Counsel for the Claimant also filed a supplementary sworn statement in opposition to the application to set aside default judgment. In the supplementary sworn statement, Counsel avers that as of July, 2020, Mr. Benjamin Chulu who administered the Oath of Mr. James Chauma on 9th July, 2020 was not working as a Magistrate but rather as a Research Officer in the Judiciary based at the Lilongwe District Registry of the High Court.

In his submission, Counsel Soko adopted all the sworn statements in opposition and the skeleton arguments and started addressing the Court on the preliminary objections. That approach was thought to be an ideal in the circumstances considering that the resolution of those objections will determine the future of the application to set aside judgment.

Firstly, Counsel Soko argued that the application to set aside judgment in default is incompetently before the Court because it was filed outside the time set by the Court when it granted an order staying execution of enforcement of judgment on 24th September, 2020. That order was granted on condition that the Defendants should file an application to set aside default judgment within seven (7) days from that date. Contrary to the stipulations of that order, the Defendants only filed the application which is purportedly being prosecuted on 1st November, 2020. Counsel further argued that if a court orders time within which some action be done, and that time expires before compliance, it is procedural to go back to court and seek enlargement or extension of time within which to comply with the order. In the present case there is no order extending or enlarging time and therefore there was non-compliance with the order of the Court.

On the second issue of the preliminary objection, it was submitted that the document with the title *"Affidavit in Support of Application"* sworn by Mr. James Chauma should not be taken into account as there is no provision for such document called an *"Affidavit"* under the relevant rules. The use of the term *"Affidavit"* was long time done with after the commencement of the CPR 2017. It is unimaginable that Counsel still uses the term in 2021. What is in support of

the application is an *"affidavit"* there is, therefore, no sworn statement supporting the application to set aside default judgment. Counsel supported his argument by citing Order 18 rule 1 (1) of CPR 2017. This sub-rule states that a reference to an affidavit in any Act or subsidiary legislation shall be deemed to be a reference to a sworn statement.

The second reason why the *"Affidavit"* of Mr. James Chauma does not qualify to be used as an affidavit or sworn statement is because it was commissioned by a person who is not authorized to do so under the relevant statutory law. The oath was purported to have been administered on 9th July 2020 by Mr. Benjamin Chulu who at that time was a research officer and not a Magistrate and therefore not a Commissioner for Oath. Counsel cited section 4 of Oaths, Affirmation and Declarations Act, Cap. 4:07 of the Laws of Malawi. Counsel stated that the error is not curable under Order 2 of CPR 2017. The question of who is a Commissioner for Oaths is grounded in a principal legislation. CPR 2017 being subsidiary legislation cannot work under any stretch of imagination to defeat a scheme provided for under a principal piece of legislation. Section 48 (2) of the Constitution and 21 of the General Interpretation Act were cited as authority. Counsel also attacked the affidavit sworn by Mr. James Chauma and the supplementary sworn statement of Mr. Maziko Nyirenda on account that both documents do not comply with Order 18 rule 7 (5) (c) and (d). Rule 7 (5) (c) and (d) which requires of a deponent, in the authorizing part, to state that the statement is made in a proceeding and that the deponent shall be liable to perjury if he makes a statement which is untrue.

The last point by Counsel on the form of the supplementary sworn statement of Mr. Maziko Nyirenda was that it purports to attach documents which in fact at law it does not. The law is very clear that documentary evidence which forms part of the sworn statement should be exhibited.

Acknowledging that under Order 2 of the CPR 2017, the Court may wave any kind of non-compliance, Counsel contended that in the present case there are

numerous irregularities which it may be difficult for the Court to ignore. It was therefore further argued that the Defendants proceeded as if the CPR 2017 does not matter and at most does not exist.

Proceeding to address the Court on the substantive issues, Counsel argued that the application to set aside the default judgment should fail on two grounds, namely, inordinate delay in filing the application to set aside default judgment and, lack of defence on the merits.

Counsel contended that the application to set aside default judgment suffers from inordinate delay. Order 12 rule 21 of CPR 2017 states that an application to set aside a default judgment should be brought within three (3) months or 90 days. In circumstances, where the application is brought outside of the three (3) months, an explanation ought to be provided. In the instant application, it should be observed that the default judgment was entered on 22nd June, 2020 and a competent application to set aside the default judgment was only filed on 1st November, 2020. In addition, the inordinate delay has not been explained in any way. Failure to provide the reason for the delay is fatal to the application.

In support of the ground that the defendants do not have defence on the merits, Counsel argued that the statement of defence that one Nephani Elliot did not have the right to sell the land to the claimant because he was not administrator of the estate of his late father cannot stand as it is on record that the Claimant admitted that he was advised that Nefani Elliot could not sell the land to him because upon expiry of the lease in 2008, the land reverted to public land and therefor it is only Government that has authority over such land.

On whether or not the Defendants were licensees of the deceased and therefore entitled to remain on the land as beneficiaries of the deceased estate, Counsel submitted that such an argument cannot be sustained at law because the land in question was held under a lease which was granted by the Minister of the Government responsible for Land matters which expired in 2008. Accordingly, the land in question became public land. In support, Counsel cited section 2 of

the Lands Act, 1965 (now repealed). Therefore, the rights of Defendants as licensees terminated in 2008 when the lease expired. Upon assuming the character of public land no individual or person is allowed to squat, let alone have the right of entry nor acquire title by prescription through adverse possession.

The letter of offer of the lease to the Claimant from the Ministry of Lands is also clear and confirms that the land in issue was public land. Based on that offer, the Claimant paid all the charges and therefore took possession of the land. It is for that reason that there is no dispute that the court should determine.

With regard to the notice of revocation attached to the supplementary sworn statement of Mr. Maziko Nyirenda, it was the argument of Counsel that this was a mere intention and that intention has not yet crystalised. It should be noted that the title of the letter from the Regional Commissioner for Lands and attached as MMZ is an error of both law and fact. The land in issue though referred to as customary land, it is not, rather it is public land. It was submission of Counsel that the distinction between the two categories of land is very critical.

In conclusion, Counsel called on the Court not to set aside the default judgment and order that the order of stay should accordingly fall off.

In reply, Counsel Ngoma submitted that the Court should proceed to set aside the judgment. Counsel relied on paragraph 5 of the supplemntary sworn statement of Mr. Maziko Nyirenda in which the Regional Commissioner for Lands acknowledged that the land in issue was erroneously offered to the Claimant. To that effect, the letter revoking the offer of the lease would expire in 30 days.

On the issues of irregularities, Counsel submitted that those irregularities are curable under Order 2 of the CPR 2017. Counsel urged the Court not to regard the application to set aside default judgment a nullity and called on the Court to set aside the judgment.

The Court will first deal with the preliminary objections in the order that the objections have been presented and argued. Counsel for the Claimant has

argued that the application to set aside the default judgment is incompetently before the Court as it was filed outside the time that the Court had ordered on 24th September, 2020. Hearing from both Counsel, and an examination of the record, it is clear to me that the Defendants are not disputing that the application to set aside default judgment was filled outside the period of seven (7) days which the Court had set as a condition for the grant of an Order of Stay. Neither did the defendants apply to the Court to extend time within which to comply with the order. Upon consideration, this Court agrees with the Defendants that this non-compliance is curable under Order 2 of the CPR 2017.

Under Order 2 an irregularity is defined as failure to comply with the Rules or a direction of the Court. The seven (7) days period set by the Court was a direction with which the Defendants did not comply with and therefore an irregularity.

In view of the above observation, this Court is of the considered view that it has power under Order 2 rule 3 (d) of CPR 2017 to declare a document or step taken to be effectual. I therefore declare the irregular step taken by the defendants herein effectual. The Court has arrived at that decision pursuant to Order 1 rule 5 (1) (b) and (d). On the same understanding the sworn statement of Mr. Maziko Nyirenda which is also affected by the irregularity of being non-compliant with Order 18 rule 7 (5) (c) and (d) is also declared effectual.

This Court therefore proceeded to deal with the next preliminary objection which is whether or not the *"affidavit"* of James Chauma in support of the application to set aside default judgment was properly commissioned. The Oaths, Affirmations and Declaration Act, Cap. 4:07 of the Laws of Malawi is clear on who is a Commissioner for Oaths. Section 4 provides as follows-

(1) The following persons shall be Commissioners for Oaths –

(a) legal Practitioners for the time being holding a licence to practice as such under the Legal Education and Legal Practitioners Act;

(b) magistrates;

(c) other public officers for the time being holding or acting in a public office of one of the following grades, that is to say, Professional Officer or Administrative Officer.

(d) persons appointed Commissioners for Oaths under any other written law; and

(e) such other persons as the Minister may by notice appoint to be Commissioner for Oaths."

The above cited provision is abundantly clear and need no any further explanation of its import. Suffice to state that a person qualifies as a Commissioner for Oaths by virtue of office that particular person is holding at that particular time. One such office is that of a magistrate. The word *"magistrate"* is defined under section 2 of the Courts Act as meaning a magistrate appointed under section 34 and includes a Resident Magistrate. It is not in dispute that Mr. Benjamin Chulu commissioned the affidavit of Mr. James Chauma. The image of the stamp affixed on the affidavit shows that Mr. Benjamin Chulu is a Magistrate/Commissioner for Oaths. The Defendants have not disputed through submissions or sworn statement or otherwise that as of 9th July, 2020 Mr. Benjamin Chulu was a Research Officer in the Judiciary. I therefore find that the *"affidavit"* was commissioned by Mr. Benjamin Chulu who was not qualified to do so under section 4 of Oaths, Affirmations and Declarations Act. Mr. Chulu was not a Commissioner for Oaths at the material time.

What then becomes of an affidavit commissioned by a person who is not a Commissioner for Oaths? In my considered view, an affidavit which has been commissioned by a person who is not a Commissioner for Oaths is not only defective but also incurably and irretrievably defective. Even the provisions of Order 2 of the CPR 2017 would not come to the aid of the defendants. The non-compliance with section 4 as has happened in this case cannot be treated as a mere irregularity or as an irregularity as to form only. This Court is of the view that

courts have a duty to rightly interpret the laws and to ensure that they do not condone any breaches of the such laws under any pretences whatsoever. An affidavit sworn in violation of section 4 of the Oaths, Affirmations and Declarations Act is, for all purposes and intents not an affidavit as envisaged in law and is not capable of being received under Order 18 of the CPR as it offends a provision of an Act of Parliament.

In the case of ***Hosea Mundui Kiplagat v Sammy Komen & 2 Others*** **(2013) eKLR,** Justice Achode said *"an affidavit commissioned by an unqualified advocate is as good as an affidavit not commissioned at all and is therefore void."*

Similarly, in the case of ***David Wanatsi Omusotsi vs Returning Officer Mumias East Constituency & 2 Others*** **(2017) e KLR** while striking out affidavits in support of a petition, the court held that, *". . .. An affidavit can only be commissioned by a Commissioner for Oaths and other officials of the Court allowed to do so under the Act.*

These decisions are persuasive on this Court. They resonate very well with the position in the present case. The affidavit of Mr. James Chauma in support of the application to set aside default judgment is not an affidavit as envisaged by law. It is a nullity and it is hereby struck out.

For an application to set aside judgment, to be complete, it is a legal requirement that it should be supported by a sworn statement. Order 12 Rule 21 (2) (d) states as follows-

"(2) The application under sub-rule (1) may be made not later than 3 months after judgment is entered and shall—

(a) .....;

(b) .....;

(c) .....; and

(d) Have a sworn statement in support of the application."

It is important to note that the rule is expressed in mandatory terms and, therefore, an application without supporting sworn statement is defective. An

application devoid of a sworn statement cannot stand. It is a bare application. A sworn statement gives life to what is contained in the application. This is clear from Order 12 rule 21 (2). There was, therefore, no application filed with the court.

It should be recalled that I had declared the supplementary sworn statement of Mr. Maziko Nyirenda to be effectual. The issue to consider is whether or not it can breathe life into the lifeless application. The short response is no. It can only be supplementary to a valid existing sworn statement in support of an application. There being no valid application, the supplementary sworn statement of Mr. Maziko Nyirenda also falls off.

All in all, and in right of all the above, the preliminary objection is sustained thereby rendering the application to set aside judgment incompetent and is hereby dismissed. In the same vein, the order of stay granted on 24th September, 2020 falls away.

The plea for costs by the Claimants cannot stand in light of the provisions of section 42 of the Legal Aid Act Cap. 4:07 of the Laws of Malawi which states that a court shall not award costs against a legally aided person. I therefore make no order as to costs.

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

W.Y. MSISKA

JUDGE