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GOVERNMENT OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

MATRIMONIAL CIVIL CASE NUMBER 415 OF 2019

(Being Civil Cause No. 5 of 2018 before the Senior Resident Magistrates Court sitting at Midima)

BETWEEN

JANE MPATE CHIKHOSI as a beneficiary of the

Estate of **LINLY MPATE**(Deceased)CLAIMANT

AND

EMMA MFULANO (on her own behalf and on behalf of the occupants

of the house on plot number 274/4, Mapale Township, Zomba).....DEFENDANT

CORAM: JUSTICE A. KANTHAMBI

Mr. C. Khondiwa

Counsel for the Applicant

Mr. J. Kalampa

Counsel for the Defendant.

Mrs. M. Chilemba

Official Court Interpreter

JUDGMENT

(Kanthambi, J, 10th June, 2022)

This is this Court's ruling on the application for summary judgment by the Claimant herein. The Claimant commenced the present action against the Defendant on 14 November, 2019 seeking an Order for possession of the house on plot Number 274/4 in Mapale township in Zomba (otherwise known as Kazembe 4 or KZ 4 or Title Number Zakazaka 23/13); she also seeks rentals that the house could have earned at the rate of MK100,00.00 per month or such rate as the Court may deem reasonable from 1st February 2019 to the date that he Defendant gives up possession; compound

interest at the rate of 20% per annum on all sums due from the rentals to the date of full payment and costs of the proceedings.

The Defendant entered a defence on 20th October, 2020 wherein she denies the claim and counterclaims for an Order giving title to the Defendant as beneficiaries of the estate of Catherine Mpate (deceased) over the house on Plot Number 274/4.

The Claimant now brings an application for summary judgment. The application is supported by a sworn statement sworn by the Claimant. The sworn statement in support of application averred the following;

I, JANE MPATE CHIKHOSI, of P O Box 166, Domasi in the Republic of Malawi today the 30th day of March, 2021 hereby MAKE OATH and STATE as follows:

1. **THAT** I am the Claimant in this action and I am duly authorized to swear this Statement.
2. **THAT** unless otherwise stated I depone to matter of fact within my knowledge and I verily believe the same to be true.
3. **THAT** I commenced this action against the Defendant on 14 November, 2019 claiming for an Order for possession of the house on Plot Number 274/4 in Mapate township in Zomba (otherwise known as Kazembe 4 or Title Number Zakazaka 23/13) rentals that the house could have earned at the rate of MK100,000.00 per month or such rate as the Court may deem reasonable from 1 February 2019 to the date that the Defendant gives up possession; compound interest 20% per annum on all sums due from the rentals to the date of full payment and costs of the proceeding.
4. **THAT** I am the granddaughter and sole beneficiary of the Estate of the late Linly Mpate who died on 30 May 2011 at Kwisongole Village, Traditional Authority Malemia in Zomba District. Exhibited hereto is a copy of my late grandmother's death report marked "**JM 1**".
5. **THAT** the Defendant is my sister, my father, Mr. Patrick Mpate, having married the Defendant's mother, Mrs. Catherine Mpate in or about 1996. My father died in or about 2017.
6. **THAT** before her death, my grandmother left a Will dated 23 May 1997 in which she appointed Messrs. Kandako Mhone Law Firm and the Defendant's mother Mrs. Catherine Mpate, as executors and trustees of her Will and bequeathed her two houses on Plot Number 274/3 (KZ 3) and plot Number 274/4 (KZ 4) to me. Exhibited hereto is a copy of the said Will marked "**JM 2**".
7. **THAT** after the death, of my grandmother in 2011, the Defendant's mother, Mrs. Catherine Mpate and my uncle, Mr. Syson Gresham Chikwakwa, informed me that I was the owner of the houses on Plot Number 274/3 (KZ 3) without telling me about the other house on Plot Number 274/4 (KZ 4) and that my uncle would continue receiving rentals from the house on Plot Number 274/3 (KZ 3) until further notice.
8. **THAT** in or about 2016, pursuant to the information in paragraph 7 above, the Defendant's mother, Mrs. Catherine Mpate, took me to Executor Kandako Mhone Law Firm at Balaka to give me what the executors believed to be the lease document for the house on plot Number 274/3 (KZ 3) for my custody as the owner of the house.
9. **THAT** however, when I sold the house on Plot Number 274/3 to a Mr. Ian Chirwa of Zomba Airwing in 2016, the buyer later realized that the lease documents that I had given him was not for Plot Number 274/3 but for Plot Number 274/4. Exhibited hereto are copy leases of the said plots respectively marked "**JM 3**" and "**JM 4**".
10. **THAT** upon enquiry from Executor Kandako Mhone Law Firm, the executor confirmed to me that the lease document was indeed for Plot Number 274/4 that had also been bequeathed to me but had been occupied by the other executor, Mrs. Catherine Mpate and the Defendant, Executor Kandako Mhone Law

Firm then showed me the original Will of my grandmother (Exhibit "JM 2" above), as proof of bequest to me.

11. **THAT** subsequently, in a bid to recover the house being occupied by the Defendant, Executor Kandako Mhone gave the Defendant Notice to Quit and deliver up possession of the house on Plot Number 274/4 (KZ 4) on 29 January 2019 but the Defendant refused and/or neglected to quit and deliver possession of the house. Exhibited hereto are copies of the letters dated 29 December 2018 that Executor Kandako Mhone wrote the Defendant and the response from the Defendant's lawyer's respectively marked "JM 5" through "JM 7".
12. **THAT** this was not the first time that the Defendant's mother grabbed property bequeathed to me. My late father also bequeathed me a house at Old Naisi, which the Defendant's grandmother grabbed and had to be evicted by the Sheriff of Malawi following two judgments of the High Court in the cases of *Catherine Mpate v Jane Mpate & 3 others*, High Court, Zomba District Registry, Probate Cause No. 18 of 2007 and *Jane Mpate V Catherine Mpate*, High Court, Principal Registry, Civil Cause No. 2459 of 2009. Exhibited hereto are copies of the said judgment marked "JM 8" and "JM 9".
13. **THAT I** believe that the house on plot Number 274/4 currently being occupied by the Defendant should fetch rentals of not less than MK100,000.00 per month.
14. **THAT** the Defendant's conduct has therefore caused me to suffer loss and damage including loss of possession of the house and rentals.
15. **THAT I** believe that the Defendant has no defence to the claim herein or any part thereof as she and the occupants of the house cannot inherit the house, which was neither a matrimonial house nor part of the Estate of the Defendant's mother, who was merely an executor and trustee of the same.
16. **WHEREFORE** I humbly pray to this Honourable Court that Summary Judgment be entered against the Defendant for an Order for possession of the house on Plot Number 274/4 in Mapale township in Zomba (otherwise known as Kazembe 4 or KZ 4 or Title Number Zakazaka 23/13); rentals that the house could have earned at the rate of MK100,000.00 per month or such rate as the Court may deem reasonable from 1 February 2019 to the date that the Defendant gives up possession; compound interest at the rate of 20% per annum on all sums due from the date of full payment and costs of the proceeding.
17. **THAT I** understand that this sworn statement shall be used in a proceeding and I acknowledge that if I make a false statement I may commit perjury and liable to a substantial penalty.

The respondent also filed a statement in opposition to the application for summary judgment. The sworn statement in opposition avers the following:

I, **EMMA MFULANO**, of C/O Emmanuel Malawi, private Bag 12, Zomba in the Republic of Malawi, hereby **MAKE OATH** and **SAY** as follows:

1. Introduction

1. I am of age
2. I am the Defendant in this matter and I am by reason/virtue thereof duly authorized and competent to make this sworn statement.
3. All matters of fact to which I depose herein are from my personal knowledge or have come to my knowledge by virtue of my conduct of this matter and I verily believe in the truth thereof.

2. Factual Matrix

1. The Claimant in this matter commenced the present proceedings claiming possession of plot number 274/4 Mapale Township, Zomba.
2. The Claimant in this matter is my sister by virtue of my mother marrying her father, Patrick Mpate

(Deceased).

3. My mother, Catherine Mpate married the Claimant's father in or around the year 1996.
4. By the time of the year, the deceased only had the Claimant as a child.
5. My mother was then working as an accountant for Toyota Malawi and was in that position for a period of 23 years.
6. In the year 1998, my mother retired from Toyota Malawi Limited and she used her pension to build a house with the deceased at Mulunguzi in Zomba district.
7. The house at Mulunguzi was later sold and they relocated to Old Naisi where they had built another house.
8. In 1997, the deceased left a will and bequeathed in property amongst his beneficiaries. On the Property bequeathed, the Old Naisi was never bequeathed to the Claimant.
9. In 2004, when Mr. Patrick Mpate died, the Claimant sold the house, despite the same not being bequeathed to the Claimant.
10. It should be stated herein in all above houses, my mother contributed substantially.
11. Since the matrimonial home was taken away from her, my mother was occupying the house in Mapale where we have been staying all along.
12. The Claimant's mother in law further allowed my mother to stay in the house and directed that she can occupy the same as a matrimonial home.
13. My Mother and Claimant's grandmother shared a quite close relationship to a point that she made her an executor to her estate.
14. My mother and my siblings used to stay in that house. The Claimant's grandmother was aware and she never asked or evicted us from the house. There was never a cause to worry as she had given my mother the house as a gift.
15. We were not leaving in this house because of my mother being an executor but as her matrimonial home.
16. The Claimant in this matter has been selling properties under the deceased estate despite my mother contributing substantially to the building of these houses.
17. The Claimant just wants to grab everything for herself without taking into account my mother's contributions to the estate. It is only the Claimant that is benefitting.
18. If this house is also given to the Claimant, there will be nothing that my mother would have benefitted from the Estate that she had substantially contributed.
19. My mother used her pension funds of 23 years to contribute to the building of houses in the Estate of Patrick Mpate. It is only fair and just that the only house that she ever got, be left to her.
20. I verily believe that whole distribution of matrimonial property is unfair considering that my mother has nothing to her name.
21. It will not be fair to deny my mother anything at all from her husband's estate

22. There are trial issues that cannot be dismissed summarily.

23. **WHEREFORE**, I pray that the Claimant's application should not be entertained and the matter should be referred to trial.

SWORN by the said Deponent who understands that this statement shall be used in proceedings and may be liable to a substantial penalty for making a false statement.

The Claimant also filed a sworn statement in reply to sworn statement in opposition to application for summary judgement which reads as follows;

I, **JANE MPATE CHIKHOSI** of P.O. Box 166, Domasi in the Republic of Malawi today the 25th day of November, 2021 hereby **MAKE OATH** and **STATE** as follows:

1. **THAT** I am the Claimant in this matter and am duly authorized to swear this statement.
2. **THAT** unless otherwise stated I swear this statement based on information within my knowledge and I verily believe the same to be true.
3. **THAT** I have read the sworn statement made by the Defendant dated 23rd November, 2021 and wish to reply as follows.
4. **THAT** I refer to paragraph 2.8 and 2.9 of the Defendant's Sworn Statement and state that it is not true that in 1997, my father left a Will in which he never bequeathed the property at Old Naisi to me.
5. **THAT** the truth of the matter is that my father left a Will dated 15th May 1999 in which he bequeathed the said property at Old Naisi (Title Number Chikamveka 183/14) jointly to me, the Defendant's mother and my grandmother and appointed the Defendant's mother and Kandako Mhone law Firm as executors. However, when the said Will was interpreted by the High Court, Zomba District Registry, under Probate Cause Number 18 of 2007, the Court found that the said property solely belonged to me having been registered in my name before the said Will was made.
6. **THAT** I refer to paragraph 2.12 of the Defendant's Sworn Statement and state that the Defendant's mother occupied the house at Mapale (the subject matter herein) without my Knowledge and consent. The said house never belonged to my late father but to my late grandmother, Mrs. Linley Adam Mpate, as shown by the title deed exhibited herein.
7. **THAT** I further refer to paragraph 2.12 of the Defendant's Sworn Statement and state that the said house in question was neither part of matrimonial property nor was it ever used as a matrimonial house as the Defendant's mother only occupied it in 2012 after the death of both my father who died on 10 October 2004 and my grandmother who died on 30 May 2011.
8. **THAT** as a matter of fact the Defendant's mother occupied the house in dispute when she was forcibly evicted from the property at Old Naisi aforesaid by the Sherriff of Malawi on or about 18 November 2011. Exhibited hereto are copies of the Application for leave to issue writ of possession against the Defendant's mother, order granting leave and the Sheriff's Report collectively marked "**JM 10**".
9. **THAT** I believe that there are no triable issues in this matter.
10. **WHEREFORE** I humbly pray to this Honourable Court that Summary judgment be entered against the Defendant accordingly.
11. **THAT** I understand that this sworn statement shall be used in a proceeding and I acknowledge that if I make a false statement I may perjury and be liable to a substantial

penalty.

The Law

The following is the law on summary judgments as contained in Order 12 rules 23 to 27 of the Courts (High Court) (Civil Procedure) Rules 2017

23.—(1) *The Claimant may apply to the Court for a summary judgment where the Defendant has filed a defence but the Claimant believes that the Defendant does not have any real prospect of defending the claim.*

(2) *Summary judgement shall not apply to a claim for libel, slander, false prosecution, false imprisonment, seduction or an Admiralty action in rem.*

24. *An application for summary judgment shall be supported with a sworn statement which shall—*

(a) *verify the facts stated in the application;*

(b) *state that the applicant believes there is no defence to the claim or part of it; and*

(c) *state the specific orders that are sought by the Claimant.*

25. *For purposes of rule 23—*

(a) *the Claimant shall file the application and sworn statement, and shall serve a sealed copy of the application and statement on the Defendant not less than 14 days before the date of hearing.*

(b) *the Defendant may file a sworn statement setting out the reasons why the Defendant has a good and arguable defence, and shall serve the statement on the Claimant at least 7 days before the date of hearing.*

(c) *the Claimant may file a sworn statement in reply and shall serve the statement on the Defendant at least 2 days before the date of hearing.*

(2) *Where the Court is satisfied that—*

(a) *the Defendant has no arguable defence to the claim or part of the claim as presented in the application; and*

(b) *there is no need for a trial of the application or that part of the application, the Court shall—*

(i) *give judgment for the applicant for the application or part of the application; and*

(ii) *make any other order the Court deem appropriate.*

26. *The Court shall not enter summary judgment against a Defendant where it is satisfied that there is a relevant dispute between the parties about a fact or an arguable question of law.*

27. *Where the Court refuses to enter summary judgment, it may order the Defendant to give security for costs within the time stated in the order*

The Determination

Having read the application, and the sworn statements filed in support of the application as well as the opposition and the reply, this Court finds that the application and the opposition satisfied the requirements of Order 12 rule 23 to 25(1) c above. The undisputable facts are that the Claimant is the granddaughter and the beneficiary of the estate of her grandmother, Linley Mpate, who passed on in May 2011. The Defendant is a step sister to the Claimant. Her deceased mother had married the Claimant's deceased father in 1996. The property in issue used to belong to the Claimant's deceased grandmother and was bequeathed to the Claimant by a will which was executed by the

deceased grandmother, Linly Mpate on 23rd May 1997, herein exhibited as “JM 2”. This will is not contested. The Defendant’s deceased mother had been named as an executor and trustee of the will of the Claimant’s grandmother’s will. She was not a beneficiary of the estate of Mrs. Linly Mpate, and so had no claim to any of the deceased estate of Mrs. Linly Mpate. She had not title in any of the property of the Mrs. Linly Mpate which she could pass on. The Defendant’s mother had moved into the property without disclosing to the Claimant that it was part of the Claimant’s inheritance, bequeathed to her by her grandmother. The Defendant continues to live in the property and now claims is entitled to the property alleging that her mother had contributed to the building of the houses of the Claimant’s father, Patrick Mpate.

This is a straight forward matter which concerns primarily the deceased estate of Mrs. Linly Mpate, the Claimant’s grandmother. In Mrs. Linly Mpate’s will which is uncontested and very clear, the property, being plot No.274/4 (K24), was bequeathed to the Claimant herein, Jane Mpate. The Defendant has been enjoying the use of the property to the exclusion of the Claimant herein and was in December 2018 issued with a notice to quit. Despite the notice to quit dated 29th December 2018, which the Defendant claims was not issued out to her, the Defendant still remains on the property and enjoys it to the exclusion of the Claimant herein without any justifiable reason and in disregard to the will and intention of the testator. There’s proof by exhibit “JM 7” (the Defendant’s Counsels communication to the Claimant’s lawyer on the Notice to Quit), that the Defendant’s counsel did receive the notice to quit on 29th December, 2018. In response, her legal counsel, Messrs. Kalekeni Kaphale wrote back on 28th January, 2019, making reference to the letter from the Claimant’s Counsel to the Defendant dated 29th December 2018 and asking if the matter could be settled out of court.

As for the matters alleged in paragraphs 9, 11, 15, 16 and 17 of the Defendant’s sworn statement in opposition to the application for summary judgment, this Court finds the assertions untruthful and irrelevant at this point. Untruthful because the High Court already determined on the matter and held that House Title number Chikamveka 183/14 at Mulunguzi suburb in Zomba belonged to Jane Mpate, because the house was in the name of Jane Mpate, by the ruling of the late Justice Manyungwa in Probate Cause number 18 of 2007, see exhibit “JM 8”. There is therefore no reason to bring up the issue relating to that particular house at this point. Further, contrary to the Defendant’s allegations in paragraphs 18, 19, 20 and 21 the issue herein has nothing to do with distribution of matrimonial property of the parties’ deceased parents. In the first place, the parties’ parents are deceased and so it is not proper to talk about distribution of matrimonial property.

Secondly, there cannot be talk of matrimonial property as the property in question neither belonged to the Claimant’s deceased father, Patrick Mpate, nor the Defendant’s deceased mother, Catherine Mpate. The property, as stated earlier belonged to the Claimant’s deceased grandmother, Mrs. Linly Mpate. It was not matrimonial property in any way. As a matter of fact, Patrick Mpate appears as a witness to the lease agreement between Linly Mpate and Malawi Housing Corporation, and in the absence of any document to the contrary, the property in question cannot be held to be matrimonial property. See Exhibit “JM 4”, being lease forms.

Being an issue concerning the deceased estate of Mrs. Linly Mpate as appears in her will, nowhere is the Defendant herein appearing in the said will of Linley Mpate as a beneficiary. There is no indication that the Defendant herein was meant to enjoy any portion of the property in question. If the Defendant and her mother were staying in the house, it was obviously contrary to the intention of the testator. According to Mrs. Linly Mpate’s will, the rightful owner of the property at the death of Mrs. Linly Mpate was the Claimant herein, Jane Mpate. See exhibit “JM 2”, being Linly Mpate’s will. Every other argument raised by the Defendant herein holds no water. The Defendant has no

legal claim or right to the property in question. This Court is therefore satisfied that the Defendant herein has no arguable defence to the claim and that there is no relevant dispute between the parties about a fact or an arguable question of law.

Disposal

Regard being had to the foregoing, this Court agrees with the Claimant's Counsel that there is no defence to the Claim and that there is no need for a trial of the application or any part of the application. To that end, this Court finds that this a case fit for summary judgment and consequently, summary judgment is hereby entered in favour of the Claimant herein entitling the Claimant to:

(a) an Order of possession of the house on plot number 274/4, in Mapale Township (otherwise known as Kazembe 4 or KZ 4 or Title Number Zakazaka 23/13), Zomba.

(b) Rentals that the house could have earned at the rate to be determined by the Registrar of the High Court upon assessment, from 1st February 2019 to the date the Defendant gives up possession;

(c) Costs are for the Claimant.

Delivered on this 10th day of June, 2022 at Chichiri, Blantyre.


A. Kanthambi
JUDGE