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REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL CAUSE NUMBER 106 OF 2014

BETWEEN:

LOVENESS GONDWE.....CLAIMANT

-AND-

YEREMIAH CHIHANA.....1<sup>st</sup> DEFENDANT  
VIKAWU TRUST.....2<sup>nd</sup> DEFENDANT

CORUM: HONOURABLE JUSTICE RUTH CHINANGWA  
Chatupa Counsel for the Claimant  
Katundu Counsel for the Defendant  
Khan Court Interpreter

JUDGEMENT

Introduction

1. The claimant seeks the following reliefs:
  - 1.1 Declaration that the Registration of the transfer of lease for title Number Jombo 7/8, City of Mzuzu in favour of Vikawu Trust from Y. Chihana and Loveness Gondwe is null and void on account that it was obtained or made fraudulently;
  - 1.2 An order that the Registration of transfer of lease with respect to Title Number Jombo 7/8, City of Mzuzu be cancelled in that it was obtained by fraud;
  - 1.3 An order of rectification of the register by directing that the registration of the transfer of lease for Title Number Jombo 7/8, City of Mzuzu be cancelled on account of the fact that the said registration had been obtained or made by fraud in terms of section 139 of the Registered Land Act;
  - 1.4 A declaration that the Registration of Title Number Jombo 7/8, City of Mzuzu from Y. Chihana and Loveness Gondwe to Vikawu Trust violets the plaintiff's constitutionally protected right to own property and to economic activity.

1.5 An order for costs.

2. The defendants opposed the reliefs sought. The claimant and 1<sup>st</sup> defendant were the two witnesses in this matter. The evidence in chief was presented in their respective witness statements followed by oral cross examination and re-examination.

**The Evidence.**

3. The claimants witness statement reads as follows:

3.1 The 1<sup>st</sup> Defendant is my husband.

3.2 I have served as Member of Parliament for 10 years; Deputy Speaker of Parliament; a member of the Pan African Parliament, and a Commissioner of the Parliamentary Commission which led to a lot of international work-related travel.

3.3 I therefore used to earn a lot of money in the form of salaries as a Member of Parliament and Deputy Speaker. I also used to earn allowances locally as a Member of Parliament and Commissioner.

3.4 Before joining politics, I worked for Import & Export Company, then South African High Commission thereafter Fifth Country Programme under the United National Development Programme (UNDP) where I earned a very good salary.

3.5 The 1<sup>st</sup> Defendant and I jointly ventured into car hire business and some point in time when I was a Member of Parliament, we jointly bought trucks which were painted orange. We used to park these vehicles at Bwandilo in Area 47 for hire.

3.6 The Defendant and I used the revenue generated from my employment, his employment and our business ventures to jointly acquire several properties, both real and personal. Most of the properties are registered in our joint names.

3.7 One of the properties which the 1<sup>st</sup> Defendant and I jointly acquired is Title Number Jombo 7/8, City of Mzuzu, hereinafter referred to as the property. In order to source additional funds to purchase the property, I also sold my own plot in Lilongwe.

3.8 The property was registered in our joint names in the year 2003. Exhibit LG1 is a copy of the transfer of lease from Malawi Government to myself and the 1<sup>st</sup> Defendant.

3.9 The 1<sup>st</sup> Defendant and I built a commercial building on the property and there are several tenants in the said building, one of which is NED Bank Limited.

3.10 In or around the month of August 2013, I discovered that the property had been transferred to Vikawu Trust, the 2<sup>nd</sup> Defendant. Exhibit 'LG2' are 'LG3' are copies of the Transfer of Lease in favour of the 2<sup>nd</sup> Defendant and the 2<sup>nd</sup> Defendant's Trust Deed.

- 3.11 I have never signed the Transfer of Lease in favour of the 2<sup>nd</sup> Defendant, let alone authorise the registration of the lease in favour of the 2<sup>nd</sup> Defendant. My purported signature on the Transfer of Lease is forgery.
- 3.12 I knew nothing about the 2<sup>nd</sup> Defendant and it is evident from a reading of LG 3 that I am neither a beneficiary nor a trustee of the 2<sup>nd</sup> Defendant.
- 3.13 The transfer of Lease on the property to the 2<sup>nd</sup> Defendant, exhibit marked LG2, is dated 30<sup>th</sup> April 2013 and it was registered on 21<sup>st</sup> May 2013.
- 3.14 The 2<sup>nd</sup> Defendant's Trust Deed, exhibit marked LG3, is dated 23<sup>rd</sup> August 2013.
- 3.15 A comparison of the dates of the 2<sup>nd</sup> Defendant's Trust Deed and the date of registration of the Transfer of Lease to the 2<sup>nd</sup> Defendant shows that the transfer of the property to the 2<sup>nd</sup> Defendant was done at least two months prior to the registration of the 2<sup>nd</sup> Defendant. A property cannot be transferred to an entity that is non-existent
- 3.16 After I discovered that the property had been transferred in favour of the 2<sup>nd</sup> Defendant, I went to meet Ms Apendezi Chakanika, Assistant Land Registrar, who purportedly witnessed the Transfer of Lease. Ms. Chakanika acknowledged that she did not see me signing the Transfer of Lease. She however told me that she could not rectify the registration in the absence of a valid court order.
- 3.17 I then went to the Controller of Lands, Mr. Kwame Ngwira, to help me rectify the register by cancelling the registration. After reviewing the file and the matter, he informed me that he could not rectify the registration in the absence of a court order. The Controller of Lands advised me to engage a lawyer to apply for cancellation of the registration.
- 3.18 On or about 9<sup>th</sup> September 2013, I registered a caution on the property. I exhibit hereto and mark the same LG4 a copy of the said caution.
- 3.19 When I confronted the 1<sup>st</sup> Defendant as to why he transferred the property in the name of the 2<sup>nd</sup> Defendant, without my knowledge and consent, he told me that I was still a beneficiary of the property. However, this is not true as I am neither a trustee nor a beneficiary of the 2<sup>nd</sup> Defendant.
- 3.20 All the rentals for the property are paid into the 2<sup>nd</sup> Defendant's account for which I am not a signatory. As a bona fide joint proprietor in equal shares of the profits from the property yet I have been kept out of rentals for the property.

3.21 The registration of the property in favour of the 2<sup>nd</sup> Defendant violets my right to not be arbitrarily deprived of property.

4. In defence the 1<sup>st</sup> defendant's witness statement reads as follows:

4.1 I am the 1<sup>st</sup> defendant, a Member of Parliament and Registered Land Valuer.

4.2 The Claimant herein is my wife and we are not divorced at present.

4.3 The Claimant did not contribute anything to the acquisition and development of property situated at title number Jombo 7/8 in Mzuzu.

4.4 The property stated in paragraph 8 above was bought in the year 1996, before I had married the Claimant herein and the same was bought after my former wife had sold our matrimonial home situated in area 15.

4.5 The transfer of the lease for the property was effected in the year 2003, after I had married the Applicant and the land was jointly transferred to me and the Claimant.

4.6 The purpose of the transfer of the property in our joint names was that we could both obtain loans for the development of the property.

4.7 The Claimant cannot point out how the said property was acquired.

4.8 As opposed to the earlier agreement I had with the Claimant that we would both obtain loans for the development of the property, the Claimant refused to be part of and parcel of the arrangement and refused to pledge her property situated at title number 12/517 as security for the loan for the development of the property herein. The property title number 12/547 was bought by myself for her.

4.9 As a result of the position taken by the Claimant herein I solely financed the development of the property situate at title number Jombo 7/8 in Mzuzu using loan facilities obtained from Standard Bank in which I pledged my own property situate at Title Number Bwaila 47/4/547 as security. Exhibits YC1 and YC2 I are copies of the Term loan letters and discharge of the charge

4.10 As of 9<sup>th</sup> March, 2016 I had unsettled liabilities with Standard Bank amounting to K29,633,967.70 as a result of the loans obtained in developing the property. Exhibit YC3 is the letter from Standard Bank detailing my liabilities as of 9<sup>th</sup> March, 2016.

4.11 I did not only obtain a loan from Standard Bank, but I also got loans from individuals to finance the development of the property, the liabilities of which I am yet to settle. I also got a loan from National Bank in April, 2011 and Pledged my property Title Number Mchengautuwa CB3/94/17 which I fully financed. Exhibit YC4 is a copy of discharge of charge.

- 4.12 As a result of her not contributing anything to the development of the property situate at title number Jombo 7/8 in Mzuzu, we agreed to transfer the property into Vikawu Trust for the benefit of our children.
- 4.13 The Trustees of Vikawu Trust are our children, namely, Tryness Chihana, Chakufwa Chihana, Takondwa Chihana; Exhibit YC5 is the Trustee deed.
- 4.14 The transfer was duly effected with the full knowledge and consent of the Claimant herein.
- 4.15 Meanwhile I bought other properties for the Claimant herein for her sole benefit one of which included commercial property situated at Plot Number 47/1166 in the City of Lilongwe.
- 4.16 The Claimant did not contribute to the development of the property herein. The Claimant was not in a financial stable position during the time which the property was being developed as she could not even pay the development charges for the commercial plot which I purchased for her. Even a notice of Re-entry for the said property in her name was entered as a result of failure to pay development charges. Exhibit YC6 is the notice.
- 4.17 The claims by the Claimant over the property which she duly consented to transfer to Vikawu Trust are as result of our failing marriage and separation and are tainted with malice and ill will.
- 4.18 As a result of her ill intentions towards me, she got a protection order against me whereas I was forced to move out of our matrimonial home together with our children.
- 4.19 I am surprised that the Claimant is seeking property from the matrimonial property when our marriage is still subsisting and there is no basis for the same.
- 4.20 I therefore request the Court to dismiss the Claimant's claim to seek property from the matrimonial property when the marriage is subsisting.

#### Issues for Determination

5. The main issue to be determined is whether Title Number Jombo 7/8 was legally transferred from Yeremiah Chihana and Loveness Gondwe to Vikawu Trust.

#### Analysis of Law and Evidence

6. Section 24(b) of the Registered Land Act states that the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, subject to all implied and expressed agreements, liabilities and incidents of the lease.



7. In *Indefund Limited v Amin* [2002–2003] MLR 80 (SCA) it was held that according to the Registered Land Act, registration of a person as the proprietor of a lease vests in that person the leasehold interest.
8. In this case it is not in dispute that Title Number Jombo 7/8 was first registered in the name of the claimant and 1<sup>st</sup> defendant. This means that both the claimant and the 1<sup>st</sup> defendant were legal owners of the property.
9. Now, being legal owners of the property, the question is how would the leasehold title transfer from one owner to another owner? Section 79 subsections (1) and (2) of the Registered Land Act provides that a proprietor, by an instrument in the prescribed form, may transfer his land, lease or charge to any person with or without consideration and that the transfer shall be completed by registration of the transferee as proprietor of the land, lease or charge and by filing the instrument.
10. In the evidence before the court the claimant states that she did not sign for the instruments transferring the property in question and that the signature appearing on the instruments was not hers. The court observes that The Transfer of Lease, Exhibit LG2, which transferred the property from the claimant and the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant, was prepared by Mkhwimba and Company of P.O Box 4005, Lilongwe 4; Apendezi Chakanika, Land Registrar, witnessed the transferors being the claimant and 1<sup>st</sup> defendant signing the Transfer of Lease; and Apendezi Chakanika, Land Registrar, certified on the Certificate As To Verification Of Instruments on 30<sup>th</sup> April 2013 that Y Chihana and Loveness Gondwe signed the documents in her presence and the said Y Chihana and Loveness Gondwe are personally known to her. It is surprising to note that Apendezi Chakanika the Land Registrar was not called as a key witness as she purportedly says she saw the claimant sign as transferor, a signature which appears on the instrument but is vehemently denied by the claimant.
11. This court found Apendezi Chakanika to be a crucial witness and thus summoned her. In her testimony, as a court witness, she said she did not witness the parties sign the documents which transferred the property in question from the Parties to the Trust. She added that the documents were brought to her with the purported signatures of the claimant and defendant already appended.
12. The court went on further to call an expert witness to determine whether the signature of the claimant transferring the property to the trust was forged. The expert witness Deputy Commissioner of Police Tiyese Chiumbuzo stated that the signature was forged. He also stated that the signature of the claimant appearing on the Caution was

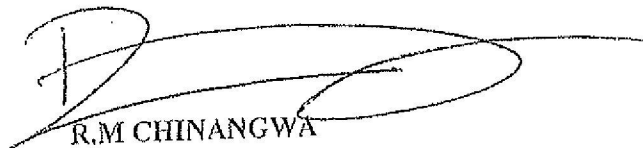
forged. During cross examination it was revealed that the caution statement was prepared at the instance of the claimant herself and thus her signature could not have been forged on the caution. Nothing relevant came out of cross examination by the claimant to the expert witness.

13. Having had all the evidence before the court, this court is of the view that the transfer was irregular noting that both parties were supposed to sign in the presence of a witness who in this case was Apendezi Chakanika. In her own words she said she did not witness the parties sign the transfer of lease. Counsel for the defendant in cross examination did raise a question regarding whether it was possible for parties to sign elsewhere and the documents be presented already signed. Ms Apendezi Chakanika did state that the same does happen. It is this courts view that a breach in a legal process can never be made lawful by practise. If the law is to be changed the same has to be through a process. The law has specifically put this rule and it is mandatory. This can only be for the simple fact that land matters are not simple transactions. A transfer of land cannot be the same as transfer of tomatoes. If the legal process requiring the transferors had been followed this matter would not have existed.
14. This being a civil matter and proof is on a balance of probabilities and not proof beyond reasonable doubt. By the fact that the transfer of lease was not witnessed by Apendezi Chakanika, there is a strong possibility that the signature was forged. In addition, there is nothing to show for what consideration the claimant gave out her interest in the land. She is not a beneficiary of the Trust nor was she given monetary value for it nor was there any communication that her share was given out as a gift. This in itself establishes the claimants case.

#### Finding

15. The claimants claim succeeds.
16. The Land Registrar is to register Jombo 7 / 8 in the claimant and defendant names as joint owners as was the original position.
17. Costs are awarded to the claimant.

Pronounced this 14<sup>th</sup> day of February 2022 at LILONGWE

  
R.M CHINANGWA  
JUDGE