



IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

Commercial Cause No. 79 of 2021

BETWEEN

ZUBEDA ISMAIL OSMAN.....CLAIMANT

AND

THE ATTORNEY GENERAL..... DEFENDANT

MUDASSIR ANJUM.....1ST INTERESTED PARTY

SAAD ANJUM.....2ND INTERESTED PARTY

Coram: **Manda, J**

Roka for the Claimant

Khan for the Interested Parties

M. Kachimanga Court Clerk/Interpreter

RULING

This was an application by the interested parties to have the default judgment which was entered against the Attorney General varied. The variation seeks to remove from the default judgment two properties, namely Titles number Limbe East 99 and Limbe East 100, which the interested parties claim to belong to them. The claimant has opposed the application.

Background

The brief background of this matter is that the claimant in this instance was a shareholder in a company called Raaz Properties Limited which company was de-registered. During its existence, Raaz Properties (the Company) did acquire several properties in Blantyre and in Lilongwe which properties were both freehold and leasehold. Following the de-registration of the Company, the Commissioner of Lands (apparently as a matter of law) went to survey the properties belonging to the Company with the apparent purpose of preparing them for resale by the Malawi Government.

When the claimant became aware of the government intentions, they lodged a vesting claim under section 352(3)(a) of the Companies Act, 2013. The claim was commenced by way of summons and the Attorney General was given the pre-requisite 90-day notice. Upon the expiry of the 90 days, the claimant proceeded to apply for a default judgment which was duly granted. The Attorney General, through Counsel Maulidi then filed an application to set aside the default judgment. However, on the appointed date, Counsel Maulidi informed the court that the Commissioner for Lands advised him to withdraw the application on the basis that the claimant in this matter was “fully entitled to the land in issue so the land was in the hands of the rightful owners”. Counsel Maulidi then went on to conclude by stating that all the issues in this matter had been concluded by the default judgment. This was on the 16th of August, 2021.

On the 24th November, the interested parties filed an application to be added as interested parties in this instance. The application was granted. The interested parties then brought the present application. In their application the interested parties argued that they are the rightful owners of Titles Number Limbe East 99 and Limbe East 100. According to the interested parties, they acquired these two properties from one Felix Tandwe in 2017 and that they got Land certificates as proof of their titles. According to the documentation on record, Felix Tandwe apparently bought the two properties from Stanley Kachingwe for MK350, 000 in 2015, who apparently had been in peaceable, open and uninterrupted use of the properties for over 25 years. It was the interested parties’ argument that the land was thus acquired by adverse prescription. It was however not clear as to who adversely acquired the property since the evidence points to the fact that Tandwe “bought” the land from Kachingwe. the suggestion that was being made therefore is that it was Kachingwe who adversely acquired the two properties. Suffice it to say that it was the submission

of the interested parties that the judgment should be varied to exclude the two properties on the basis that they acquired good title to the same.

The claimant on their part argued that the properties in question have always belonged to the Company as evidenced by land certificates dated November, 1997. The claimant's further argued that the Company was de-registered without the requisite Notice being granted but that when the made an application for judicial review, the same was dismissed for being out of time. This is when the claimant brought this vesting claim. The claimant went to further argue that neither Kachingwe nor Tandwe can claim to have adverse possession of this land since the land has always remained bare and that Kachingwe and Tandwe just used to cultivate on the same. In this regard Counsel Roka referred to a number of affidavits sworn by the neighbors to the effect that the land has not been developed but that it has just been used for cultivation. It was the claimant submission then that Kachingwe would not have passed any good title to Tandwe and that Tandwe would not in turn have passed title to the interested parties in this instance. In fact, the claimant was almost suggesting that there must have been something fishy in the way that the interested parties got their land certificates when in actual fact they had certificates with Commissioner of Lands The claimant thus prayed that the application to vary the judgment should thus be dismissed with costs.

Issues

The question that I have before me is whether the default judgment that was entered into in this instance should be varied. Of course I must also consider as to what would be the implications of varying the default judgment.

At the outset, let me take cognizance of the fact that if we do vary the default judgment as prayed for by the interested parties, the effect would be that we would be acknowledged their purported title to the two properties. This is essentially in the sense that the interested parties' application is to the effect that the two properties should not have been vested in the claimant on account that they own the properties as evidenced by the land certificates. Of course the interested parties do not seem to dispute the fact that the Company in this instance also has land certificates and that the latter's certificates are earlier in time.

This then leads me to the question as to whether looking at the facts and evidence so far before me, it can be stated that the interested parties in this instance acquired any title in the two properties

for them to be considered as interested parties in the first place. This leads me to inevitably look at the question whether there was adverse possession in this instance.

The Law

Section. 134(1), in part IX of the Registered Land Act (Cap 58:01 of the Laws of Malawi) deals with the subject of adverse possession. That section states that:

‘The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of twelve years’.

Any person who claims to have acquired the ownership of land by virtue of S. 134(1) aforesaid may apply to the Land Registrar for registration as proprietor thereof (as per section. 134(2)). This right to acquire by adverse possession and to be so registered does not apply to customary land or public land. – see the proviso to S. 134(1) of the Act. (see *Hetherwick Mbale v Hassan Maganga* MSCA Civil Appeal No. 21 of 2013)

Further, it has also been held that adverse possession must be proved. In the case of *Mbekeani v. Nsewa* [1993] 16 (1) MLR 295, Tambala J, as he then was, stated that the defendant would be assisted by the Limitation Act to defeat the plaintiff’s title if he could show that he was in adverse possession of the land for more than 12 years. Tambala J, went on to say that.

‘To amount to adverse possession, the defendant must commit acts which are inconsistent with the lawful owner’s enjoyment of the soil (land) or the purpose for which he intended it.’

Tambala, J then went on to cite with approval the case of *William Brothers Direct Supply Ltd v. Raftery* [1958] 1 Q. B. 159. Where it was held that

‘In the case of an owner who wanted to develop the land in future, the defendant’s use of the land in breeding greyhounds and subsequently cultivating it was found to be insufficient to amount to adverse possession’

Finally, in *Hetherwick Mbale v Hassan Maganga*, Mbendela, JA considered the House of Lords decision in *J.A. Pye (Oxford) Ltd. v. Graham* [2002] 3WLR 221. The brief fact in this case were that Pye owned Henwick manor and a substantial amount of land. In 1977 he sold off the

farmhouse and some of the land and retained the disputed land, which consisted of four fields, with a view to develop it in the future. There was an agreement with the buyer of the farmhouse to graze on the disputed land. In 1982 The Grahams purchased the farmhouse and in 1983 entered an annual grazing agreement in respect of the disputed land for which they paid £2,000. The following year, Pye refused to renew the agreement as he wished to apply for planning permission and thought it would be easier if the land was not in use. The Grahams were asked to vacate the land at the end of the agreement. However, the Grahams continued to occupy the land which was fully enclosed and the gate padlocked with a key being held by the Grahams. Pye never did apply for planning permission. The Grahams continued to use the land and the following year requested a new agreement but this was not accepted. The Grahams continued to use the land and gave up seeking to communicate with Pye as he was getting no reply to any correspondence. In 1999 Pye issued proceedings to gain possession of the land.

Held: Pye's claim was defeated by adverse possession of the Grahams. The Grahams were in factual possession of the land as they were in occupation and had exclusive physical control. Pye was physically excluded from the land by the hedges and lack of key. They farmed the land in the exact way they farmed their own land. By remaining in possession and using the land in the way they thought best they had demonstrated an intention to possess. The fact that the Grahams were aware of Pye's intended use of the property did not prevent them having the requisite intention to possess. The law on adverse possession does not infringe the European Convention of Human Rights..

What is imperative though are the observations of Lord Brown Wilkinson who stated as follows:

*"It is clearly established that the taking or continuation of possession by a squatter with the actual consent of the paper title owner does not constitute dispossession or possession by the squatter for the purposes of the Act. Beyond that, as Slade J said, the words possess and dispossess are to be given their ordinary meaning. It is sometimes said that ouster by the squatter is necessary to constitute dispossession: see for example per Fry J in **Rains v Buxton** (1880) 14 Ch D 537 at p 539. The word "ouster" is derived from the old law of adverse possession and has overtones of confrontational, knowing removal of the true owner from possession. Such an approach is quite incorrect. There will be a "dispossession" of the paper owner in any case where (there being no discontinuance of*

*possession by the paper owner) a squatter assumes possession in the ordinary sense of the word. Except in the case of joint possessors, possession is single and exclusive. Therefore, if the squatter is in possession the paper owner cannot be. If the paper owner was at one stage in possession of the land but the squatter's subsequent occupation of it in law constitutes possession the squatter must have "dispossessed" the true owner for the purposes of Schedule 1 para 1: see **Treloar v Nute** [1976] 1 WLR 1295, 1300; Professor Dockray (supra). Therefore, in the present case the relevant question can be narrowed down to asking whether the Grahams were in possession of the disputed land, without the consent of Pye, before 30 April 1986. If they were, they will have "dispossessed" Pye within the meaning of paragraph 1 of Schedule 1 to the 1980 Act.*

What comes out clearly here is that there are two elements necessary for legal possession:

1. a sufficient degree of physical custody and control ("factual possession");
2. an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")."

Discussion

In the context of this matter what is coming out clearly is that the person who claimed adverse possession was the one who should have registered the same. This means that it was supposed to be Kachingwe who should have registered the possession by showing proof that he had physical custody and control of the land and that he decided to exercise such custody and control for his own benefit. This is clearly not the case in this instance as the mention of adverse possession is only made by Tandwe who said that he bought the land from Kachingwe.

So far, the evidence which we have on the file is that Kachingwe was just using the land for cultivation and that the land still remains bare to this date. In the light of this I do not think that Kachingwe would have been in a position to argue that the Company bought this land to cultivate it so that his interest and that of the Company were aligned. Further, what we see from the evidence is that Kachingwe's possession of the two properties could at best be characterized as seasonal and not physical custody and control. Further still, Kachingwe did not register his adverse possession. Such adverse possession, could not, in my considered view be registered by Tandwe on behalf of Kachingwe. The adverse possession was up to Kachingwe to prove. From what we

can gather from the evidence (as exemplified by the fact that it is not in dispute that the land is still bare), there is no evidence that Kachingwe took possession of the two properties apart from using them for seasonal cultivation. Seasonal cultivation or use of land, according to law, is not enough to prove adverse possession.

Conclusion

There being no proof that Kachingwe was actually in physical custody of the two properties in question, it follows then that he cannot claim adverse possession which could have defeated the Company's title. And if we take the argument by the interested parties that land certificates are proof of title, then it would follow that in as far as the Company's land certificates were not cancelled, then the Company's titles (being earlier in time), will supersede any later title.

It is actually quite inexplicable as to how the Commissioner for Lands (South), would have proceeded to register land certificates in the name of the interested parties when there were land certificates in favour of the Company still in existence. This perhaps explains why the Commissioner later instructed Counsel Maulidi to withdraw the application challenging the default judgment. Here it must also be noted that Counsel Maulidi is on record as stating that the claimant in this instance is the rightful owner of all the properties that have been in question in this instance. These include the properties that the interested parties are now claiming. On this note I would actually also conclude that something fishy seems to have happened at the Commissioner for Lands (South) offices. As they say, "if it walks like a duck, quacks like a duck, it is probably a duck"!

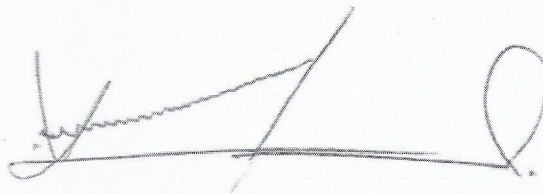
Now going back to the facts and evidence in this case, what is clear is that there being no adverse by Kachingwe, he could not have transferred good title to Tandwe. In turn Tandwe could not have passed good title to the interested parties. On this basis, I must find that the interested parties cannot claim interest in this matter to warrant them to file the application to vary the default judgment in this instance. The reality thus far is that the interested parties never acquired good title.

In view of the above, I must state that I do not think that there is need for a further investigation of this matter through a trial. I do not see what purpose a trial would serve since the Commissioner of Lands already intimated that the claimant is the rightful owner of the properties. In any case, I

would think that if the interested parties have any issues, then they ought to take it up with Tandwe who “sold” them defective title. Further, if at all there is to be an investigation then the same would have to pertain to how the interested parties got land certificates for the properties in question when there were existing certificates in the name of the Company.

In sum, it is the finding of this court that the application by the interested parties to vary the default judgment has no merit and must be dismissed with costs. Since the default judgment stands as it is, the Lands Registrar is also hereby directed to rectify the Land Registry and vest the titles of Limbe East 99 and Limbe East 100 in the name of the claimant.

Made in Chambers this.....13.....day of.....July.....2023

A handwritten signature in dark ink, appearing to be 'K.T. Manda', with a large loop at the end.

K.T. MANDA
JUDGE

