



Republic of Malawi

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

COMMERCIAL CAUSE NUMBER 294 OF 2020

(Msungama, J.)

BETWEEN:

ESTHER NATALIA MTENJE CLAIMANT

AND

FDH BANK LIMITEDDEFENDANT

Coram:

Msungama, J

Chipeta, Counsel for the Claimant

Hara, Counsel for the Defendant

Makonyo, Court Clerk

JUDGMENT

The Claim

1. By her statement of case, the Claimant herein states that she was, at all material times, the owner of leasehold property known as Title Number Katoto 32/122 located in Mzuzu. She states that on or about 21st August, 2019 the Defendant wrongfully and without reasonable cause lodged and maintained a caution over the said property on the ground that it had an interest in the land as a chargee when in fact there was no charge executed between her and the Defendant. The Claimant states that as a result of this act by the Defendant, she suffered loss and damage in that a transaction to sell the property at MK60 million was rescinded by the buyer after he found out that there was a caution registered in favour of the Defendant. The Claimant contends that this forced her to sell the property to an alternative buyer at a lower price of MK40 Million in the process losing a sum of MK20 Million. The Claimant also states that she had to engage lawyers to have the caution removed. These lawyers charged her legal fees in

the sum of MK155,000. In the circumstances, the Claimant is claiming the said sum of MK20,155,000 as damages, legal collection charges and party and party costs.

2. The Defendant not only denies the claim, it is also counterclaiming certain sums from the Claimant. The counterclaim itself is in turn denied by the Claimant.

The defence and counterclaim

3. In its detailed defence, the Defendant admits that it registered the caution on the property but continues to state that it was entitled to do so under S.126(1) of the Registered Land Act because it had an unregistrable interest in the property as a result of being a victim of large-scale fraud perpetrated against it. It is alleged that the Claimant obtained money in the sum of MK5.95 million belonging to the Defendant. It is alleged that this money was credited to her account as a result of fraud perpetrated by her daughter, one Mbumba Nyalo who, at the material time, was working for the Defendant. In the alternative, the Defendant states that it was entitled to lodge the caution on the property because the Claimant's use and access to the money wrongfully credited to her account was an advance by the Defendant of money on the account held by her.
4. The Defendant further denies that the caution could have been the cause of the Claimant's loss and damage because of the following reasons:
 - a. The caution did not entitle the purchaser to rescind the sale agreement.
 - b. The purchaser could rescind the sale agreement only after ascertaining that there was a charge or mortgage on the land which the Claimant could not discharge.
 - c. The rescission of the sale agreement by the buyer was ineffectual.
 - d. The loss was caused by the erroneous belief on the part of the parties to the agreement that the sale agreement was rescinded.
 - e. The Claimant ought to have or in fact received a notice of the entry of the caution from the Land Registrar within reasonable time.
 - f. The time between the registration of the caution and discovery of its existence offered adequate time within which the Claimant could have challenged the caution in which case it is contended that the Claimant either had notice or ought to have had notice of the caution but failed or neglected to challenge the same before entering into a sale agreement with the purchaser.

- g. Alternatively, the Land Registrar failed and neglected to discharge his duty to give notice to the Claimant which failure robbed the Claimant a chance to challenge the entry of the caution timely.
- 5. In its counterclaim, the Defendant claims the sum of MK5.95 million referred to above being damages for fraud and money had and received by the Claimant as a result of an abuse of its bank system by an employee of the Defendant who was, incidentally, the Claimant's daughter. The Defendant also claims interest on the said sum, legal collection costs and party and party costs of the action.
- 6. The Claimant denies the counterclaim and further states that the said counterclaim raises no cause of action against her and as such, is frivolous and vexatious.

Issues

- 7. The issues for the determination of this court are as follows:
 - a. Whether the registration of the caution on the property was wrongful.
 - b. If the answer to the a) above is in the affirmative, whether the Claimant has suffered loss and damage as a result thereof.
 - c. If the answer to b) above is in the affirmative, what is the extent of her loss.
 - d. Whether the Claimant received and utilised the sum of MK5.95 million belonging to the Defendant.
 - e. If the answer to d) above is in the affirmative, whether the Claimant should be ordered to pay back this amount (with or without interest) to the Defendant as money had and received.

Law

- 8. The burden of proof in civil matters lies upon the party who substantially asserts the affirmative of the issue. **Robbins vs National Trust Company (1927)** AC 515, 520. The burden is fixed at the beginning of the trial by the state of the pleadings and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting in any circumstances whatsoever. If, when all the evidence, by whomsoever introduced, is in, the party who has this burden has not discharged it, the decision must be against him. The true meaning of the rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests upon him.

9. The standard of proof required in civil cases is expressed as proof on the balance of probabilities. “If the evidence is such that the tribunal can say, ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal it is not. The degree of probability which must be established will vary from case to case. Denning J. in **Miller vs Minister of Pensions** (1947) 2 All ER 372 had this to say:¹

“The degree depends upon the subject matter. A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court even when considering a charge of a criminal nature, but still, it does require a degree of probability which is commensurate with the occasion. Likewise, a divorce court should require a degree of probability which is proportionate to the subject matter”.

10. Division 2 of Part VIII of the Registered Land Act deals with cautions. It states as follows:

“126.—(1) Any person who—

- (a) claims any unregistrable interest whatsoever, in land or a lease or a charge;
- (b) is entitled to a licence;
- (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge; or
- (d) being a Bank, has advanced money on a current account to the proprietor of land or a lease or a charge, may lodge a caution with the Registrar forbidding the registration or dispositions of the land, lease or charge concerned and the making of entries affecting the same.

(2) A caution may either—

- (a) forbid the registration of dispositions and the making of entries altogether; or
- (b) forbid the registration of dispositions and the making of entries to the extent therein expressed.

(3) A caution shall be in the prescribed form and shall state the interest claimed by the cautioner and the Registrar may require the cautioner to support it by a statutory declaration.

(4) The Registrar may reject a caution which he considers unnecessary.

(5) Subject to this section, the caution shall be registered in the appropriate register.

¹ at 373 to 374

127.—(1) The Registrar shall give notice in writing of a caution to the proprietor whose land, lease or charge is affected by it.

(2) So long as a caution remains registered, no disposition which is inconsistent with it shall be registered except with the consent of the cautioner or by order of the court.

128.—(1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.

(2)—(a) The Registrar may, on the application of any person interested, serve notice on the cautioner warning him that his caution will be removed at the expiration of the time stated in the notice.

(b) If at the expiration of the time stated the cautioner has not objected, the Registrar may remove the caution.

(c) If the cautioner objects to the removal of the caution, he shall notify the Registrar in writing of his objection within the time specified in the notice, and the Registrar, after giving the parties an opportunity of being heard, shall make such order as he thinks fit, and may in the order make provision for the payment of costs.

(3) On registration of a transfer by a chargee in exercise of his power of sale under section 71, the Registrar shall remove any caution which purports to prohibit any dealing by the chargor and which was registered after the charge by virtue of which the transfer has been effected.

(4) On the withdrawal or removal of a caution, its registration shall be cancelled, but any liability of the cautioner previously incurred under section 130 shall not be affected by the cancellation.

129. The Registrar may refuse to accept a further caution by the same person or anyone on his behalf in relation to the same matter as a previous caution.

130. Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has thereby sustained damage, to pay compensation to such person.”

11. Generally, a caution lodged pursuant to Section 126 (1)(a) of the Registered Land Act seeks to protect property rights which exist in equity. The Eastern Caribbean Supreme Court had occasion to define what the term ‘unregistrable interest’ in land in **Lilian**

Riley v Christopher Gerald, Registrar of Lands and Hon. Attorney General
Claim No MN1HCV 2004/0009 (Eastern Caribbean Supreme Court.) where an equivalent of our own Section 126 (a) was examined. The court stated:

“Section 127 refers to an unregistrable interest. This is an interest which is not capable of registration but is recognizable by law. Section 127 gives a person with such an interest the ability to protect it. What is clear is that the caveator must have the interest and it must be clear what that interest is and it must be an interest in the land. Lodging does not establish any right in the land, it only gives notice that there is an interest which is not capable being registered on the Title.”

12. In disposing of an issue as regards whether one of the defenders in the matter, Mr. Gerald, who had registered a caution over the property belonging to a party who owed him money, the court stated:

“What is the unregistrable interest that Mr. Gerald has in the property? What is the interest in the land that he is asking the court to protect by the entry of the caution? It is clear that he seems to have a pecuniary interest, one which is only monetary in nature. As a creditor, I must agree with Mr. Brandt that he has not done what was required to establish his interest. His caution suggests some element of a promissory estoppel but it is nothing more than a suggestion. There is no indication that he had taken steps to pursue such a claim which would allow him to establish his interest. I conclude that Mr. Gerald does not have an interest in the land, what he has is a personal claim, a claim for the payment of a sum of money and nothing else. It is not a lien or a charge. I disagree with Mr. Markham’s submission that it was an interest directly related to the proprietor and to the property. It related to the former but not the latter. With regard to an interest based on estoppel, there was no evidence that he had sought to have his rights litigated, he had not commenced proceedings which might result in an interest being vested in him. The interest in the land must be in existence at the time the caution is lodged, it cannot be one to be established at a later date. I find that Mr. Gerald does not have an unregistrable interest in the property and there is therefore no basis for maintaining it. Accordingly, it must be removed by the court.”

13. In **David Gaynair v Registrar of Lands and Collin Bull**, Civil Appeal No.1 of 2017, the Supreme Court of Belize was of the opinion that the registration of a caution over land does not give the cautioner any proprietary interest in the land and that its main purpose is to preserve the status quo in order to protect the rights of the cautioner and acts like a statutory injunction preventing any dealing with the land which is inconsistent with, or subject to it. The registration of the caution disables the proprietor of the land to deal with the land until the caution is removed.

14. The elementary position in as far as an action for money had and received is concerned is that such an action is maintainable in situations in which one person receives and obtains money belonging to another which he ought, in good conscience, to pay. There is no need for privity of contract between the parties, or any promise to pay, other than that which results or is implied from one man's having another's money, which he has no right consciously to retain. In such a case, the equitable principle upon which the action is founded implies the contract and the promise. When the fact is proved that he received the money, if he cannot show a legal or equitable ground of retaining it, the law creates the privity and the promise: **Mason v Waite**, 17 Mass., 560. It is not necessary that the Defendant should have accepted the money under an agreement to hold it for the benefit of the claimant, or that the party from whom he received intended it for the claimant's benefit. Money had and received is an equitable doctrine used primarily to prevent unjust enrichment. A cause of action for money had and received is not necessarily based on wrongdoing but instead "looks only at the justice of the case and enquires whether the defendant has received money which rightly belongs to another": **Amoco Prod. Co. v. Smith**, 946 S.W. 2d 162 at 164.
15. The US Supreme Court has observed that a cause of action for money had and received is "less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money which... belongs to the plaintiff": **United States v Jefferson Elec. Mfg. Co.**, 291 U.S. 386, 402-403 (1934).
16. In **Hudson v Robinson** (1816) 4 M. & S. 475, a partner fraudulently contracted in the name of the partnership to sell goods to the plaintiff. The fraud received the purchase price from the plaintiff and defaulted on delivery of the goods. It was held that the plaintiff could recover the purchase price from the fraud as money had and received. Lord Ellenborough C.J. said, at p 478:

"It is said that an action for money had and received is not maintainable in this case. But an action for money had and received is maintainable whenever the money of one man has, without consideration, got into the pocket of another. Here the money of the plaintiffs has got into the pocket of the defendant; and the question is whether this has been without any consideration. The consideration was the supposed right of the defendant to dispose of the goods as partnership property, which was the inducement to the plaintiffs to give this bill, under which they have been obliged to pay the money. The defendant has no such right, therefore, the absence of any consideration entitles the plaintiffs to maintain this action, and still more so where the money has got into the defendant's pocket through the medium of fraud"

17. In **Black v Freeman & Co.** (1910) 12 C.L.R. 105, the High Court of Australia held that money stolen by a husband and handed over to his wife by way of gift to her could be recovered by the victim. O'Connor J. said at p.110

"Where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character. If he pays it over to another person, then it may be followed into that other person's hands. If, of course, that other person shows that it has come to him bona fide for valuable consideration, and without notice, it then may lose its character as trust money and cannot be recovered, but if it is handed merely as a gift, it does not matter whether there is notice or not"

18. Change of position generally provides a defence to restitutionary claims including money had and received. The House of Lords recognized this defence in the case of **Lipkin Gorman V Karpnale Ltd** [1991] 2 AC 548 in which Lord Goff (at p.580 c-h) stated as follows in respect of this defence:

"I am most anxious that, in recognizing this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case-by-case basis, in the usual way. It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer. These are matters which can, in due course be considered in depth in cases where they arise for consideration. They do not arise in the present case. Here, there is no doubt that the respondents have acted in good faith throughout, and the action is not founded upon any wrongdoing of the respondents. It is not however appropriate in the present case to attempt to identify all those actions in restitution to which change of position may be a defence. A prominent example will, no doubt, be found in those cases where the plaintiff is seeking repayment of money paid under a mistake of fact; but I can see no reason why the defence should not also be available in principle in a case such as the present, where the plaintiff's money has been paid by a thief to an innocent donee, and the plaintiff then seeks repayment from the donee in an action for money had and received. At present I do not want to state the principle any less broadly than this: that the defence is available to a person whose position has changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress however that the mere fact that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things. I fear that the mistaken assumption that mere expenditure of money may be regarded as amounting to a

change of position for present purposes has led in the past to opposition by some to recognition of a defence which in fact is likely to be available only on comparatively rare occasions”

Evidence

19. The Claimant was the only witness who testified in support of her claim. She told the court that at all material times, she was the registered owner of the property whose market value as at 30th August, 2019 was MK58 Million. She tendered a copy of the valuation report compiled by a firm of valuers called Property and Valuation Services as Exhibit ENM2. In or around September, 2019 she decided to sell the property and advertised the same with an indicative price of MK62 Million. A copy of the advert that appeared in the Nation Newspaper was tendered as Exhibit ENM3. Mr Steven Kunthembwe offered the sum of MK60 million for the property and a sale agreement was entered into for this price. A copy of the sale agreement was tendered as Exhibit ENM4. However, on 15th December, 2019 Mr Kunthembwe terminated the agreement on the ground that he had discovered that there was a caution registered on the Property by the Defendant. A copy of Mr. Kunthembwe’s letter was tendered as Exhibit ENM5. She stated that the registration of the caution on the property was wrongful because she had not executed any charge in favour of the Defendant. She later engaged a firm of lawyers to help her have the caution removed. The lawyer successfully had the caution removed and charged her legal fees in the sum of MK155,000. A copy of the fee note was tendered as Exhibit ENM8. After this was done she was not able to have the property sold at the same price of MK60 million and only managed to get a buyer who offered MK40 million. She accepted this offer because of her pressing need for funds. The property was therefore sold at MK40 million to a Mr Mughandira. A copy of the sale agreement she entered into with Mr. Mughandira was tendered as Exhibit ENM6. The Claimant alleges that the sale of the property to Mr. Mughandira made her lose the sum of MK20 million being the difference between what Mr Kunthembwe had been willing to pay and the price at which the property was eventually sold.
20. In cross examination by counsel for the Defendant, the Claimant confirmed that one Mbumba Nyalo who at some point worked for the Defendant was her daughter. She however denied any knowledge of fraudulent activities by her daughter at her daughter’s work place but confirmed that she was once questioned by the police about alleged fraudulent transactions by her daughter. The witness further confirmed that her daughter once facilitated a transfer of the sum of MK5.95 million into her account which she had with the Defendant’s bank.
21. On its part, the Defendant also called one witness during the trial of the matter, namely, Yohane Julio. He was at all material times employed by the Defendant as a

security officer. It was his evidence that following reports of suspicious money transactions at the Defendant's Limbe Branch, investigations carried out revealed that one of the employees of the Defendant, one Mbumba Nyalo, had fraudulently made some money transfers to the Claimant's bank account. The funds transferred to the Claimant's account were to the sums of MK3,350,000 and MK2,600,000 on 24th January 2019 and 1st April, 2019 respectively. The investigations further revealed that some of these funds were subsequently transferred to Mbumba Nyalo by the Claimant via a mobile money facility. A copy of the investigation report was tendered as Exhibit YJ1. Mbumba Nyalo later resigned from the Defendant's employment. After this resignation, it was discovered that the Claimant was advertising a house for sale. The Defendant suspected that either the house belonged to Mbumba Nyalo and was merely held in the mother's name or that the mother had constructed the house on the property using the proceeds of the fraud. The Defendant therefore moved to ensure that the property would not be sold until the investigations were concluded. To do this, they registered a caution on the property. The witness stated in cross examination that he was not sure if the Claimant knew that the money which was transferred to her account was fraudulently obtained. He stated further that there was an on-going criminal case against Mbumba Nyalo but none against the Claimant.

Discussion and disposal

22. There is ample evidence that has been tendered in this court to show that the Claimant had her account credited with the sum of MK5.95 million being funds belonging to the Defendant. It was suspected by the Defendant that this was facilitated through some nebulous and/or a criminal scheme by her daughter who was working for the Defendant at the relevant time. I must point out that it is not the duty of this court to determine whether the transfer of the funds comprised a criminal act by the Claimant's daughter. This will, no doubt, be the duty of the court that is handling the criminal proceedings which, this court has been informed, are underway in another court. However, it is clear, and it has not been disputed by the Claimant and indeed she admitted in cross examination that the said sum of MK5.95 million was transferred into her account at the Defendant's bank. She also admitted that some of these funds were subsequently transferred to her daughter and the rest were utilised by her.
23. In view of my finding above, it is important that I examine if the fact that the Claimant received these funds in her account and her utilisation thereof, entitled the Defendant to register the caution on the property either as a chargee or as a party who had unregistrable interest therein. The answer, in my considered view, is in the negative in both cases. When the Claimant applied through her lawyers to have the caution removed, the Land Registrar called representatives of both parties to a meeting in order to hear their sides. The Land Registrar resolved the issue in favour of the

Claimant and his letter in which he communicated his decision is illuminating. It would do the matter justice if we were to quote the letter in its entirety:

“The Legal Department
FDH Bank Limited
P.O. Box 512
Blantyre

Copy to:

Knight & Knight
Attorneys and Law Consultants
Private Bag B324
Lilongwe

Dear Sir,

REMOVAL OF CAUTION OVER TITLE NUMBER KATOTO 32/122 IN THE
CITY OF MZUZU

Reference is made to the caution which is registered over Title Number Katoto 32/122 in your favour as a chargee. The property is registered in the name of Esther Mtenje of Post Office Box 84 Mzuzu. The caution is registered as Application Number 307/2019 registered on 21st August, 2019.

The caution states that you have interest in the property as a chargee and our expectation is a chargee will follow and the same be entered on the register of which the chargee is not registered to date.

Later, we received a letter from Knight & Knight Attorneys and Law Consultants who are acting on behalf of Esther Mtenje dated 21st February, 2020. The letter seeks the removal of the caution since Esther Mtenje has not executed any charge with FDH Bank Limited.

Basing on the claim by Esther Mtenje, we had invited both parties, yourselves and the representatives of Esther Mtenje, Counsel William Chibwe for mediation, which was done on 6th April, 2020 at the Registrar's office in Mzuzu.

The issue of mediation was to find out whether the claimant had never executed any charge with FDH Bank Limited. The Representatives of FDH Bank Limited: Mr. Yohane Julio and Mr. Peter Chinangwa confirmed that it is true Esther Mtenje has never executed a charge with FDH Bank Limited over Title Number Katoto

32/122 located within Mzuzu City. The fact that Esther Mtenje did not at any time execute any charge with FDH Bank Limited, this means that she is not a chargor herein and contrary to the charge execution requirements under Section 60(1) of the Registered Land act: Cap. 58:01.

It was further stated by FDH Bank representatives that the caution was registered out of the alleged bank defrauding (sic) by Mbumba Nyalo who is a daughter to Esther Mtenje who was working as an IT expert within FDH Bank Limited. It was stated that Mbumba Nyalo had fraudulently transferred MK35,000,000.00 to her relatives and the account of Esther Mtenje was a beneficiary for the transaction hence the issue can directly be dealt with under criminal case.

According to the requirements for transacting a caution over a property, FDH Bank Limited has failed to satisfy the requirement as stipulated under Section 126(1) of the Registered Land Act Cap. 58:01 and confirmation that Esther Mtenje has never executed any charge within FDH Bank Limited, therefore, caution registered under Katoto 32/122 has been removed under the powers vested under section 128 of the Registered Land Act respectively.

This, therefore is considered to be in order.

Anthony Tchokola Nzimba
LAND REGISTRAR”

24. I cannot do any better than to agree with the Land Registrar in his determination to the effect that the Defendant was not entitled to register a caution over the property as a chargee under Section 126 (a) of the Registered Land Act. The Land Registrar was therefore correct to proceed to remove the caution. The Defendant no doubt agree with the position taken by the Land Registrar as a result of which it saw no sense in challenging that finding.
25. The Defendant has urged this court to look at the substance of the matter rather than concentrate on form. In other words, the Defendant argues that although when registering the caution the Defendant indicated that it was doing so as a chargee, in essence the court should find that the Defendant was nevertheless entitled to register the caution because the circumstances surrounding this matter created an unregistrable interest in the land in favour of the Defendant. We have already seen above what comprises unregistrable interest in land. Did the fact that the Claimant received and utilised funds belonging to the Defendant create unregistrable interest in the Property in its favour? The answer, in the opinion of this court, is in the negative. Like in **Lilley**, it is clear that what the Defendant seems to have is a pecuniary claim against the

Claimant which is monetary in nature and does not amount to an unregistrable interest in the land entitling it to register a caution on it. Registration of a caution under S.126 (a) and S.126 (d) requires different preconditions to be fulfilled. In the case of S.126 (a) one has to have unregistrable interest in the land. In the case of the latter, one must be a banker who has advanced money on a current account to the proprietor of land or a lease or a charge.

26. The Defendant in the present case, although a banker, did not advance money to the Claimant on a current account. The transfer of the funds to her account was certainly without its consent and/or knowledge. It cannot, therefore, be concluded that the Defendant advanced money to the Claimant entitling it to register a caution as a chargee. The Land Registrar in this case, when registering the caution, must have been under the illusion that the parties were in a chargor/chargee relationship. The information given to Land Registrar was therefore misleading. It is my conclusion that the registration of the caution in this matter was wrongful requiring the invocation of the provisions of S.130 of the Registered Land Act by the Court. To find otherwise would be tantamount to encouraging parties to take the law in their own hands and promote anarchy on registration of cautions. The provisions of S.126 of the registered Land Act have to be strictly complied with by anyone wishing to register a caution over somebody else's land.
27. The Defendant has argued further that, in any case, any loss and damage suffered by the Defendant did not come about because of its registration of the caution over the property. The Defendant split its argument on this aspect into two parts. The first part is that the caution could not have been the cause of the termination of the sale agreement. It has been argued by the Defendant that the sale agreement made on the 1st November, 2019 between the Claimant and Mr. Kunthembe was invalid in that it was signed by the parties without any witnesses although it provided for spaces for witnesses by indicating the words "in the presence of". The Defendant argues that the case of **Albert Chew v Hong Leong Finance Bhd** [2001] 4 MLJ 497 elucidates that where a document itself prescribes that a legal document is required to comply with a legal formality of attestation, then the execution needs to be witnessed and attested by an eligible or authorised person having physical sight of the act of execution of the document by the signatory. I have read the above cited judgement. Its purport is to the effect that it is a mandatory requirement for a person authorised to attest a signature to ensure that the instrument in question is signed by a real person before him. Further, the decision in that case was based on a particular piece of legislation, namely the provisions of section 211 of the National Land Code 1965, which is not applicable in our jurisdiction. I have not been cited any law that suggests that an agreement for the sale of land is invalid unless witnessed by witnesses. I am, therefore, unable to agree with the Defendant on this issue. In the circumstances, I refrain from making a finding

that the agreement which was entered into between the Claimant and Mr. Kunthembe was invalid by reason of the fact there was no witness. The importance of witnesses in such transactions comes in when one of the parties to such an agreement denies execution of the agreement.

28. The second part of the argument is that even if the sale agreement is found to be valid, then Mr. Kunthembe, the purchaser, was not entitled to rescind the same. This argument is premised on the basis that the sale agreement itself provided that the purchaser could rescind specifying that a charge or a mortgage which the vendor could not have discharged and or further that there was a statutory provision prohibiting or imposing adverse conditions upon the continued use of the property for any purpose or for the purpose for which the vendor used it immediately before the date of the agreement. The Defendant argues that there was in fact no charge on the land which according to the sale agreement "could not or had not been discharged". It is thus argued that the caution could not have been the reason for the rescission. The letter from the purchaser to the Claimant communicating the decision to rescind the agreement offers a clue as regards why the vendor decided to cancel the transaction. This letter, a copy of which was tendered as Exhibit ENM5, reads as follows:

" Dear Madam,

NOTICE OF RESCISSION OF CONTRACT / SALE AGREEMENT- TITLE
NUMBER KATOTO 32/122

The above subject and our sale agreement signed and entered into on 1st November 2019 refer.

It is with regret that I write to give you notice of my decision to rescind the Agreement dated 1st November 2019, which I entered into with you to purchase your house on land title Number Katoto 32/122. I have recently discovered the land has a caution registered on it on 21st August 2019 by FDH Bank Limited, which prevents transferring of the land and shows that you have a charge with the said bank. This fact was not disclosed to me by yourself at the time we signed the agreement on 1st November, 2019, contrary to clause 5.1 of the Agreement.

Due to the fact that my need to purchase land is very urgent, I cannot wait until the caution is removed. Therefore, I have decided, with immediate effect, to rescind the Agreement in accordance with Clause 5.2 of the same for the given reasons. I will not, as such, proceed to make payment for the purchase as earlier indicated.

Yours faithfully,
Signed
STEVE KUNTHEMBWE”

29. The tone of this letter clearly shows that the purchaser was surprised to find that there was a caution registered on the property when in actual fact the seller had not disclosed to him that there was some liability owing on the property to the Defendant. In my view, the purchaser acted in a manner in which any diligent purchaser would have acted. He was entitled to proceed to rescind the agreement as, in his view, he was dealing with a party who had failed to disclose all material facts to him. The presence of the caution on the register must have sent a warning to him that he was dealing with a party who had not given him a complete story concerning the property. The caution was certainly matter of serious concern to him. He was entitled to proceed to rescind the agreement rather than embark on an exercise to have the caution removed. As is indicated in his letter, his need to purchase property was urgent. There is, in my considered view, no merit in the argument by the Defendant.
30. The Defendant has also argued that the Claimant had adequate notice of the existence of the caution. As such, it is argued, she should have taken measures to have it challenged and removed well before entering into the sale agreement. The Defendant states that in view of the provisions of S.127 of the Registered Land Act which requires the registrar to give notice in writing of a caution to the proprietor of land affected, the Claimant must have known of the Defendant’s registration of the caution much earlier than 1st November, 2019 and could have taken measures to have it removed much earlier than she did. Again, this argument has no merit. There is no evidence that has been given in this matter to show that in fact the Land Registrar did notify the Claimant that a caution had been registered on the property by the Defendant. Further, there is no evidence to show that the Defendant itself notified the Defendant that it had registered a caution on the Property.
31. In view of my findings above, I find that the registration of the caution on the property was wrongful. I further find that because of the caution registered by the Defendant, the Claimant lost an opportunity to sell her property to Mr. Kunthembwe for the sum of MK60 Million. This price does not seem to be far-fetched in view of the uncontroverted evidence that the property was valued at MK58 million at around the same time the agreement was being entered into. I also find it as a fact that the property was eventually sold at MK40 million to another party after the caution was removed on application by the Claimant. I also find that the Claimant paid the sum of MK155,000 by way of fees to her lawyers who helped her in the process of removing the caution. I, therefore, enter judgment in favour of the Claimant and award her the sum of MK20,155,000 which she claimed by way of damages. Ordinarily the courts

do not award interest on damages. I therefore decline to award any interest on this sum.

32. In relation to the counterclaim, as indicated elsewhere above, it has not been disputed and indeed it was admitted by the Claimant that her bank account was credited with the sum of MK5.95 million part of which she transferred to her daughter and part of which she utilised for her own benefit. It has also not been disputed by her that these funds belonged to the Defendant and further that the Claimant received these funds without any consideration. In her defence to the Defendant's counterclaim for money had and received, the Claimant asserts that the counterclaim raises no cause of action against her and such is frivolous and vexatious. This stand is maintained by the Claimant in her final submissions in which she further contends that in fact there was no evidence of fraud against her that was produced during the trial. In the first place, as we have seen elsewhere above, it is not important to prove any wrong-doing in order for one to succeed in a claim for money had and received. All that a claimant needs to show in such cases is that the defendant received the money without any consideration and, further, that the prevailing circumstances do not provide the defendant any right consciously to retain the money. The Claimant in this case has not been able to provide any justification why she should be allowed to retain the money which she received without any consideration. In my opinion, the claim by the Defendant against the Claimant for money had and received has been made out on the requisite standard. I, therefore, enter judgment for the Defendant on its counterclaim against the Claimant for the sum of MK5.95 million as money had and received. The Defendant is also awarded interest on this money at the Defendant's lending rate applicable from time to time with effect from the dates when the funds were credited into her account to the date of payment. The said interest shall be assessed by the Assistant Registrar if not agreed by the parties. The Defendant is further awarded collection costs to be assessed by the Assistant Registrar on a sliding scale in case of failure by the parties to agree on the quantum thereof.

33. The issue of party and party costs is always in the absolute discretion of the court, a discretion which, of course, has to be exercised judicially. In this matter, in view of the success of both sides in their claims against each other, it is ordered that each side should bear its own costs. It is so ordered.

Delivered at the High Court, Commercial Division, Principal Registry, Blantyre this 13th day of June, 2023.


M.T. Msungama
JUDGE