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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 520 OF 1993

BETWEEN:

REGINA KUNTAJA PLAINTIFF

and

STANLEY LUHANA DEFENDANT

Coram: D F MWAUNGULU, REGISTRAR
Zimba, Counsel for the Plaintiff
Defendant present and unrepresented

ORDER

This is an originating summons for possession of land. It is made under Order 113 of the Rules of the Supreme Court. The plaintiff, it is alleged bought of the defendant's father, plot No. SW8/1017/5, Zingwangwa in the City of Blantyre. This is a residential house. The defendant, who is the son of the vendor, and is in occupation of the residential house, is refusing to leave the premises alleging that the plot, which belonged to his mother, did not belong to the vendor.

Looking at the affidavit in support of the application and evidence of the defendant, given on oath, the appropriate order is under Order 28, rule 8 of the Rules of the Supreme Court, that the action be taken as if it was commenced by writ. Secondly, the plaintiff must serve a statement of claim on the defendant in the next 14 days and defence must be filed 14 days thereafter.

According to the plaintiff, she bought this plot of land and paid K8,000 to the defendant's father. The agreement was executed on 9th October 1992. There is a transfer of lease from the City of Blantyre, who have now taken control of the urban traditional housing locations like the one where the residential plot is situate. It is deponed that the defendant was not living at the premises. He only came when he heard of the agreement. It is contended that he came to exclude the plaintiff from occupying the premises.

On oath, the defendant has said that he had lived on the piece of land since childhood. The plot was registered at the Malawi Housing Corporation, who, as we have seen surrendered the traditional housing area to the City of Blantyre. According to the defendant, he and the other children lived on the premises until their mother died. The father had apparently moved out and only came in when the mother died. The next thing that the defendant heard was that somebody had bought the residential plot on which they lived.

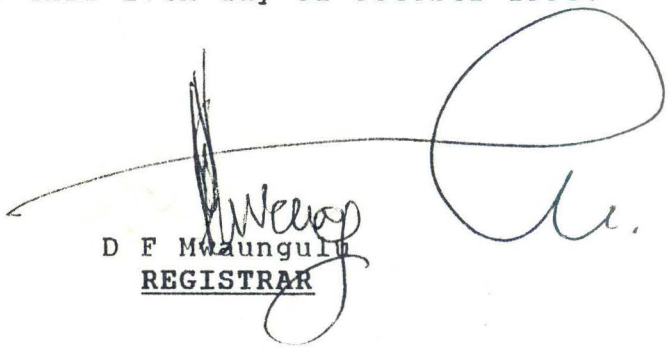
Whatever complexion one gives to these facts, two results are of legal significance. If these were the vendor's children and the plot belonged to the vendor, the children lived on the premises by the permission of the vendor, who is a predecessor in title, to the plaintiff. Now Order 113 (1) provides:

"Where a person claims possession of land which he alleges is occupied solely by a person or persons "not being a tenant or tenants holding over after termination of the tenancy) who entered into or remained in occupation without his license or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order."

It can be seen here that if the defendant lived on the premises and was the vendor's child, the plaintiff cannot proceed under Order 113(1) because the defendant was there by the license or consent of the plaintiff's predecessor in title. Further it could be that as the plaintiff alleges, the defendant only moved in when the sale was concluded. The defendant, however, says on oath that he had been there all along. There is here a disputation of fact, which in my opinion cannot be resolved by affidavit evidence of the plaintiff. Moreover, if the piece of land belonged to the defendant's deceased mother, the administration of the estate of the deceased has to be established. It could very well be that the defendant is entitled to some share in the estate of the exclusion of the vendor. He, therefore, would have some interest in the land. These are issues which can best be resolved by trial of the

matter. In circumstances like these, it is not proper to grant an order in a summary manner as is permitted by Order 113 of the Rules of the Supreme Court.

Made in Chambers this 27th day of October 1993.



D F Mwaungulu
REGISTRAR