

10-02-1994

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.883 OF 1993



BETWEEN:

GERALD MWAWA (MALE) PLAINTIFF

- and -

JEKEMU (MALE) 1ST DEFENDANT

- and -

WILLIAM (MALE) 2ND DEFENDANT

CORAM:

MBALAME, J.

Matipwili, Counsel for the Plaintiffs
Nyimba, Counsel for the Defendants
Manondo, Court Clerk

O R D E R

This is an originating summons by the plaintiff herein against the two defendants for an order to recover possession of a piece of land situate at Mbame in Traditional Authority Nsomba's area in the District of Blantyre on the ground that the plaintiff is entitled to possession of the said piece of land and that the two defendants are in occupation of part of the land without licence or consent of the plaintiff. To support the summons the plaintiff has filed an affidavit in which he states that he is a leasee in respect of the land in question under deed No.68463 dated the 29th day of August, 1992 and that the defendants have been and have continued to be in illegal occupation of the said land notwithstanding the intervention of the Blantyre District Commissioner.

It was the plaintiff's oral evidence that he acquired the land in 1966 on his return from the Republic of South Africa and that it was Village Headman Kasalambande who allocated it to him. He said he found some people including the defendants' parents on the land. Sometime later the Blantyre City Fuelwood Project evicted all the people there leaving the plaintiff with 12 hectares of land. Exhibited to support this was a letter from the District Commissioner, Blantyre which is in the following terms:

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"Ref. No. ADM 83/Vol.VII/387

FROM: THE DISTRICT COMMISSIONER, P/BAG 97, BLANTYRE.

TO: THE RESIDENT MAGISTRATE, BLANTYRE MAGISTRATE COURT, BLANTYRE.

LAND ENCROACHMENT

Mr. G. Mwawa was offered lease by the Government for a piece of land that he owns in Milare, Blantyre. The area is approximately 12 hectares.

There are Mr. Jekemu and Mr. William who are encroaching on the leased piece of land. In fact all the other villagers were removed as the whole area around there was taken up by Blantyre City Fuelwood Project. The only land that was left untouched by the Project was the one belonging to Mr. Mwawa because it is leased.

This office went there to try to enlighten the affected people on what the status of the land means.

~~Unfortunately~~ they have categorically stated that they will not move away from Mr. Mwawa's land.

We have therefore advised Mr. Mwawa to take Court action in order for these encroachers to be evicted. We have no objection of the people seem not to hear our advice.

G.A.K. Khaki
for/DISTRICT COMMISSIONER

cc : Mr. G. Mwawa,
P.O. Box 695,
BLANTYRE."

The defendants bitterly and very vehemently contest the summons. They contend that their ancestors have been on the land since 1919 and that the plaintiff obtained the lease without their knowledge. He is not a bonafide purchaser and the lease is void Mr. Nyimba has submitted on their behalf. This is the background on which I am called upon to decide the summons..

Summary proceedings for possession of land are made under Order 113 of the Rules of the Supreme Court. Under rule 1 of that Order:

"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 the termination of the tenancy) who entered into or remained in occupation without his licence 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."

I am, therefore, satisfied that the proceedings have been properly brought before this Court. It is to be observed that the Order does not provide a remedy, it is merely procedural. It provides a procedure for the recovery of possession of land which is in wrongful possession by trespassers. It is meant to shorten the process for obtaining a final order for possession of land. It overcomes the question whether such an order should be made on an interlocutory application or final judgment or order. On this note I think the case of Manchester Corporation v. Connolly (1970) Ch. 420 is in point.

Before I proceed to decide on the merits of the summons one question exercised my mind to a large extent and that is that of jurisdiction for ordinarily proceedings under this Order are determined by a Master who may refer them to a Judge if he thinks they should properly be decided by him. Vide rule 1A which provides:

"Proceedings under this Order may be heard and determined by a Master, who may refer them to a Judge if he thinks they should properly be decided by the Judge."

In the circumstances although this Court may have an ultimate jurisdiction I think the summons was brought before me prematurely. I order that the same be brought before the master for him to deal with accordingly. Costs to the defendants.

MADE in Chambers this 10th day of February, 1994 at
Blantyre.



R.P. Mbalame
JUDGE