

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRARY

CIVIL CAUSE NO. 1350 OF 1994



BETWEEN:

STUART CHIMWELE ..... PLAINTIFF

AND

MRS KUMALONJE ..... 1ST DEFENDANT

HENDERSON ..... 2ND DEFENDANT

CHAPINGASA ..... 3RD DEFENDANT

CORAM: QOTO, DEPUTY REGISTRAR

Chipeta Chief Legal Aid Advocate, for the plaintiff  
Defendants present and unrepresented

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ORDER

QOTO, DEPUTY REGISTRAR:- This is an originating summons by the plaintiff, for whom Mr Chipeta appears, for an order of possession of land, to wit, plot number RW/W9/N/80, which is occupied by the defendants without his licence or consent.



The summons is made under Order 113 of R.S.C. Order 113 r. I of R.S.C. provides a procedure for possession of land which is in the wrongful occupation by trespassers. The rule is in the following terms:-

"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 enters into or remained in occupation without his licence or consent or that of any predecessor in title of his proceedings may be brought by originating summons in accordance with the provisions of this Order".

It is clear from the words of this rule that the Order covers two distinct states of facts. The first is that of a person who has entered into occupation of land without licence or consent of the person entitled to possession or any predecessor in title of his. The second state of facts is that of a person who has entered into occupation of the land with licence or consent from the person who is entitled to possession of the land or any predecessor in title of his but who remains in occupation of the land without licence or consent of the person entitled to possession or any predecessor in title. This in my view, is clear from the use of the disjunctive word 'or' in the rule.

In the affidavit in support of the application the plaintiff states that he is the son of Late E. Chimwele, the deceased, who, during his lifetime, owned inter alia plot number NW/109/N/80 in Ndirande in the City of Blantyre. The deceased died intestate and as such the Administrator General, as administrator of the estate distributed it in terms of the Wills and Inheritance Act (Cap: 10:03) of the Laws of Malawi. Among other things, the Administrator General gave the said plot to the plaintiff.

The first defendant is an aunt to the plaintiff. She and her late husband, one Kumalonje who died last year, with their

children were already living on the said plot before its allocation to and assumption of title by him.

The first defendant and her family, the plaintiff states, have defiantly refused to vacate the said plot and they have resorted to all sorts of ways to frighten him off. They even have subjected him to physical injury at times.

The second defendant, he said, is in no way related to him but he carries on a tyre-fitting business on the plot without his licence or consent. Attempts by him to assert his title have also been met with resistance from the second defendant. The second defendant too has threatened him with violence.

The plaintiff further states in his affidavit that he knows of no other persons on the plot who are in occupation of it in defiance of his directions.

He accordingly prays for a final order for possession of the said plot of land.

The defendants did not file any affidavits in opposition. This is understandable considering that both of them are lay persons. I however allowed them to say something on the matter.

They did not mount a root and branch attack on the plaintiff's title to the said plot.

The first defendant said that the deceased, who owned the plot in issue before he died, had allowed her and her late husband to built a house on it in which she and her children now live. She said, the deceased had also stated that after his death, she and her children should continue to stay on the plot.

She also told the Court that the deceased had two wives. The senior wife and the mother of the plaintiff who was the junior wife. He had no children with the senior wife. After deceased's death, she said, all his property was allocated to



his first wife. Later, she too died intestate.

The first defendant further told the Court that she does not resist the order sought by the plaintiff but her plea is that she has nowhere else to go and stay with her children. She sought the court's assistance in this regard.

The second defendant stated that he had come onto the plot in issue in 1983 and since then, nobody told him that the plot was his. He further said, the place where he transacts his business is very far from the plot in issue and that is why, he said, he gets his licences from the City of Blantyre.

In cross-examination he conceded that if the boundaries show that he is within the plot, he is ready to vacate the same without further ado. He also said that he suspects that as he is close to the road he is outside the plot.

Thus it is not in dispute that the deceased died intestate and as such his property fell to be administered by the Administrator General in terms of Wills and Inheritance Act. It is again not in dispute, and I find it as established, that the Administrator General allocated the plot of land in issue to the plaintiff. This is evidenced by the letter he wrote to Town Clerk of the City of Blantyre and copied to the District Commissioner dated 24th January, 1996, and which is exhibited to the affidavit in support of the originating summons sworn by the plaintiff. It is marked 'SC 1'.

It is false and barefacedly false the first defendant's claim that all the deceased's property was allocated to his senior wife after his death.

I find the first defendant's claim that the deceased had expressed the wish that in the event of his death, she and her children should continue to stay on the plot difficult to believe.

First, and as I said earlier, the deceased father, died intestate and as such his estate fell to be administered in terms of the said Act. The matter would have been different if had the deceased, had left a valid Will and those wishes were expressed in it. The court would have given effect to them.

Secondly, the first defendant's claim here, in so far as she stated it to assert its truth, infringes the rule against hearsay and as such, it is inadmissible.

On the first defendant's plea for assistance in seeking alternative accommodation, I say that whilst the Court has every sympathy for her plight, it does not allocate plots within the City of Blantyre. All the court can do is to advise her to approach the City of Blantyre and other Ministries dealing with land for assistance.

The second defendant's claim that he came onto the plot in 1983 is no defence to the plaintiff's claim for possession of it. He has not acquired squatter rights as there is abundant evidence that he did not have adverse possession of the plot. The predecessor in title to the plot as well as the first defendant and her family all lived on that plot. It is trite that you only acquire squatter rights if you have adverse possession of the land.

I also found that the second defendant was not positive in his claim that he transacts his business outside the plot in issue. He conceded in cross-examination that he transacts his tyre fitting business close to the road and that plots do extend to roads. That he gets his licences from the City of Blantyre is neither here nor there in so far as the plaintiff's claim is concerned. Those licences are for him to transact his business with the City. They do not give him title to the plot.

In the final analysis I find that there is nothing in the circumstances of this case militating against the order the plaintiff seeks.

I accordingly make an order that he recovers possession of plot RW/109/N/80. The defendants do give up possession of the plot within 1 month from today.

A right of appeal explained.

MADE IN CHAMBERS THIS 5TH NOVEMBER, 1996 AT BLANTYRE.

A handwritten signature in dark ink, appearing to read 'W. W. Oeto', is written over a circular official stamp.

DEPUTY REGISTRAR