



IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CIVIL DIVISION
Civil Cause No 102 of 2016

Between

Samson K. MlenjePlaintiff

-and-

Tiwonge Mlenje1st Defendant

Kayimbonye Mlenje2nd Defendant

Tunduma Mlenje3rd Defendant

CORAM:

HONOURABLE JUSTICE D.A. DEGABRIELE

Mr. A Chunga

Mr. W. Mwafulirwa

Mr. A. Kanyinji

Counsel for the Plaintiff

Counsel for the Defendants

Official Interpreter

DeGabriele, J

JUDGEMENT

Introduction

The plaintiff, Samson K. Mlenje applied for and obtained an *ex parte* order of injunction pursuant to Order 29 of the RSC on 14th October 2016, restraining the defendants by themselves or their agents from evicting the plaintiff from his house on Plot Number 673/Title number Katawa MAS 78 in Mzuzu, or disposing or dealing with the house in any manner until the matter is determined by the court or until a further order of the court. The plaintiff was

ordered to file an *inter partes* summons for the continuation of the injunction within 7 days, and the *inter partes* summons was to be heard within 14 days.

The plaintiff filed an amended originating summons on 22nd November 2016 in which he seeks a declaration that the house under dispute belongs to him, that the said house does not form part of the deceased estate and that evicting him from the said house amounts to arbitrary deprivation of property. The plaintiff is seeking an order to have the letters of administration obtained by the defendants revoked; an order for nullifying the defendants' application to be registered as proprietor by transmission, and an order of a permanent injunction restraining the defendants from evicting him from the said house.

The Application

In his affidavit in support of the originating summons, the plaintiff states that in the early 1990s he had requested his brother, John Risco Kay Mlenje (now deceased) to find a piece of land and build a house on his behalf. He claims that his brother found the land and build a house on it, but the lease was registered in the name of the deceased because the plaintiff was then living in Zambia. The plaintiff claims that he used to send money for the construction of the house. He claims that he returned to Malawi in 1992 and occupied the house. When the deed of the house was issued in June 1993, it was handed to him by the deceased. He claims that the defendants could not be administrators to the property because it never belonged to their deceased father and as such, the letters of administration were obtained wrongly.

The Response

The defendants relied on the affidavit in opposition to the originating summons, sworn by Barbara Mlenje, the wife of the deceased John Risco Kay Mlenje. She states that her husband died intestate on 25th August 1995. She states that the house in question was built by her husband on a piece of land which he had applied for in 1978 (BM3). After the husband passed away, all correspondence of the plot was being sent to the widow (BM4). The plaintiff, a

brother to the deceased was offered by the deceased to live in the boys' quarter when he returned from Zambia around 1993 as he had no accommodation. Later on the plaintiff moved into the main house, but, on being challenged by the deceased, he promised to move back into the boys' quarters. The plaintiff claimed title to the house as soon as his brother passed on and made some attempts to change ownership of the house without success. The widow commenced proceedings to claim back the house but was unable to proceed due to illness and lack of resources. The defendants, who are her biological children with the deceased, obtained letters of administration on 27th August 2015, under probate cause No. 657 of 2015 at the High Court Principal Registry in Blantyre. She stated that the defendants applied to be registered as proprietor by transmission and the Department of Lands duly authorised the transfer of title to the defendants by transmission (BM6). She stated that the defendants are now holding the title and are legitimate owners of the house.

Issue for determination

The major issue to be determined herein is whether the house in question belongs to the plaintiff Samson K. Mlenje. The dispute herein hinges on a purported transaction between the plaintiff and his deceased brother. I proceed to examine the evidence around this transaction to ascertain the veracity of the plaintiff's claims.

The standard of proof required in cases which are civil in nature is that he who alleges must prove the allegation on a balance of probabilities. At the end of the trial, the one who is alleging a fact must discharge the burden of proof as failure to do so will mean that the allegation has not been proved, and the claim must fail. It is trite law that he who holds a title has a good claim at law. Mere proof of possession is good at law, but possession of title deeds is even better. He who has title has a good claim to land.

Analysis of Evidence

The plaintiff claims that he had requested his deceased brother to find him land and build a house while he was living in Zambia. He claims that he sent money to his brother and that he occupied the house in 1992 before it was completed. He also states that the title deed to the house was issued in 1993 in the name of his deceased brother and before he could make changes regarding ownership, his brother passed away. The plaintiff has not tendered any documentary evidence to support any of these claims. The evidence attached to the affidavit of the Barbara Mlenje, shows that the deceased had applied for a piece of land in 1978 as evidenced by a letter dated 29th May 1984 addressed to the deceased, which was a follow-up on whether the deceased was still interested in a piece of land in Chimaliro low density (BM3). It is not disputed that the disputed house is built on a piece of leased land situated in Chimaliro low density area. Therefore this evidence shows that the piece of land was not acquired at the behest of the plaintiff in the early 1990s as he is claiming. From the letter, it is clear that there were prior discussions or applications made in 1978 by the deceased. I find as a fact that the deceased had acquired the leased land from Government in his own right and therefore the leased land and the house built on it formed part of the deceased estate.

The plaintiff claims that he has been peacefully living in the house since 1992 without anybody claiming ownership. From the evidence presented by both the plaintiff and defendants, it is not true that the plaintiff's interest in the ownership of the house has not been challenged since 1992. There was a civil suit against him (SKM6, SKM7), and despite the fact that the matter was dismissed for want of prosecution, it shows that there was a dispute and a challenge to the title ownership of the house in Chimaliro.

The plaintiff has also attached some receipts to demonstrate that he completed the house. There is a receipt from PGI made out to Mr William of Box 775 Mzuzu and dated 23rd September 2003 in which the sum of

MK474.52 was paid for clear glass. Another receipt is dated 4th January 2002 made out to Mr W. Mlenje of Box 20167 Mzuzu in which the sum of MK520.08 was paid for clear glass. The third receipt was dated 15th September 1999 from PGI made out to Mr W Mlenje of Box 20167 Mzuzu 2 for the sum of MK287.66 for clear glass. Finally there is a receipt from PGI for the sum of MK385.88 made to Mr W. Mlengi of P.O. Box 20167 Mzuzu. These receipts do not prove that the clear glass purchased was for the house in Chimaliro or for any other house for that matter. Again, the receipts are dated between 1999 and 2003 which may mean that these purchases were for the general maintenance of the house as reflected by the quantities involved. One wonders why these receipts, with the anomalies of the purchasers' names and addresses were accumulated at the time the plaintiff was being challenged on the ownership of the house by the widow of his brother. I am not convinced these are genuine receipts. It seems the plaintiff was hard pressed to find some proof that he owned the house. I find that the receipts do not prove one way or another that the plaintiff owned the house, or that the plaintiff completed the building of the house.

The plaintiff has exhibited some receipts that he paid city rates as follows; MK10000 on 5th August 2015 (SKM9) as against a demand notice for property rates showing MK142,000.00, and MK10,000 for land rent against a demand notice of MK80,066.07. I note that these payments were made in August 2015 and there is no evidence that the plaintiff had consistently made any other payments prior to August 2015. All these receipts reflect the name of the deceased, J.R.K. Mlenje showing that the house belonged to the deceased and his estate. One further wonders why these payments were made within the same month the defendants obtained the letters of administration for the deceased estate and in particular the house under dispute. As stated above I find the plaintiff's actions to be that of a man clutching at straws and trying to fabricate evidence to show some vestige of ownership. Again as stated above, I disregard this evidence and it is not convincing at all.

Apart from his claim that in the early 1990s the plaintiff used to live in Zambia, there is no evidence of any correspondence between himself and the deceased on the issue of land. The plaintiff has sought to include some documents as proof that he owned the house. The first document is from Mpho Jere (SKM 4) dated 19th May 2001 in which the deponent states that the house in Mzuzu was built for him by his brother so that he can live there and he was given the house before the brother died. There is nothing in this document that proves that the plaintiff owned the house. If anything, there is a purported 'gifting' that was done, which then has been a subject of dispute between the plaintiff and the widow of his brother and the 3 defendants herein. The second document is SKM5 dated 19th May 2001, signed by Ettah Kumwenda which simply states that the plaintiff entered the house in 1992 before the brother passed away. Interestingly, the document further states that all the property in Blantyre was left for the widow and children, meaning that the plaintiff saw it fit that the house in Mzuzu was his, as a matter of right. The actions of the plaintiff are indeed despicable where he is trying to disposes the defendants of their proprietary rights.

The plaintiff claims that the title deed for the house was released in 1993 and the deceased handed it over to him. He also states that the deceased passed on before the plaintiff could make changes regarding ownership. What I do not understand is why, if indeed the house was his, did the plaintiff not start the change ownership process as early as 1992 when he returned to Malawi, even before the title deed was issued? Again there is no evidence from June 1993 when the deed was released to July 1995 when the brother died, that shows that an attempt was being made to change ownership of the house. It is therefore not surprising that first the widow and then the defendants are claiming ownership based on the sole reason that the deed is in the name of their late father. I find that the title deed has remained in the name of the deceased all this time. At law, possession of title deeds shows a strong case for ownership. I therefore find as a fact that the house under dispute belonged to John Risco Kay Mlenje and after his demise, formed part of his deceased

estate. The plaintiff claims that there was an arrangement between himself and his deceased brother but he has failed to prove the claim and convince the court that the disputed house belonged to him.

Finally, the house now legally belongs to the defendants whose application to be registered as proprietor by transmission was approved and endorsed by the Mzuzu Land Registry on 15th June 2016.

Determination

Having discussed thus, I make the following orders


1. That the injunction that was obtained by the plaintiff on 14th October 2016 **BE** and **IS** hereby vacated as it was obtained erroneously and under serious suppression of material facts. The plaintiff is ordered to indemnify the defendants as was stipulated in the undertaking in the order of injunction.
2. That the house on Plot Number 673/Title number Katawa MAS 78 in Mzuzu has always belonged to John Risco Kay Mlenje (deceased) and not the plaintiff, and thereby formed part and parcel of the deceased estate. To this end, the defendants, as well as the widow in her own right, were entitled at law to obtain letters of administration and legally apply and be registered as proprietor by transmission.
3. That the title to the House is now vested in the 3 defendants herein by way of transmission and they have all the legal rights to deal and transact any business concerning the house as part of the deceased estate.
4. That the originating summons is hereby dismissed, and the reliefs sought by the plaintiff fail in their entirety.
5. The Court further makes an order of permanent injunction restraining the plaintiff and his agents from interfering with the defendants' right to enjoy quiet possession of the house.

6. That the plaintiff is ordered to pay monthly rentals for the house from August 2015 when the defendants were legally granted the letters of administration to the end of the month of April 2017 when this judgement is delivered. The rentals are to be based on current market values. The plaintiff is being penalised for wrongly holding on to property that was not his.

7. The plaintiff is condemned in costs for these proceedings.

It is so ordered.

Made in CHAMBERS at Mzuzu Registry this 9th day of May 2017


D.A. DEGABRIELE
JUDGE