



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY
CIVIL CAUSE NO. 306 OF 2016

BETWEEN

DAVIE GOBEDE.....1st PLAINTIFF
PATRICIA GOBEDE.....2nd PLAINTIFF
PAUL GOBEDE.....3rd PLAINTIFF
JOSEPH GOBEDE.....4th PLAINTIFF

AND

THE REGISTERED TRUSTEES OF THE ORTHODOX
ARCHDIOCESE OF MALAWI.....DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA** (ASSISTANT REGISTRAR)

Mr. Manda - of Counsel for the claimant

Mrs. Mkandawire- Court Clerk and Official Interpreter

RULING

This is a summons for Summary Judgment taken under Order 14 of the Rules of the Supreme Court.
The application was supported by the affidavit of Davie Gobede the 1st plaintiff in this matter.

In his affidavit in support of this application, Mr. Gobede stated that by an agreement in writing dated 20th of November, 2014 or thereabouts they agreed to sell the defendant piece of land situate at Govati Village in Blantyre District at a consideration of K58,000,000.00 (fifty eight million Kwacha). He further averred that it was an express term of the contract that the defendant would pay the plaintiffs a deposit of K15,000,000.00 on signing of the agreement and the balance of K43,000,000.00 on 30th March, 2015 and the time of payment was expressed in the contract to be of essence. Contrary to the express terms of the agreement the defendant refused and neglected to pay the balance of K43,000,000.00 on the agreed date and only paid the said sum in January 2016.

The 1st plaintiff further deposes in his affidavit that apart from breaching the key condition of the contract of sale, the defendant's prolonged delay to pay the plaintiffs the balance of K43,000,000.00 deprived the plaintiffs the use of the money and the interest which could have been earned thereon from the 30th March, 2015 to end January 2016. He also stated that in the defendants in their purported defence clearly admitted having delayed to pay as agreed and therefore to have breached the agreement of sale. He further deposes that they never represented or acquiesced that the clear written terms of the sale be varied and they are not aware of or party to any written variation to the agreement of sale executed by the parties themselves. He verily believes the defendants have no defence to the action and the purported defence is merely meant to delay the action.

The defendants acknowledged service of the summons but they did not attend the hearing. Observably, they filed an affidavit in opposition to the application which I did duly consider in arriving at this ruling. In the affidavit in opposition, the defendant concedes that by an agreement in writing dated 20th of November, 2014 or thereabouts the plaintiffs agreed to sell them a piece of land situate at Govati Village in Blantyre District at a consideration of K58,000.00. He also concedes that it was an express term of the contract that the defendant would pay the plaintiffs a deposit of K15,000,000.00 on signing of the agreement and the balance of K43,000,000.00 on 30th March, 2015 and the time of payment was expressed in the contract to be of essence.

The defendants however aver that at material times (starting from the sale negotiations, formation of sale agreement and payments of purchase price) the Defendant dealt with the Plaintiffs through their agent. They state that the Trust had no direct dealings whatsoever with the plaintiff. When it became apparent to the Trust that it would not be possible to pay the balance of K43,000,000.00 on or by the agreed date, they personally negotiated with the Plaintiffs' agent that the Sale Agreement be varied so as to extend the period within which the balance aforementioned above would be repaid.

It is the defendant's averment further in the said affidavit in opposition that the plaintiffs' agent agreed that the sale agreement be varied so as to extend the time within which the balance was to be paid by the Defendant. Pursuant to the variation of the agreement, the Plaintiffs instead of terminating the sale agreement immediately after the agreed date of payment had passed accepted receipt of the payments made by the Defendants as follows:

- In or around March, 2015 the sum of K14,000,000.00
- In or around April, 2015 the sum of K8,000,000.00
- In or around November, 2015 the sum of K21,000,000.00

It is the defendant's assertion that the Plaintiffs' choice to accept the receipt of the payments mentioned above instead of terminating the contract by reason of the Trust's failure to pay by the agreed date coupled with the negotiations they had with the plaintiffs' agent that the sale agreement be varied so as to extend the date of payment of the balance goes as long way to establish that the sale agreement was indeed varied. The defendants contend that the Plaintiffs' conduct in accepting to receive payment made by the Defendant after the initial agreed date and their acquiescence amounted to a representation that the sale agreement had been varied to allow the trust to pay the balance after the agreed date. The Trust having relied on the Plaintiffs' representation made through their agent that the trust had been allowed to pay the balance after the agreed date, the defendants depones that in all fairness the plaintiffs ought to be estopped from turning around. Essentially, the defendants argue that they did not refuse or neglect to pay the balance by the agreed date as time of payment had been extended and time of payment was no longer of essence. On this basis of the matters the defendants believe that this matter cannot be determined summarily as there are issues that need to progress to trial.

Looking at the issues being raised in this instance both the plaintiff and by the defendant, the question becomes can the same be resolved by way of Summary Proceedings.

This court is mindful of the fact that to be entitled to summary judgment under Order 14 of the Rules of the Supreme Court, the plaintiff must prove his/her claim clearly and the defendant must be unable to set a bona fide defence or raise an issue which ought to be tried (see *Roberts v Plant* [1895] 1 QB 597). In *Anglo-Italian Bank v Wells* [1878] Jessel, M.R stated that where a judge is satisfied that not only is there no defence, but no fairly arguable point on behalf of the defendant, it is his duty to give judgment for the plaintiff. Similarly, in the case of *Sugar Corporation of Malawi v Harding t/a Kirtland Company (SA)* [1991] 14 MLR 473 (HC) Mwaungulu J (as he was then) stated that Order

14 is intended only to apply to cases where there is no reasonable doubt that the plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay Jones v Stone [1894] AC 122. He further stated that leave to defend must be given unless it is clear that there is no real substantial question to be tried (Lodd v Delap (1905) 12 LT 510); that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgement (Thompson v Marshall (1880) 41 LT 720; Jacobs v Booth's Distillery Co (1901) 85 LT 262).

Against better judgment, this court was inclined to grant the summary judgment to the plaintiff considering the failure by the defendants to appear for the hearing. Basically, the assumption is that the defendant was not keen in prosecuting the matter for lack of confidence in their defence. However, in this instance I had to consider the possibility that some of the issues raised by the defendant in his defence might be true and that if that is the case, giving the plaintiff summary judgment would, in my view, not be in the interests of justice.

The plaintiffs claim that the defendants breached a key condition of the contract by their prolonged delay in the payment of the balance of K43,000,000.00 and hence deprived them of use of the money. On the other hand, the defendants contend that they dealt with the plaintiffs' agent upon negotiating that the sale agreement be varied so as to extend the period within which the balance would be repaid. In my view, some of the issues being raised by both sides are issues of fact and that there are disputes regarding the same. The assertion that the defendants negotiated for a variation of the sale agreement with an agent acting for the plaintiffs can only be ascertained at full trial.

It is my considered view that in this instance the defence that was filed by the defendant does raise issues which can only be dealt with at a full trial. It is therefore on this basis that I proceed to find that the plaintiffs' application for summary judgment cannot succeed and I do accordingly dismiss it and direct that the plaintiff should proceed to apply for summons for directions so that this matter should be duly set down for trial. Costs will be in the cause.

THIS 3rd DAY OF APRIL 2018 MADE IN CHAMBERS THIS 3rd DAY OF APRIL 2018.

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR