



JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
CIVIL CAUSE NO 24 OF 2016

BETWEEN

VINCENT NYIRONGO CLAIMANT

AND

VILLAGE HEADWOMAN MANGWERE 1ST DEFENDANT

TRADITIONAL AUTHORITY KULUNDA 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Ms. Chihana, Counsel for the Claimant
Mr. Matumba, Counsel for the Claimant
Mr. Henry Kachingwe, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

This is my judgement on the Claimant's claim for an order of specific performance of the agreement in respect of a piece of land in Salima District at Lifuwa Village. The statement of claim is in the following terms:

1. *The Plaintiff was at all material times a businessman in the City of Lilongwe.*
2. *The Defendants are Village Headwoman and Traditional Authority in Salima District.*
3. *On or around the 17th of July, 2015, the Plaintiff bought a piece of land from the 1st Defendant in Salima at Lifuwu, T/A Kalumba at a price of K6,000,000.00.*
4. *The Plaintiff paid a deposit of K1,000,000.00 and the balance it was agreed would be paid upon the 1st and 2nd Defendant completing the processes of obtaining the title deed for the Plaintiff.*

5. *The Plaintiff went to the Lands Departments and obtained a Consultation with the Chief Form which is the first step towards obtaining Title for land which was customary.*
6. *The Plaintiff asked the 1st Defendant to process the said Form by having herself and the 2nd Defendant sign for it.*
7. *The 1st and 2nd Defendants refused in the face of the Plaintiff to sign the said Form on the ground that they have cancelled the sale with him and sold the land to another purchaser, an NGO at a higher price and were ready and willing to return his K1,000,000.00 deposit.*
8. *The Plaintiff insisted on specific performance in that he did not need his deposit back but the land which he had bought and reported the matter to the District Commissioner for Salima to intervene in the dispute.*
9. *The District Commissioner for Salima invited both Defendants to a round table meeting for discussions and both failed to turn up.*
10. *By reason of the matters aforesaid, the Plaintiff is suffering loss of title to land."*

The 1st Defendant resists the action and she, to this end, filed with the Court the following Defence:

1. *The 1st defendant admits paragraphs 1, 2 and 3 of the plaintiff's statement of claim.*
2. *The 1st defendant denies paragraph 4 of the plaintiff's statement of claim to the extent that the balance was to be paid after obtaining the title of the land for the plaintiff and the plaintiff is put to strict proof thereof.*
3. *The 1st defendant denies paragraphs 5, 6 and 7 of the statement of claim and the plaintiff is put to strict proof thereof.*
4. *The 1st defendant denies paragraph 8 of the plaintiff's statement of claim on the basis that the plaintiff cannot insist on specific performances when he has not performed part of his obligation under the contract and the plaintiff is put to strict proof thereof.*
5. *The 1st defendant denies paragraphs 9 and 10 of the statement of claim and the plaintiff is put to strict proof thereof.*
6. *SAVE as herein admitted the 1st defendant denies each and every allegation of fact as if the same were set out and traversed seriatim."*

There is basically one issue in this case for the determination of the Court, namely, whether or not the Claimant is entitled to an order of specific performance, ordering the Defendants to execute and process the Consultation with Chief Forms and any

other documentation requiring their processing necessary for the Claimant to gain title deed to the land sold to him?

The Claimant called two witnesses to prove his case and these were the Claimant himself and Mr. Allan Kamanga.

The Claimant adopted his witness statement as part of his evidence in chief. The witness statement provides as follows:

4. *The subject matter of the dispute herein is ownership of land situated at Lifuwu, in the village of T/A Bibi Kulunda in the district of Salima.*
5. *I asked Mr. Allan Kamanga who is a family friend of mine to look for some land for me, on which I intended to construct a lodge. I specifically wanted land near the beach.*
6. *When the said Mr. Kamanga found this place which is situated at Lifuwu in the village of T/A Bibi Kulunda, he called to visit and view the place to verify if it was to my satisfaction.*
7. *Subsequently, I went to the place and confirmed that it was to my satisfaction. On this day I was accompanied by the 1st Defendant's son and Mr. Kamanga.*
8. *Thereafter we met the 1st Defendant to discuss the purchase price and eventually agreed on the sum of K6,000,000.00. I refer and attach a copy of the sale agreement marked "VNI".*
9. *It was further agreed that I would pay the sum of K1,000,000.00 as deposit of the purchase price leaving a balance of K5,000,000.00 which would be paid once the land forms were duly signed by the T/A Bibi Kulunda. I refer and attach a copy of the Consultation form marked "VN2".*
10. *However, when the time came and we paid the T/A a visit to do the needful she refused to sign the forms saying that the land belonged to someone else.*
11. *Since Mr. Kamanga had heard of the person who had been mentioned by the T/A we decided to pay him a visit to confirm the statements of the T/A.*
12. *It was confirmed that he was apparently the owner at the time.*
13. *We then returned to the 1st Defendant who confessed that there had been outstanding issues between her and the T/A which may have influenced her not to sign the forms.*
14. *However, the 1st Defendant confirmed that the land belonged to her and that she had not sold it to anyone else.*
15. *The 1st Defendant also gave a new twist to the issue, saying the land had been the subject matter of a dispute which she had won.*

16. *Considering that there is an outstanding payment of K5,000,000.00 it was agreed at the time, that the money would be paid after she furnished me with Court documents declaring that she is the owner of the land herein.*
17. *It was further agreed that after being furnished with the Court documents, we would request the attendance of the District Commissioner of Salima, 2nd Defendant (as T/A) and the 1st Defendant as the buyer, to arrange and facilitate the signing of the sale of land instruments.*
18. *I waited for the court documents as agreed, unfortunately the 1st Defendant who was supposed to obtain them from the office of the District Commissioner, has not furnished me up to date.*
19. *To assist me, Mr. Kamanga also visited the office of the District Commissioner to secure the said court documents but has also not been successful to date.*
20. *In my attempts to follow up on the progress of this issue, I called her and she agreed to meet in Lilongwe City.*
21. *Eventually when we had the discussion she proposed that she should refund me my deposit since she had resold the land to someone else for the reason that I was still insisting on getting the court documents for her.*
22. *By virtue of the agreement we had, that the payment of K5,00,000.00 balance would be paid after she had furnished me with copies of the court documents. I was disappointed to learn of the development that she had resorted to sell the land to someone else.*
23. *Due to the disappointment, I decided to consult a legal practitioner to advise me on the best way forward in resolving this issue. This is what led to the commencement of this case against the Defendants.*
24. *I purchased the land in good faith although the Defendants treated me otherwise.*
25. *When I purchased the land I had no knowledge or any reason to believe that the land had issues.*
26. *It was also easy for me to make decisions regarding the purchase of the land because the 1st Defendant is the Village Group Headwoman of the area.*
27. *The 1st Defendant wrongly sold the land to someone else knowing that there was an outstanding issue between us.*
28. *The 1st Defendant breached the contract of sale of land by selling the land to another person whilst there was an ongoing transaction between me and her.*
29. *It is only fair that the Defendants be ordered to sign the forms and relevant documents to enable the process of registration in my favour."*

In cross-examinations, the Claimant admitted that he did not pay the balance of the purchase price because he wanted the documents of lease of the piece of land to be

processed. He told the Court that they agreed that the 1st Defendant would make lease documents for him and thereafter, he would pay the balance of the purchase price. The Claimant admitted that there was no evidence to support his assertion that the balance had to be paid after the lease documents were processed. The Claimant admitted that the 1st Defendant offered to refund him the deposit of MK1 million but he declined to accept it.

The Claimant was shown Exhibits VN1 and VN2 attached to his witness statement and he was asked to confirm if payment of the balance of the purchase price was on condition that the 1st Defendant had to process lease documents for him first and he answered that there was no such condition. The Claimant admitted that he did not bother to search if the 1st Defendant was the actual owner of the piece of land in issue because he trusted the 1st Defendant to be truthful.

In his re-examination, the claimant stated that he was told about the case that the 1st Defendant had over the ownership of the piece of land with the 2nd Defendant. He said that it was agreed that 1st Defendant would produce the judgment of the case before the District Commissioner but she did not. The Claimant said that he did not pay the balance of the purchase price because the 1st Defendant did not process documents of the piece of land in his favour.

Mr. Allan Kamanga adopted the following witness statement as his evidence in chief:

4. *The subject matter of the dispute herein is ownership of land situated at Lifuwu, in the village of T/A Bibi Kulunda in the district of Salima.*
5. *Since I was residing and still do reside at Salima district, the Claimant asked me to find him land situated there for purposes of buying and constructing a lodge.*
6. *I duly complied and found this place which as stated above is situated at Lifuwu in the village of T/A Bibi Kulunda.*
7. *The 1st Defendant sent me with her son to view the said land.*
8. *When I was satisfied with what I had seen I communicated with the Claimant to make a point to visit the site and confirm that it was to his satisfaction as well.*
9. *The Claimant visited the site and was accompanied by the 1st Defendant's son and myself.*
10. *Upon our return, we met with the 1st Defendant who agreed to sell the land for the price of K6,000,000.00. A deposit of K1,000,000.00 leaving the sum of K5,000,000.00. I refer and attach a copy of the sale agreement marked "AK1".*

11. *It was agreed that the balance would be paid once the 2nd Defendant had signed the necessary forms.*
12. *However, when we went there, the 2nd Defendant refused to sign the forms saying that the land belonged to someone else.*
13. *Since the person who had been mentioned by the 2nd Defendant is well known in Salima we decided to pay him a visit to confirm the 2nd Defendant's statements.*
14. *It was confirmed that he was apparently the owner at the time.*
15. *We returned to the 1st Defendant who confessed that there have been outstanding issues between her and the 2nd Defendant which may have influenced her not to sign the forms.*
16. *However, 1st Defendant confirmed that the land belonged to her and that she had not sold it to anyone else.*
17. *The 1st Defendant also gave a new twist to the issue, saying the land had been the subject matter of a dispute which she had won against the 2nd Defendant.*
18. *Since then, all I have been doing to assist with this issue is following up with the District Council of Salima to obtain documents of the case the 1st Defendant alleged to have won.*
19. *Due to the foregoing I believe that the Claimant was wrongly treated despite buying the land in good faith.*
20. *Further, it is only fair that the Defendants be ordered to sign the forms and relevant documents to enable the process of registration to be done in favour of the Claimant."*

In cross-examination, Mr. Kamanga identified exhibit VN1 as a sale agreement between the Claimant and the 1st Defendant. He told the Court that the Claimant was supposed to pay the balance of the purchase price within a week from the date of the sale agreement. Mr. Kamanga further confirmed that the Claimant did not pay the balance of the purchase price.

In re-examination, Mr. Kamanga stated that the balance of the purchase price was supposed to be paid after the documents of the piece of land were produced. He said that the 1st Defendant signed the documents to process the lease but it was the 2nd Defendant who refused to sign the documents on the basis that the land belonged to another person. Mr. Kamanga also told the Court that the balance of the purchase price was not paid because lease documents were not processed.

Two witnesses testified in support of the case of the 1st Defendant. These were the 1st Defendant and Mr. Isaac Selemani.

After being sworn, the 1st Defendant adopted her witness statement which reads as follows:

1. *I am Village Headwoman Mangwere (Mrs. Rose Kalinde) the 1st defendant in this matter.*
2. *My Village falls within T/A Kulunda in the district of Sallima.*
3. *I know the claimant as he wanted to buy a piece of land in my village.*
4. *I showed the claimant the piece of land and he was happy with it.*
5. *I told the claimant that the price of the piece of land was K6,000,000.00 (Six Million Kwacha) only and the claimant paid MK1,000,000.00 (One Million Kwacha) only. I exhibit a copy of acknowledgment of receipt of MK1,000,000.00 marked as "RK1"*
6. *I kept on demanding the balance of the purchase price from the claimant but he never paid.*
7. *A year later someone came looking for the same piece of land and I informed the claimant that there was a person who wanted the piece of land and he needed to pay the balance or else I would sell it and give him back his deposit.*
8. *The claimant did not pay and I proceeded to sale the piece of land to the new person and I told the claimant to get his MK1,000,000.00 (One Million Kwacha).*
9. *There was no agreement that I had to make papers for the piece of land for the claimant.*
10. *I therefore pray to the Honourable Court that the claimant's claims be dismissed in their entirety which costs of this action."*

The 1st Defendant was cross-examined by Counsel Chihana. The 1st Defendant told the Court that she became village headwoman Mangwele in 2010. She told the Court that she had done a lot of land transactions. She told the court that for a person to obtain a title deed, you signed a document and she identified VN2 exhibited to the witness statement of the Claimant as such document.

The 1st Defendant told the Court that she never agreed that the balance of the purchase price was to be paid after the documents were signed by the 2nd Defendant. She told the Court that normally the buyer of customary land paid the whole money before processing documents for the land. She told the Court that the 2nd Defendant was supposed to sign the documents after the sale was done. She told the Court that

when she was told that the 2nd Defendant declined to sign the lease form, she advised the Claimant to proceed to develop the piece of land because the land was hers.

The 1st Defendant told the Court that the Claimant had security to develop the land because she was the owner of the land and she had authority to stop an encroacher or anybody interfering with the piece of land. She told the Court that nobody would claim ownership of the piece of land or use title documents of the land without her consent as village headwoman of the area.

Regarding the court case she had against the 2nd Defendant over the land, she stated that the Court found in her favour. She told the court that she informed the Claimant about the case well before a sale agreement was executed.

In re-examination, the 1st Defendant told the court that it was not the first time for the 2nd Defendant to decline to sign a lease form and that in such instances, she advised the buyer to proceed developing the land and there had been no problems.

Mr. Isaac Selemani adopted his witness statement. The witness statement is brief and it will be quoted in full:

1. *I am Isaac Selemani of Mangwere village, T/A Kuluunda, Salima district.*
2. *The 1st defendant is my biological sister and I was involved in the sale of the piece of land to the claimant.*
3. *The price of the piece of land was K6,000,000.00 (Six Million Kwacha) only and the claimant paid MK1,000,000.00 (One Million Kacha) only.*
4. *The claimant did not pay the balance despite several demands we were making to him.*
5. *A year later someone came looking for the same piece of land.*
6. *The 1st defendant told the claimant to pay the balance which he did not and the 1st defendant proceeded to sale the piece of land to the new person and she told the claimant to get his MK1,000,000.00 (One Million Kwacha).*
7. *There was no agreement that the 1st defendant had to make papers for the piece of land for the claimant."*

In cross-examination, Mr. Selemani told the Court that he did not sign the sale agreement between the Claimant and the 1st Defendant. He said that he was involved only when he went with the Claimant in the company of the 1st Defendant to show him the piece of land that the 1st Defendant was selling.

In re-examination, Mr. Selemani reiterated his involvement in the case as stated in paragraphs 7, 8, 9 and 10 of his witness statement.

It is the case of the Claimant that he has proved on a balance of probabilities that he is entitled to an order of specific performance. Paragraphs 8.1 and 8.2 of the Plaintiff's Final Written Submissions are relevant and they read as follows:

"LAW AND ARGUENDO ON SPECIFIC PERFORMANCE

4.5 *Land is unique and to this end Justice Kenyatta Nyirenda has in a number of cases, such as Mberenga v Destone Germany aka Group Village Headman Mberenga & Ors¹ reasoned that:*

It is trite that every piece of land is of particular and unique value to the owner and damages are an inadequate remedy and, in any case, damages would be difficult to assess. The clearest and fullest statement of the principle regarding inadequacy of damages with respect to land is contained in Chitty on Contract - General Principles, 26th ed., Sweet and Maxwell at paragraph 1868:

"Land: The law takes the view that the purchaser of a particular piece of land or of a particular house (however ordinary) cannot, on the vendor's breach, obtain a satisfactory substitute, so that specific performance is available to him. A vendor of land, too, can get specific performance, for damages will not adequately compensate him if he cannot easily find another purchaser or if he is anxious to rid himself of burden attached to the land. It seems to make no difference that the land is readily saleable to a third party; or that after contract but before completion a compulsory purchase order is made in respect of it ... Yet in such cases damages (based on the difference between the contract price and the resale price, or the compensation payable on compulsory acquisition) would seem normally to be adequate remedy. "

4.6 *Specific performance according to the Black's Law Dictionary² is the:*

'Rendering, as nearly as practicable, of a promised performance through a judgment or decree; a court ordered remedy that requires precise fulfilment of a legal or contractual obligation when monetary damages are inappropriate or inadequate, as when the sale of real estate or a rare article is involved. Specific performance is an equitable remedy that lies within the court's discretion to award whenever the common-law remedy is insufficient, either because damages would be inadequate or because the damages could not be established.'

1 (Land Cause 199 of 2016) [2016] MWHC 655 (12 December 2016)

2 11th Edition, Garner, Thomson Reuters

- 4.7 In *Chirwa v Ndaferankhande*³ Justice Kenya Nyirenda defined specific performance as an equitable remedy which courts order particularly in cases where the common law remedy of damages is inadequate. He cited that the leading case on the remedy of specific performance which is *Finance Bank of Malawi Limited v Benson Tembo (2007) MLR 99* wherein the Supreme Court of Appeal stated the law, at page 101, as follows:

"Specific performance is an equitable remedy which the courts will decree when the remedy available at common law, usually damages is not adequate. In other words, specific performance will not be ordered if there is adequate remedy at law. And like other equitable remedies, specific remedy is not a matter of right in the person seeking relief but is given as a matter of discretion to be exercised, of course, in accordance with settled principles; it is not left to the uncontrolled caprice of an individual judge, so to speak. Where a vendor of land refuses to convey the land sold, it is a widely accepted general rule that an award of damages would not meet the just and reasonable expectations of the purchaser, hence it becomes necessary for the courts to decree for specific performance of the agreement, one reason for this being that each piece of land is unique." – Emphasis by underlining supplied

- 4.8 In upholding the decision of the Malawi Supreme Court of Appeal in the above cited leading, the court in *Chirwa v Ndaferankhande*⁴ stated as follows:

'In the present action, the Plaintiff maintained that he is still willing to abide by the terms and conditions of the Sale Agreement. There is also unchallenged evidence that the Plaintiff, acting on the instruction of the Defendant's agent, has spent a considerable amount of money on LK781/2. In the premise and bearing in mind the fact that the Defendant has advanced no grounds why the Court should not exercise its discretion in favour of granting specific performance, I am minded to grant the Plaintiff's prayer for specific performance compelling the Defendant to fulfil his obligations under the Sale Agreement. So it is ordered.

- 4.9 Looking at the evidence furnished to this court and the precedents cited, the claimant pleads that it will do more perfect and complete justice for this Court to enter judgment in his favour since he has demonstrated that damages will not be an adequate remedy to compensate him for the fundamental breach of contract on the part of the 1st Defendant.

- 4.10 The claimant also gave evidence that he is ready to pay the sum outstanding as long as the defendants are compelled to fulfil their legal obligations regarding registration of land title."

The 1st Defendant contends that the Claimant's action must be dismissed on the ground that the Claimant is seeking an equitable remedy with unclean hands. This contention is dealt with in paragraph 4.4 of the Defendants' Final Written Submission and it may be useful that the same is set out in full:

³ [2016] MWHC 433 (17 January 2016)

⁴ Ibid

- “5.1 We submit that there was a valid contract of sale of the customary piece of land between the claimant and the 1st defendant.
- 5.2 The contract had no specified time for payment of the balance of the purchase price as evidenced by the contract itself marked as VNL and indeed by the evidence from the claimant himself and his witness and the 1st defendant herself.
- 5.3 For emphasis, PW2 stated that it was agreed that the balance of the purchase price would be paid in a week’s time after execution of the sale agreement while in re-examination, he changed the statement to the effect that it was agreed that the balance of the purchase price would be paid after documents of the piece of land were processed in favour of the claimant.
- 5.4 As for PW1, he testified that it was agreed that the balance of the purchase price would be paid after documents of the piece of land were processed in his favour and he admitted that there was no evidence to support his claim.
- 5.5 DW1 however said that there was no agreement that the balance of the purchase price would be paid when documents for the piece of land were processed in favour of the claimant as that had no bearing on ownership and sale of the piece of land to the claimant being a customary piece of land.
- 5.6 DW1 went on to state that actually she demanded payment of the balance of the purchase price from the claimant who refused to pay demanding that until papers for the land were processed.
- 5.7 DW1 stated that when the claimant refused to pay the balance of the purchase price, she proceeded to sell the piece of land and she offered a refund to the claimant who declined to accept the refund.
- 5.8 The claimant admitted in cross-examination that he refused to pay the balance of the purchase price because he needed the papers of the piece of land to be ready and that he also declined a refund of his deposit from the 1st defendant.
- 5.9 The claimant also admitted that he had not paid the balance of the purchase price but he was willing to pay only if the 1st defendant processed title document into his name.
- 5.10 The evidence therefore shows that there was no agreement as to when the balance of the purchase price was supposed to be paid and in that case, it was up to a party to make a demand notice for payment and the 1st defendant rightly did so and the claimant refused to pay in breach of the sale agreement.
- 5.11 The 1st defendant was therefore entitled to treat the contract as repudiated and proceed to sell the piece of land.
- 5.12 The claimant cannot come to court to seek an equitable remedy of specific performance when he himself is in breach of the contract.
- 5.13 This is not a proper case for the court to grant an order for specific performance for the reason that the claimant is seeking the equitable remedy with unclean hands due to his failure to pay the purchase price even after a demand notice from the seller.”

That a piece of land in Salima District at Lifuwa Village was the subject matter of a sales agreement is not in doubt. There is documentary evidence to this effect, namely, Exhibit "AK1". Exhibit "AK1" is dated 17th January 2015 and the body thereof states as follows:

"I, Vincent Nyirongo have bought a land in Salima, Lifuwa, T/A Kuluunda amounting to six million kwacha I have made an advance payment of one million kwacha to village headman Mangwere."

The question is whether the remedy of specific performance can be granted in the circumstances of this case. It is noteworthy that before the balance of the purchase price of K5,000,000 could be paid by the Claimant to the 1st Defendant, the land in question was sold to a third party. The Claimant was aware of this fact: see paragraph 7 of the statement of claim. No evidence whatsoever has been adduced before this Court to show that the third party was not a bonafide purchaser with value. Clearly, the rights of the third party would be adversely affected by granting the Claimant the remedy that he seeks. Granting an order of specific performance in the circumstances of the present case would be inconsistent with equity and good conscience.

The fact that the land in question was sold to a third party makes this case distinguishable from what obtained in **Michael Bakhona Chirwa v. Mark Sydney Soza Ndaferankhande, HC/PR Civil Cause 95 of 2011**, a case cited by both parties. That case did not have the effect of adversely affecting the rights of third parties. The following paragraph in that case is instructive:

"In the present action, the Plaintiff maintained that he is still willing to abide by the terms and conditions of the Sale Agreement. There is also unchallenged evidence that the Plaintiff, acting on the instruction of the Defendant's agent, has spent a considerable amount of money on LK781/2. In the premise and bearing in mind the fact that the Defendant has advanced no grounds why the Court should not exercise its discretion in favour of granting specific performance, I am minded to grant the Plaintiff's prayer for specific performance compelling the Defendant to fulfil his obligations under the Sale Agreement." – Emphasis by underlining supplied

It is also important to remember that an order for specific performance will not be granted where it would compel the defendant to embark upon uncertain litigation: see the English case of **Wroth v. Taylor (1974)** where specific performance of a contract to sell a house was refused as it would require the defendant to embark on uncertain litigation to compel his wife to leave the house when her rights of occupation had been registered under the Matrimonial Homes Act 1967.

All in all, the total evidence in the present case leads the Court to the conclusion that it would be legally inappropriate to grant the Claimant's prayer for a specific performance. His remedy lies in recovery of the K1,000,000 that he paid the 1st

Defendant as a deposit, it being an established principle of law that a purchaser whose contract of purchase remains unperformed through no fault of his own has an equitable lien for the recovery of any money he paid under the unperformed contract: see **Rose v. Watson 11 ER 1187 at 1192 per Lord Cranworth**. The 1st Defendant must return to the Claimant the said sum of K1,000,000 within 14 days of the date of this judgement. It is so ordered.

Looking at the facts of this case, I consider that the appropriate order to make would be that each party should bear its own costs and so it is ordered.

Pronounced in Court this 23rd day of February 2022 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE