IN THE MALAWI SUPREME COURT OF APPEAL

(CIVIL APPEAL NUMBER 25 OF 2009)

BETWEEN

LEVANT MORTON CHILETA MFUNE---------- APPELLANT

AND

INDEFUND LIMITED---------- RESPONDENT

CORAM: HON. JUSTICE A.K.C. NYIRENDA, SC, JA

HON. JUSTICE E.M. SINGINI, SC, JA

HON. JUSTICE E.B. TWEA, JA

Makwinja, of counsel for the Appellant

Respondent, unrepresented

Balakasi, Court Clerk

JUDGMENT

SINGINI, SC, JA.

We heard this appeal on 5th May, 2010. The respondent was not represented at the hearing but respondent's counsel had filed skeleton arguments opposing the appeal. As for the appellant, the record of the appeal shows Mr. Philip Banda of Mulinga Chambers in Mzuzu to have been counsel for the appellant but he gave a brief to another counsel, Mr. Makwinja, who appeared for the appellant at the hearing. We accepted Mr. Makwinja and decided to proceed to hear the appeal which Mr. Makwinja then presented according to his brief.

The respondent had held a charge over the property of land in the City of Mzuzu, including a house on it, registered under title number Muchengautuwa CB3/34 belonging to the appellant. The charge was held as security for a loan the respondent had granted to the appellant. Subsequently the respondent exercised its power of sale under the charge to realize its security and sold the property to one M.G. Mvula.

When notified by the respondent of the sale, the appellant refused to deliver up possession of the property to the respondent. The respondent then applied to the High Court for an order that the appellant should deliver up possession of the property. The application was registered as Civil Cause Number 3241 of 2003 at the Principal Registry in Blantyre and it came before Justice Kapanda. The appellant, as defendant, filed a defence with skeleton arguments opposing the application. The appellant did not make an appearance at the hearing, which was on 7th February, 2007, despite having been served with notice of hearing. The court proceeded to hear the application. In its judgment delivered on 24th July, 2007, the court determined that the issue it was to adjudicate upon, arising from the summons and from submissions by counsel for both parties, was whether the respondent was entitled to possession of the property registered under title number Muchengautuwa CB3/34. The court decided that issue in favour of the respondent and held that the respondent was entitled to possession of the property and made the order for the appellant to deliver up possession. The appellant did not appeal against that decision.

Then by originating summons under Order 28 read with Order 5 of the Rules of the Supreme Court, filed on 24th June, 2008, almost a year later after the decision by Justice Kapanda, the appellant commenced a suit in the High Court at Mzuzu against the respondent asking the court to declare that the sale by the respondent of the land under title number Mchengautuwa CB3/34, including the house on that land, to a third party was null and void and that such sale be cancelled forthwith and the right to title to the land and to possession of the land be restored to the appellant. He also claimed for damages for loss of use of the land by reason of the sale by the respondent. The respondent then filed an application to have the suit commenced by the appellant dismissed on the ground

that the issue had already been adjudicated upon by the High Court before Justice Kapanda in Civil Cause Number 3241 of 2003 at Blantyre and was thus caught by the principle of *res judicata*.

The *res judicata* application was heard by Justice Chikopa sitting at Mzuzu. The learned judge concluded that the suit by the appellant was indeed caught by *res judicata* and could not proceed. He accordingly dismissed it. It is against that decision by Justice Chikopa that this appeal is before this Court.

There are four grounds of appeal presented by the appellant. These are that:

- The learned judge misdirected himself and erred in law by refusing to adequately deal with the question of fresh facts which came to light only after the hearing of Civil Cause Number 2341 of 2003 (Principal Registry, Blantyre) showing that Justice Kapanda's court was deliberately misled by acts of fraud by the respondent;

- The learned judge erred in law by refusing to take into consideration and deal adequately with the fact that judgment in Civil Cause number 2341 of 2003 was virtually by default as it was arrived at in the absence of the appellant and his counsel, and the appellant knew of it only when he was forced to vacate his house on 19th September, 2007;

- By reason of what has been stated in the above two grounds the court below erred in law by concluding that the appellant's originating summons was caught by *res judicata* without hearing the case fully on merits;

- In the circumstances the court below wrongly dismissed the appellant's originating summons and its decision must be quashed.

We remind ourselves that this is not an appeal against Justice Kapanda's decision in Civil Cause Number 2341 of 2003 but an appeal against Justice Chikopa's decision dismissing the appellant's suit on the ground that it was caught by *res judicata*. It is therefore the errors, if any, in Justice Chikopa's judgment that fall to be examined in this appeal.

On the first two grounds of appeal, which are that Justice Chikopa did not adequately deal with the question of fresh facts which came to light only after the hearing of the matter before Justice Kapanda and also did not deal adequately with the issue that Justice Kapanda's judgment was a default judgment in that the hearing was in the absence of the appellant or his counsel, we consider it proper to quote from Justice Chikopa's judgment the way he dealt with the two issues, and we quote (with some minor editing) from pages 5 to 6 of the judgment, and he refers to the parties to the application before him as applicant and respondent:

> "... The respondent's case is all about the legality of the sale of the charged land. The legality/propriety of the sale of the charged land is a question we cannot determine. Justice Kapanda did that when he in Civil Cause Number 2341 of 2003 held that the plaintiff, the applicant in the instant case, was entitled to possession of the charged land. The only way the respondent can further challenge the propriety of such sale is to appeal against the decision of Justice Kapanda. We are aware of the respondent's argument that there have since that judgment been discovered new facts tending to show that Justice Kapanda's court might have been misled by fraud. It matters not in our view. We are also aware of the argument that the respondent was during that trial without counsel. It also matters not in our view for purposes of this case. If a judgment is entered in default of attendance by a party or his counsel or both, as happened in this case, the remedy is not to commence fresh proceedings on the same facts before a different court. One need only apply for the judgment entered in default to be set aside and the matter to commence *de novo*. And we know for a fact that such applications are granted. Concerning the allegations of fraud it was open to the respondent either to advance such facts in the application

for the setting aside of Justice Kapanda's judgment or during the appeal against his judgment. It would then have been up to whichever court that heard such application or appeal to proceed as it deemed fit. It cannot be proper though that we reopen the matter as if no decision has ever been made as to the propriety of the sale of the charged land.".

We uphold that passage in Justice Chikopa's judgment as a correct statement of the law on the issues that were before him. We consider that statement of the law to be well supported by several case authorities including the High Court judgment in the case of *Inspector of Taxes v. Sacranie*, 1923-60 ALR Mal. 615, where Spencer-Wilkinson, C.J. at page 622, firstly cites with approval a passage in the judgment of the Privy Council in case of *Badar Bee v. Habib Mericana Noordin* [1909] A.C. 615 that: "It is not competent for the court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed from in due time.". He goes further to state in his own words that:

> "... I am of opinion that the plaintiff ought not to be allowed in these subsequent proceedings to raise a point which was open to him in the other proceedings. If it was thought that the order in the bankruptcy court was wrong, an application could have been made for review or the matter could have been decided on appeal in the proper way. I think it will be wrong to allow the plaintiff to raise this matter over again in these fresh proceedings and that ... this court ought to exercise its inherent jurisdiction to prevent the same question between the parties being agitated for a second time.".

We also find it to be evident from the passage in Justice Chikopa's judgment which we have quoted that the learned judge had adequately considered the issues raised by the appellant in the first two grounds of appeal. We therefore have no hesitation to dismiss those two grounds of appeal.

As it happens, the third and fourth grounds of appeal are premised on the first two grounds which we have dismissed. Logically therefore those two remaining grounds of appeal also fall away. However, we find it necessary for us

to address the issue of *res judicata* on the facts of this case alluded to in the third ground of appeal and which the learned judge also considered.

The doctrine of *res judicata* is part of the law of estoppel under common law. It has also been recognized by statute in our jurisdiction under section 44 of the Courts Act (Cap. 3:03). It operates as a bar to subsequent litigation between the same parties over an issue arising from the same circumstances where the rights and obligations of the parties between them were concluded by an earlier judgment of a competent court. It is clear from case authorities that for the defence of *res judicata* to apply, the earlier judgment must have been by a competent court and the matter in issue was controverted before that court and was clearly and finally decided by the court on merits and that decision was in respect of the same thing or object that is the subject matter of the subsequent cause of action. See: *Eastwood and Holt v Studer* (1926) 31 Com Cas 251; *Stanstead Corporation v. Beach* (1899) QR 8 QB 276 (CANADA); *Dunlop v. Haney* (1900) 7 BCR 307 (CANADA). We also cite the case of *Ngunda v. Mthawanji* (1987-89) 12 MLR 183, where Mbalame, J., in what was clearly a brilliant judgment on the several issues that were before him and in which he considered a number of leading English case authorities on the doctrine of *res judicata*, had this to say at page 189 with a pinch of good humour:

> "I think that counsel, knowing that there is no way he can now set that judgment aside, is trying to achieve the same thing by instituting other proceedings. Surely, if an issue has been distinctly raised and decided between the parties, it is, in my judgment, most unjust and unreasonable to permit the same issue to be litigated afresh between the same parties, be it in French or Chinese".

It is also stated in *Halsbury's Laws of England, Fourth Edition*, Para. 1527, citing several case authorities, that "it is a fundamental doctrine of all courts that there must be an end of litigation".

In the appeal before us, the suit brought by the appellant against the respondent was challenging the propriety of the sale of the property by the respondent in exercising the power of sale under the charge over the property.

The issue in the earlier suit between the same parties before Justice Kapanda was about whether the respondent was entitled to possession of the property which meant that the court had to determine whether the respondent had properly exercised the power of sale under the charge to become entitled to possession of the property. From that we have concluded, as did Justice Chikopa, that the issue in both suits was exactly the same. Both suits were between the same parties. The subject matter in both suits was the same property of land registered under title number Mchengautuwa CB3/34. In our view, that issue was conclusively decided in the earlier judgment of Justice Kapanda. That judgment was not given as a default judgment but was a decision on merits in that although the appellant did not appear for the hearing his counsel had filed a defence with skeleton arguments which the learned judge analyzed, along with the submissions of the respondent, and proceeded to give judgment. We are therefore unable to fault Justice Chikopa in finding that appellant's suit was barred by the doctrine of *res judicata*. In our judgment all elements were present for the application of the defence of *res judicata* to the suit brought by the appellant.

We accordingly dismiss the appeal.

We have considered the question of costs for this appeal and we have determined that, in the circumstances of this case, the parties shall bear their own costs.

Pronounced in open court at Blantyre this 9th day of July, 2010.

HON. A.K.C. NYIRENDA, SC, JA.

HON. E.M. SINGINI, SC, JA.

HON. E.B. TWEA, JA.