



JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE

MSCA CIVIL APPEAL NO. 2 OF 2010
(Being Commercial Cause No. 65 of 2009)

BETWEEN:

SAJID A.A. JUSSAB.....APPELLANT

- AND -

NBS BANK LIMITED.....RESPONDENT

**CORAM: THE HONOURABLE JUSTICE TAMBALA, SC, JA
THE HONOURABLE JUSTICE NYIRENDA, SC, JA
THE HONOURABLE JUSTICE TWEA, JA**

Mr Salimu, of Counsel for the Applicant
Mr Mpaka, of Counsel for the Respondent
Mr Balakasi – Official Interpreter

J U D G M E N T

Twea, JA

This is an appeal against the decision of the High Court Commercial Division, sitting in Blantyre. The appellant; a private businessman, brought this action against the respondent, a registered commercial bank, by way of originating summons, in the expedited form. The appellant sought four

declarations. The lower court having found for the respondent the appellant appealed on the following grounds, that:-

- “i the trial judge erred at law in effectively holding that the respondent was not legally and contractually bound to see to it that the appellant got good title to the plot in issue
- ii the trial judges findings of law are generally against the evidence.”

The appellant then sought that the whole judgment of the lower court be dismissed.

To appreciate what happened in this case it is important that we restate the original case.

The appellant, by originating summons issued on 7th April, 2009, sought three declarations, as follows:

- “1) that having sold title number Limbe East 377 to the plaintiff the Bank was under contractual duty to see to it that the plaintiff gets good title to the property
- 2) that the property was illegally sold to one Leston Mulli by a Mr Katopola because the defendant failed to register a charge against the title in respect of the loan that Mr Katopola had taken from the Bank
- 3) that as a direct consequence of the Bank’s omission in (2) above the plaintiff has and continues to suffer loss as detailed in the affidavit in support of the originating summons.”

In his affidavit, in support of the originating summons, the appellant averred that after the purchase of the property from the respondent in the year 2001, at the price K501, 000.00 he resold it to a Mr Lucias Phekani at the price of K3, 500,000.00 in the year 2005. He further averred that he requested the respondent to transfer the title directly to the said Mr Phekani. However, when he and the said Mr Phekani instructed their lawyer to do the conveyancing it was discovered that the property was transferred to a Mr Leston Mulli. He averred further, that he was consequently required to pay back Mr Phekani, the money that he received for the property with interest from the year of receipt: 2005. He therefore prayed for an order that

the respondent pays him the K3, 500,000.00 plus interest that Mr Phekani was claiming from him and costs for the action.

We have taken the trouble to state the case for the plaintiff in the court below because it is material to the decision arrived at by this court.

It was not disputed that the respondent in or about April 2001, advertised for sale, by auction, property title No. LE 559, BCA Hill in Blantyre. The plaintiff, being the successful bidder, was issued a standard "Condition of Sale and Acceptance" agreement form of the respondent on 27 April, 2001. This was Exhibit SJ3. The agreement which was addressed to the respondent, cited the appellant as the purchaser of the property, the price thereof, being K501, 000.00 and further provided as follows:

1" I/We confirm that I/We will pay you by cash or bank certified cheque fifty percent (50%) of the purchase price within 10 days of the date of your written offer to me of the property and that I/We will pay the balance of the purchase price before the expiry of 30 days from the date of sale or over any extended period which may subsequently be agreed in writing ("the stipulated period").

- a. If I/We do not pay the deposit as aforesaid my/our bid shall be deemed to have been unsuccessful; and
- b. If having paid the deposit I/We do not pay the balance of the purchase price within the stipulated period or if I/We otherwise cancel the sale you shall be entitled to deduct from the deposit in addition to all your expenses an amount equal to 5% of the purchase price agreed at the auction as agreed and liquidated damages and the sale to me/us shall forthwith and automatically be cancelled.

- 2 I/We understand and agree that I/We shall be liable to pay interest at such rate as you shall determine on any balance of the purchase price not paid within 30 days aforesaid unless the said requirement shall stand waived by you.
- 3 I/We acknowledge and agree that we shall not be entitled to have possession or enjoy the rents or profits realized from the property before the full purchase price (and any interest charged thereon) is paid to you.
- 4 I/We confirm that I/We will accept such title as you are able to give.
- 5 I/We acknowledge that:
 - a. I/We are fully acquainted with the property building and improvements and that the property is sold as it

stands and not with or subject to any condition or warranty, express or implied as to extent conditions, nature or fitness.

- b. neither you nor any other person is responsible for any defects whether latent or patent in the property,
- 6 I/We acknowledge and confirm that in the event of your findings that you are not able to complete the sale of the said plot for any reason whatsoever, the sale shall be cancelled by you and my/our only claim will be for the refund of any monies paid by me/us hereunder.
- 7 I/We acknowledge that you shall have the right to withdraw and cancel the agreement at any time and for any reason whatsoever before the transfer/conveyance is executed by the parties and my/our only claim will be for the refund of any monies paid by me/us hereunder.
- 8 I/We agree that I/We shall be entitled to take occupation of the property and/or become entitled to receive rents and profits as from the first day of the month next succeeding the one in which I/We shall have completed paying the purchase price (whether or not government consent shall have been received) and that the risk of loss shall then pass to me/us.
- 9 I/We acknowledge that your appointed solicitors shall be responsible for the preparations of all legal documents relating to the sale and transfer/conveyance and that I/We shall be responsible for all outstanding city rates, legal fees, costs, stamp duty and incidental expenses in respect of the transfer/conveyance of the plot to me/us.
- 10 I/We confirm that the sale to me/us is subject to Government consent which you shall be responsible for securing.”

This agreement was signed by the appellant on 4th May, 2001.

It was not disputed that on the 5th May, 2001 the appellant paid K250, 500.00 by cheque to the respondent as deposit for the property under purchase: see Exhibit SJ5. This was acknowledged by the respondent in its letter, Exhibit SJ2. On 31st May, 2001, the appellant paid, again by cheque, another K250, 500.00. It should be noted that these payments were in accordance with the agreement Exhibit SJ3: first payment of the 50% deposit to be made within 10 days of acceptance of the written offer and the rest with 30days thereafter unless waived by agreement in writing. In this respect therefore, we endorse the findings of the court below that Exhibit SJ3 was the basis of the agreement between the parties. Their relationship,

and actions were to be determined by this agreement. The cause of action must therefore, be determined by this agreement: Exhibit SJ3.

Having examined the basis of the originating summons and the issues that the court below was called upon to decide, we will now refer to what the judge below found to be the issues for determination. In his judgment, he said as follows:-

“ISSUES FOR DETERMINATION

The questions that have been isolated below arise from my reading of the Originating Summons before me and the arguments of the parties. The principle question though is whether, on the evidence adduced as a whole in this Originating Summons, NBS Bank is responsible for refunding to Mr Phekani the money which Mr Jussab received from Mr Phekani”.

There are of course other ancillary issues that will also be alluded to later in this ruling. However, it will suffice to put it here that, as I see it, the issues which do appear on the face of the originating summons can be summed up as follows:-

- (a) Having received full payment for title Number Limbe 377 from the plaintiff, was the defendant under a legal obligation to transfer good title to the plaintiff?
- (b) What are the consequences if any of the defendants alleged failure to pass on good title to the plaintiff?

I will now discuss the applicable law and the court’s findings on the questions for determination in this matter.”

This approach determined how the judge arrived at his decision.

The judge’s approach in effect changed the case. First and foremost is that it mixes the pleadings with the affidavit evidence. The pleadings raised three issues for declaration: first that the respondent was under a contractual duty to ensure passing of good title to the appellant, secondly that the property was illegally sold because the respondent failed to register the charge against the title, third and last, that as a direct consequence of the respondent’s failure to register the charge, and therefore the illegal sale of property, the appellant suffered and continues to suffer loss. The extent of the loss was detailed in the affidavit. The Judge in his approach however,

put the origin and extent of the loss as the principle issue. It is no wonder that he had dwelt so much on privity of contract between the appellant and Mr Phekani in relation to the respondent. Had he treated the details of the loss, as alleged in the affidavit, as a measure of the damages he most probably would have approached the issues differently. The issues in this case, in our view, were; the contractual obligations of the parties, failure of the respondent to register a charge and, therefore, the consequent or resultant loss. We find that the Judge in the court below relegated the main issues to ancillary ones. Further, he misled himself by examining whether the respondent had a legal obligation to transfer good title. Clearly, the issue was the contractual duty of the respondent to transfer good title. By referring himself to legal obligation, he unwittingly raised the standard. A legal obligation or duty is a matter of law or statute while as a contractual duty or obligation is a matter of mutual agreement between or among the parties.

It is clear that agreement between the parties was based on Exhibit SJ3. In his judgment the learned Judge below pointed out that:

“Indeed the entire agreement requires to be read as a whole. It will be seen that once read as one document it will come out clearly that conversion of title was not the exclusive domain of one party.”

We would have no difficulty in accepting this as a correct statement of law. However, we have immense difficulty with how the Judge interpreted Exhibit SJ3.

It is on record that the respondent’s Legal Services Manager, by his letter Exhibit SJ1, transferred certain documents to the appellant on 25th of June, 2001. The appellant was required to acknowledge receipt thereof by signing. The cover document apparently did not bear any signature by or on behalf of the appellant. This aside, we acknowledge that this document was not disputed. The court below held that this document and thereby the transfer of the documents cited therein was sufficient to enable the appellant to effect the conveyance of the property to himself. It must be mentioned at the outset however, that the “Conditions of Sale and Acceptance”, Exhibit SJ3, did not require nor mention that the respondent shall send any documents to the appellant for him to effect the conveyance to himself. In our view Exhibit SJ3 was clear, that; firstly, the appellant would be require

to accept such title as the respondent would be able to give; clause 4. Could the sending of documents, as said in Exhibit SJ1, be deemed to give a title to the appellant? We don't think so. Secondly although the appellant was entitled to take occupation and/or receive rents or profit on the property, thereby assuming the risk of loss, clause 8, it is clear that this on its own did not pass legal title to him. It was still a requirement that the respondent should obtain Government consent to effect a transfer or conveyance. This responsibility lay with the respondent: clauses 7, 8 and 10. It must be borne in mind that the respondent enjoyed the right to withdraw or cancel the agreement at anytime and for any reason whatsoever before transfer or conveyance. Should Government consent have been refused, the respondent would have relied on these provisions. Thirdly, the respondent was responsible for appointing a lawyer who would be responsible for the preparation of all legal documents relating to the sale and transfer/conveyance. The appellant had corresponding duty to pay outstanding city rates, legal fees, costs and all incidentals expenses in respect of the transfer or conveyance.

All these clearly show that several issues had to be dealt with before transfer or conveyance. Although the appellant had or was entitled to possession of the property, he did not have legal title to it. It was argued in the court below that the appellant did not plead the negative on the part of the respondent, that is, that the respondent never appointed lawyers, nor pass on the bills of expenses for city rates, legal fees or costs of transfer or conveyance. The Judge below accepted this. With due respect, this amounted to selective reading of Exhibit SJ3. The Judge below had directed that the document should be read as a whole. Further he found that conveyancing was not a domain of one party. It is strange that he went back on this and found that the responsibility lay with the appellant, alone, to plead and prove the negative. The respondent swore in its affidavit that it concluded the sale; by performing its obligations as per Exhibit SJ3, this was in paragraphs 4, 5, 6 and the ill fated paragraph 7. Did it prove that it appointed a lawyer who prepared all legal documents relating to the sale and transfer/conveyance? Did it prove that a bill for outstanding city rates, legal fees and costs was prepared which the appellant refused to honour? No. The Judge below said that he who alleges must prove, however, there was no basis for his finding that the respondent proved that it performed its part of the agreement.

What comes out clearly is that respondent received the purchase money and did nothing else in terms of the agreement Exhibit SJ3. What it did; sending documents to the appellant, was not part of the contract. Consequently they cannot come to this court and say that the appellant was given all documents to enable him to transfer title to himself. The learned Judge rightly found in the court below, as he also did in the case of *Zeyaur Rahman V DAL Express H/C Civ. Cause 423 of 2005* (unreported), that parties to a written contract are bound by the terms of the contract. This is amply fortified by the findings of this court in the case of *NBS Bank Ltd V Henry Mumba, MSCA Civ App. 26 of 2005*, that courts should be slow to intervene contrary to the express desire of the parties to a lawful agreement. We find that the appellant acquired an equitable right in the property, but never got legal title. This was still dependent on further acts to be performed by the respondent, subject to Government consent, and the appellant himself paying outstanding city rates, legal fees and costs of the transfer/conveyance. We therefore, find that the respondent was under a contractual duty to pass as good a title as it could give to the appellant but had failed to do so.

The second point raised by the appellant was that of registration of the charge by the respondent.

It was not disputed that the appellant's last payment was on 31st May, 2001, and therefore, that he was entitled to occupancy, rents or profits of the property from 1st June, 2001. Further that, as per Exhibit SJ3, clause 8, the risk of loss passed on to him. The court below accepted that the parties had agreed, as per clause 9 of Exhibit SJ3, that an appointed lawyer of the respondent would prepare the necessary documents for transfer/conveyance of the property. The court however found that as between them, they did not agree on when such transfer/conveyance would be executed. The court below therefore concluded that time was not of the essence to the agreement, and that since the risk had passed to the appellant he must bear the blame for the loss. The Judge was of the view that, as the purchaser, the onus was on the appellant to ensure that he obtained good title. The reasoning of the Judge is difficult to follow on this point but what is clear is that he deliberately ignored the express terms of clause 9 of the Exhibit SJ3. He preferred to rely on the so called "standard and usual practice" as he knows it. We do not think he was justified to do so. While we accept his view that the time for completing the transaction was not fixed, we find it difficult to accept that it was open ended and that the prime mover should have been the

appellant. Where no specific time is stipulated for any transaction prudence would dictate that the transaction be concluded within a reasonable time. What amounts to reasonable time will depend on the facts of the case, and the practice in such transactions.

Indeed the transaction opened in April, 2001. The appellant deposed that he resold the property to Mr Phekani in 2005, notified the respondent in 2008 by then, in 2007, the property had been transferred to a Mr Mulli by a Mr Katopola. The court below was of the view that such a “sale” was occasioned, first, by the delay by the appellant to effect the transfer of title, and secondly, by the default of the adjudicating officer in registering the charge. The court below found that while the adjudicating officer complied with Section 6 of the Adjudication of Title Act, that is, issuing of notice of the adjudication section, he failed to comply with Section 16(1) (c) of the Act, to register the charge over the property that the respondent had. Is such a finding supported by the evidence.?

The evidence of the respondent clearly shows that it did not register the charge on the land. According to Exhibit MM1(a), it was the adjudication officer who noted that there was default on the part of the respondent and sent it the claim forms. Further, according to Exhibit MM1(b), the respondent after filling the said claim forms forwarded them to the Principal Adjudicating Officers without title deeds or copies thereof. It informed the Principal Adjudicating Officer that the title deeds were with it’s lawyers then, Messrs Saidi and Company, and directed the Principal Adjudicating Officer to get in contact with it’s lawyers directly. There was no instruction or directive to Messrs Saidi and Company on this issue. Further there was no evidence that Messrs Saidi and Company, their agent, submitted or made copies of the title deeds for the Principal Adjudicating Officer or, indeed, that the respondent or Messrs Saidi and Company appeared before the Adjudicating or Records Officer in terms of Section 8 of the Act to lay their claim. Further there is no evidence that, during the adjudication period or indeed after, when the notice of the completion of the exercise was published in the Gazette, the respondent or their lawyers verified the records for accuracy in terms of their interests. We find as a fact, that the respondent never verified the record. Had it done so it would have discovered that the charge was not recorded and would have objected or appealed within the stipulated period in accordance with Section 20 and 23 of the Act. We bear in mind that the adjudicating exercise was in 1992, eleven years before the sale of the land to the appellant and 15 years before a

Mr Katopola purportedly sold the land to a Mr Mulli. It would appear that the respondent took a very casual attitude towards the exercise. In the case *Khrishna Vishnu Patel and another V The Minister of Home Affairs Misc. Civ. Cause 24 of 2001* the court held that the onus to comply with the procedure for filling and submitting prescribed official forms lies on the applicant and that it should not be taken lightly. One cannot be heard to say he or she directed a Government officer to transact with a third party. It is not the responsibility of the Government officers to comply with the procedures on behalf of citizens. In this respect therefore, we find that a citizen, be it a natural or cooperate person, who fails to submit official document, in the manner required cannot be deemed to have complied with the law. Put simply, the respondent did not register the charge.

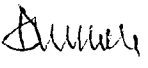
It is on record that the title deeds in issue were with Messrs Saidi and Company, in 1992. There was no evidence in the court below or indeed before this Court as to who had custody of the same thereafter. Further there is no explanation as to how the title deeds, if any, ended up in the hands of a Mr Katopola for him to effect a sale and transfer to a Mr Mulli. It is not even clear whether the land sold or transferred was freehold or leasehold. It is interesting to note that the documents in respect of the sale and transfer of land to a Mr Mulli do not quote any deed number. Since the respondent could not tell who was in custody of the title deeds after Messrs Saidi and Company, could not explain how, if at all, the deeds left its custody or that of its agents, and it was submitted and not disputed, that it was the legal firm of the former Legal Services Manager of the respondent that handled the transaction between a Mr Katopola and a Mr Mulli, this court can not be satisfied that the respondent was capable of transferring title.

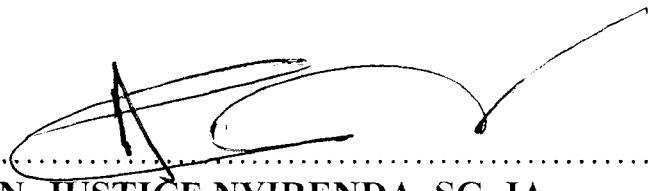
The last issue was whether the appellant suffered loss as a direct result of the non registration of the charge. We have little difficulty in coming to a conclusion on this. We found that the respondent took a very casual attitude towards the registration of the charge, and the same casualness continued when the property was sold. It ignored to conclude the transaction within a reasonable time. The respondent is one of the leading banks in this Country. From its standard document, Exhibit SJ3, it was aware of the legal risks and consequences involved in land transactions. The appellant is a private citizen. There was no evidence to suggest that he is a land jobber and therefore versed in the legal risks and consequences of land transactions. We would, therefore, be very slow to impute legal knowledge on his part. On the other hand, we find that the respondent was aware that purchase of

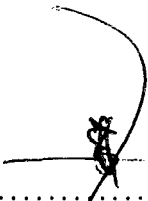
landed property is an investment and that unreasonable delay in legally concluding land transactions can cause loss. In this case we find that the appellant suffered loss.

Having heard the submissions and considered the evidence in the court below we find that this appeal must succeed. It is our judgment that the respondent was under contractual duty to transfer as good a title as it could give to the appellant, it failed to register the charge and that the appellant suffered loss. Further, we find that the judgment of the Court below was against the weight of the evidence. The appellant therefore is entitled to damages; to be assessed by the Registrar, and costs in this court and the court below.

Pronounced in open Court this 28th day of July 2010 at Blantyre.

Signed: 
HON. JUSTICE TAMBALA, SC, JA

Signed: 
HON. JUSTICE NYIRENDA, SC, JA

Signed: 
HON. JUSTICE TWEA, JA