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**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**MISCELLANEOUS CIVIL CAUSE NO. 89 OF 2016**

**BETWEEN:**

IREEN-YVONE C. ZULU AND 4 OTHERS.....CLAIMANTS

AND

AGNESS SHELLA.....DEFENDANT

**CORAM: HON. JUSTICE POTANI**

Ms. Katangwe/ Thindwa, Counsel for the Claimants

Mr. Mlauzi, Counsel Defendant

Mr. Mbekeani, Court Clerk

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**RULING**

The bone of contention in this matter relates to Plot Number SW8/744/429 being Title Number Soche East KS7/2.

On October 13, 2016, the claimants approached the court with an *Ex Parte Summons to Remove Caution*. The summons indicated that it was taken pursuant to Order 128 of the Registered Land Act. Apparently, the reference to Order 128 was an error otherwise it should have been Section 128.

The summons was filed with a sworn statement of Ireen-Yvone C. Zulu. The court declined to attend to the summons *ex parte* and accordingly directed an *inter partes* hearing to be heard on November 11, 2016. In readiness for the hearing, the defendant filed and served a sworn statement in opposition. She also filed and served a *Notice of Preliminary Objection* and a sworn statement in support thereof.

The court heard arguments from the parties on the preliminary objection and reserved its ruling thereon. Before the delivery of the ruling, the claimants on February 9, 2017, made an *ex parte* application which was granted staying the sale of the property. It should be stated that the court was persuaded to grant the *ex parte* order staying the sale of the property considering that the rights of the parties were yet to be determined. Subsequently, the defendant filed an *ex parte* application to vacate the order staying the sale of the property and to dismiss the claimants' action for want of prosecution. The court declined to grant the application as granting it would have meant allowing the property to be deisposed of before the rights of the parties were determined. As a way forward the court directed that the parties should file with the court and serve on each other written submissions on the substantive application by the claimants to remove caution. The court now has before it those arguments.

As matters stand, the logical manner to proceed would be to first deal with the defendant's preliminary objection to application to remove caution and should the objection be sustained it would mean that the claimants' application to remove caution would automatically fall off hence there would be no need to consider the parties' written arguments filed and served on the direction of the court.

The pertinent facts are that in 1999, the one Wisdom Yotamu Shella, then husband to the defendant, acquired the disputed property. Later in September 2011, Wisdom Yotamu Shella sold the property to Melia Mugawa Zulu now deceased who happened to have been a mother to the claimants. It so transpired that the marriage between Wisdom Yotamu Shella and the defendant was dissolved by a competent court of law whereuopn, among others, it was ordered

that the property (house) should be sold and that the defendant should get 35 percent of the proceeds. In order to protect her 35 percent share in the property as ordered by the court that dissolved the marriage, the defendant placed a caution on the property on November 3, 2015.

The essence of the defendant's preliminary objection to the claimants' application to remove the caution is that the claimants are strangers to the sale transaction between their deceased mother, Melia Mugawa Zulu and the defendant's ex-husband, Wisdom Yotumu Shella hence have no standing to commence these proceedings in their own right and that if at all, they need Letters of Administration and proceed with the action on behalf of the estate of the deceased.

In response to the objection, counsel for the claimants relies on the case of **Laison Kalangwiche v The Registered Trustees of Kenani Trust** High Court Principal Registry Civil Cause No. 6 of 2001 in which it was held that a person with a beneficial interest in property of a deceased person has standing on his own behalf and not on behalf of the deceased estate to commence an action to protect that interest. It has been submitted by counsel for the defendant that the decision in the case relied on by the claimants being one by a court of equal jurisdiction is not binding on this court. It has further been argued the two cases should be distinguished as that case related to an application for an injunction which does not involve determination of the rights of the parties while the present case is about a caution which involves determination of those rights.

It is the considered view and position of this court that the decision in the *Laison Kalangwiche* case stands as good law. There is no basis for this court to depart from the holding in that case. The argument that that case and the present case should be distinguished on the basis that the former related to an application for an injunction which does not involve determination of the rights of the parties while the present case relates to removal of a caution which involves determination of the right of the parties, is unattainable. It is unattainable because what is critical is that the party commencing the action should have a beneficial interest in the subject matter of the action. In the end result, the defendant's preliminary objection is abortive.

Moving on to the central issue of whether or not the caution placed by the defendant should be removed as per the claimants' prayer, the court reckons that the parties have put forward formidable and spirited arguments on a number of

issues they consider beg consideration and determination by the court. However, looking at the facts of the matter with a discerning mind, the issue can easily be resolved by zeroing in on the events leading to the entering of the caution by the defendant.

It is clear from the facts that the defendant placed the caution in order to protect her 35 percent stake in the property as awarded by the court that dissolved her marriage with her ex-husband who, as it turned out, sold the property to the claimants' deceased mother.

Evidently, the property was sold in September, 2011, well before the order of the court was made in August, 2012. It has been argued by counsel for the claimants that in that case, the order of the court was academic as the property had already been sold; so too at the time the caution was placed in on November 3, 2015, hence the caution cannot stand.

It is important to observe that there is no dispute from the facts that in the course of the proceedings leading to the divorce of the defendant's marriage, the court issued a protection order that restrained the defendant's husband from disposing of the property herein. The protection order is dated September 13, 2011. Interestingly, the sale agreement of the property is dated September 15, 2011. It has been submitted by counsel for the defendant that the defendant's husband proceeded with the sale in defiance and contempt of the protection order and therefore the sale was tainted hence the caution should be sustained. On the other hand, counsel for the claimants has argued that the buyer of the property was a *bona fide* purchaser without notice hence the caution should be removed.

The question the court considers to be central in the determination of the matter is whether the buyer of the property had notice of the order of the court restraining the disposal of the property. There is a suggestion from the defendant, that the buyer was aware of the order through Soche Police. Observably, this has only come through counsel's submission. There is no evidence either from the defendant or the police that the buyer was made aware of the restraint/protection order. It is unfortunate that the defendant's husband chose to defy a court order but is so far as the buyer is concerned, she was not party to the defiance of the court order. The court would therefore uphold the submission by counsel for the claimants that their mother was a *bona fide* purchaser without notice. The application to remove caution is therefore

granted. Indeed from the facts in totality and the law, the defendant's remedy lies in putting forward a claim against her ex- husband for her 35 percent share in the property.

On costs which are a matter in the discretion of the court, the circumstances of this case are such that fairness would demand that each party should bear its own costs.

**Made this day of October 21, 2020, at Blantyre in the Republic of Malawi.**



**HEALEY POTANI**

**JUDGE**