

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 275 OF 2002**

**BETWEEN:**

LANDED PROPERTY AGENTS.....PLAINTIFF

- and -

SINGH TRUST INVESTMENT.....DEFENDANT

**CORAM: TWEA, J.**

Kasambala, of Counsel for the Plaintiff

Absent, of Counsel for the Defendant

Nsomba, Official Interpreter

**JUDGMENT**

This is an originating summons taken out by the plaintiff that the court should make the following determinations:

- (a) Whether there was a contract for sale of land known as Kambiri Holiday Resort.
- (b) Whether the defendant were in breach of such contract by not paying 20% deposit within 48 hours or within a reasonable time after the sale.

© Whether the plaintiff is entitled to damages for breach of contract.

(d) Whether the plaintiff is entitled to costs for this action.

The summons was supported by an affidavit sworn by Mr. Kasambala of Counsel for the plaintiff to which the defendant filed an affidavit sworn by Tochi S. Gill in opposition.

I must mention at the outset that on the date appointed for hearing the defendant did not turn up notwithstanding service on it. The plaintiff applied for and were granted leave to proceed in the absence of the defendant after showing proof of service on the defendant.

The facts of the case are straight forward and not disputed.

It is deponed by the plaintiff that one Messrs Lawson and Company a firm of legal practitioners instructed them to conduct a sale of really known as Kambiri Lakeshore Hotel in Salima District on behave of their client Messrs Indebank. The plaintiff for the purpose conducted an auction. At the said auction, one Mr. Sam Singh of the defendant made the highest and the successful bid. The said bidder signed an acknowledgment of the bid undertaking to pay 20% of the bid price within 48 hours from date of sale: 21st April, 2001. This acknowledgment was exhibited as Exhibit RK1.

It was further deponed that despite reminders to the defendant the 20% deposit was not made nor was any payment made at all. The plaintiff was obliged, as a result thereof, to resale the property to the next highest bidder thereby losing K5.5 million. The plaintiff now sues the defendant for defamation as prayed in respect of the K5.5 million.

As I mentioned earlier the defendant does not dispute the facts. In the affidavit in opposition, the defendant avers that the said Mr. Sam Singh is now deceased and that he had no authority to bend the trust, as the trust did not consent to the said contract. Further, it is contended that the plaintiff failed to mitigate its loss by not re-advertising and conducting a further auction sale.

Coming back to the facts in this case, the bid having been accepted at the fall of the hammer, as evidenced by Ex.RK1 of the plaintiff, there was a contract of sale between the plaintiff and the defendant. The defendant had, according to the said exhibited, undertaken to pay 20% accepting the terms of the sale. This was not done. Two days later, the defendants were reminded of the undertaking and requested to make the 20% deposit but to no avail.

The defendants in their affidavit averred that the said Mr. Sam Singh now deceased had no authority to enter into the sale agreement and therefore could not bind the defendant.

Looking at the facts of this case. I find that the contract is not denied rather it is the validity which is challenged. Be this as it may, since the case of **Royal British Bank vs Turquand (1856)** 6 E & B327 outsiders to a company are protected by the evidential maxim-"omnia presumuntur rite et solemniter esse acta" - **that everything is presumed to have been done properly and solemnly which ought to have been done so.** The outsider therefore need not be concerned with internal irregularities of a company. In any case I agree with the plaintiff submission that this irregularity has not been established by exhibiting the memorandum or articles of the defendant. I find that the defendant cannot now rely on this irregularity. In my view that plaintiff are entitled to damages for breach of the contract.

I must mention at the outset that the originating summons merely seeks determinations of the legal position. However, in their affidavit the plaintiff avers that the damages sought are equivalent of the difference between the defendant bid and the final purchaser. It was submitted that the final purchaser was the second highest bidder at the auction sale and thus the issue of re-advertising or mitigation of damages as alleged by the defendant should not apply.

I have examined the affidavit sworn on behalf of the plaintiff and the exhibits thereto. I find that it does not disclose who the purchaser was or when the subsequent sale was done. In their submission the plaintiff submitted that the purchaser was the second highest bidder, but did not disclose when the sale was made. In my view these questions and answer are pertinent to determining whether there was any mitigation or not. The plaintiff was aware that the defendant put up mitigation of damages in defence and I am of the view that if it had anything to prove otherwise, it would have sworn a supplementary affidavit. There being no disclosure on this, a mere assertion that the purchaser was the second highest bidder and there being no other evidence as to why they could not re-advertise, I find that they are not entitled to claim damages as specified in their affidavit. They are entitled to general damages to be assessed by the Registrar after hearing the parties on the issue.

The defendant condemned to costs for this action.

**Pronounced** in Chambers this 27th day of June, 2002 at Blantyre.

E.B. Twa

**JUDGE**