

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 3086 OF 2002**

**BETWEEN:**

AHMED YUSUF DASSU.....PLAINTIFF

- and -

-

WAYESI RUPIYA (male).....DEFENDANT

**CORAM: CHIMASULA PHIRI J.**

T. S. D. Chirwa of Counsel for the plaintiff  
A. Mwenifumbo of Counsel for the defendant  
M. H. Fatch, Court Clerk.

**RULING**

Chimasula Phiri J,

This is an application made by the defendant under Order 113 Rule 8 of the Rules of Supreme Court for an order that the order for possession made on 16th December 2002 requiring the defendant to unconditionally surrender possession of parcel of land known as Lot No. 14 Mitsidi, Blantyre to the plaintiff be set aside. There is an affidavit in support of this application sworn by the defendant.

The affidavit evidence is as follows:

The defendant bought the land in dispute on 1st August 1974 from Mr V. H. Weaver at a price of K3,000.00. An agreement is exhibited signed by the defendant and his former wife Betty Machila. At the time he bought the said land there were two houses built on that land which were eventually occupied by the defendant and his family. Since 1974, the defendant lived on this land peacefully until 1982 when he built another house on the land. The plaintiff claims to have bought the land from Mrs Betty Machila in the year 2000. The defendant has also exhibited Ruling of Justice Chipeta in civil cause number 3311 of 2000 between

Betty Machila vs Wayesi Rupiya where the judge observed that the plaintiff had been wrong in commencing proceedings to recover possession of land using summary proceedings under Order 113 of the Rules of the Supreme Court. The judge noted that the defendant at least initially entered in occupation under licence or consent of V. H. Weaver, the predecessor in title who expressed wish to sell this property to the defendant and his then wife, Betty. The judge rightly held that the matter was out of the realm of Order 113 originating summons. The judge also noted that the defendant produced some old tattered letters and documents showing that the defendant was clearly part and parcel of the said dealings with Mr V. H. Weaver. The judge said that the effect of this would be to throw question marks on the Statutory Declaration obtained by Betty Machila. The judge dismissed the originating summons on 21st November 2000. Later Betty Machila instituted fresh proceedings in civil cause number 3780 of 2000 where Justice Twea advised the defendant to seek legal representation. The defendant was for a moment then represented by the Department of Legal Aid. However, due to non-attendance, an order was made for the committal of the defendant. Later in 2002, the plaintiff served on the defendant a summons for an order for possession. On 16th December 2002, this court ordered the defendant to surrender possession of the land to the plaintiff. The plaintiff exhibited a Deed of Conveyance made between Betty Machila and the plaintiff as a Trustee. This conveyance relates to the same land in dispute. The court proceeded to hear the matter on 16th December 2002 in the absence of the then lawyers of the defendant because no explanation had been given for their absence. In May 2004, this court deferred another committal order on condition that the defendant should apply to set aside the order of 16th December 2002. This gave birth to the current application. At the beginning of this summons, the defendant produced a document showing that there was an agreement for the sale of this parcel of land by Mr Weaver to the defendant and his wife. It was made on 1st August 1974. The authenticity of this document is not challenged. The defendant has further stated that his inability to challenge the proceedings has been due to his lawyers being unable to attend court on due dates. The defendant stated that it not his wish to deliberately flout court order. He submitted that in the light of the Sale Agreement of 1st August 1974, the defendant has title to this land and therefore a good defence to the plaintiff's claim. He contended that the plaintiff cannot get good title from a unilateral sale by Mrs Betty Machila without the consent of the defendant. He prayed that the order of 16th December 2002 be set aside.

Mr Chirwa argued that there has been undue delay in bringing this application. He submitted that the defendant received advice from the court to seek legal representation but that he was stubborn and never acted on such advice.

Whilst agreeing that there has been inordinate delay, I probably would excuse that delay on the following grounds. Firstly, it is clear that his lawyers in Department of Legal Aid and Mr Kalua of Mbendera, Chibambo & Co then, did not offer best service to the defendant. It is clear that it has always been his wish to defend his title and possession of this land. Secondly, the periods he had been committed to prison for wilful disobedience of court orders contributed to the delay in that he was unable to make applications whilst he was in custody. Thirdly, as observed by my brother judges, the level of literacy of the defendant is very low. He was unable to appreciate court process. Therefore, I will still consider the application on its merits despite the associated delay in bringing it.

Mr Chirwa has submitted that the defendant merely produced a Sale Agreement and not a Deed of Conveyance. He contends that there is no evidence that title passed to the defendant and his wife. On the other hand, there is evidence to show that Mrs Betty Machila sold land to the plaintiff. Therefore, the plaintiff has good title to the land. It was observed by Justice Chipeta that the effect of the Sale Agreement of 1st August 1974 would cast doubt on the credibility of the Statutory Declaration which Mrs Betty Machila obtained from the Department of Lands. It is well settled law that for one to be out of reach of challenge, a search for legal title to land must be over 40 years. It will be seen that by going back to 1974 which is less than 40 years, it is clear that the defendant had association with this land through an agreement of sale by Mr Weaver to the defendant and his wife. Therefore, the wife alone could not effectively pass title without consent of the defendant. I find that the defendant has a defence on merit and as such, he should be given an opportunity.

Therefore, I set aside the order this court made on 16th December, 2002 with costs to the plaintiff. The defendant should file his defence to the action within 14 days.

**MADE** in chambers this 31st day of August, 2004 at Blantyre.

Chimasula Phiri  
**JUDGE**