

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 638 OF 2004**

BETWEEN:

PAUL MSATIDA.....
PLAINTIFF/RESPONDENT

and

DAVID KWENDA
DEFENDANT/APPELLANT

CORAM: KATSALA J.
Tandwe of Counsel for the plaintiff/respondent
Gulumba of Counsel for the defendant/appellant
Nsomba, Court Clerk.

RULING

Katsala J,

This is an appeal by David Kwenda against an order made by the learned Assistant Registrar on 31st March 2004 granting possession of property known as Plot number LE993 to Paul Msatida. The order of possession was made following the plaintiff/respondent's application under RSC Order 113, r.1.

The facts of this case as emerge from the affidavits filed by the parties are as follows. The plaintiff and the defendant are next-door neighbours at Mpingwe residential area in Limbe in the City of Blantyre. The plaintiff owns property known as Plot number LE 993

being Title number Limbe East 748 and the defendant owns Plot number LE 992 being Title number Limbe East 747. These properties comprise *inter alia*, dwelling houses that are also known as house number F36 and F37, respectively. It is worth mentioning that these houses are part of a residential estate previously owned by Malawi Railways Ltd, a public enterprise, and used as residences for its staff. The defendant was one of such staff members and was allocated the aforesaid property.

It would appear that Malawi Railways Ltd was privatised and changed its name to Central and Eastern Africa Railways Ltd. As part of the privatisation exercise, the residential houses were offered for sale initially to the employees in occupation but subsequently to “outsiders”, that is, members of the general public. Thus the defendant acquired the aforesaid property.

On the other hand, the plaintiff is not a former employee of Malawi Railways Ltd. He is one of the “outsiders” that acquired some of the properties. It would appear that during the Malawi Railways Ltd days the plaintiff's property was occupied by a Mr Mukhwapa. He was the defendant's neighbour for a long time.

When the decision to sell the properties was made each of them was valued depending on what it comprised. Both F36 and F37 were valued at K750,000.00 each. As per exhibit "JSG1" attached to the affidavit of counsel for the defendant, both properties were described as comprising "2 bedrooms, lounge, dining, laundry and 3 roomed servant quarters". The plaintiff acquired his property at a consideration of K307,251.00 while the defendant acquired his at K307,257.62.

Now in this action the plaintiff claims that his property comprises a dwelling house and two servant quarters. He has exhibited a deed plan dully approved by the Department of Surveys dated 6th December 2002 which shows that there are two similarly shaped structures adjacent to each other situate close to the boundary with the defendant's plot and a smaller structure situate towards the centre of the plot. The parties agree that these two similarly shaped structures are two servant quarters. The plaintiff says the defendant is wrongfully occupying one of the servant quarters, which is closest to his (the defendant's) house. He is using it as his servants' quarters. It is this occupation that is the subject of these proceedings.

The defendant contends that his occupation is not wrongful. In fact, he says the servant quarters he is occupying are not part of the plaintiff's property. They are part of his property. He says he has occupied these servant quarters since the property F37 was allocated to him by his former employer, Malawi Railways Ltd. The defendant says the property he acquired comprises a main house and the servant quarters he is occupying. He has exhibited a layout plan of the properties in this residential area to support his claim. This layout plan shows that both F36 and F37 comprise one main structure (a dwelling house) and one smaller structure (servant quarters) each.

The defendant submits that this matter cannot be determined under RSC Order 113 because there are serious disputes of facts. He further says that he entered into occupation

of the disputed servant quarters with the licence and consent of Malawi Railways Ltd, the plaintiff's predecessor in title, as such he is not a trespasser as envisaged under the RSC Order 113, r.1.

After hearing arguments from counsel the learned Assistant Registrar entered judgment for the plaintiff and ordered that the defendant should deliver up possession of the servant quarters within 21 days. It was his view that the matter fell within the ambit of the RSC Order 113, r.1. He found that there was no dispute that Plot number LE 993 belongs to the plaintiff and held that if the defendant occupied part of it under the licence or consent of Malawi Railways Ltd, then that licence or consent expired and/or terminated on the sale of the property to the plaintiff. It is this decision that the defendant now appeals against.

I have had the benefit of reading the record of the proceedings before the Assistant Registrar and also his ruling apart from hearing the parties in argument. They basically repeated the arguments they advanced before the learned Assistant Registrar.

Let me start by looking at RSC Order 113, r.1. It provides;

"where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."

This rule envisages two scenarios;

- a) of a person who enters into occupation of land without licence or consent of the person entitled to possession of the land or any predecessor in title of his; and
- b) of a person who has entered with licence or consent but remains in occupation of the land without licence or consent of the person entitled to possession of the land or any predecessor in title of his.

The plaintiff argues that the defendant falls within the second scenario. He entered into occupation with the consent or licence of the plaintiff's predecessor in title but remains in occupation without the licence or consent of the plaintiff who is now entitled to possession having acquired the property from Malawi Railways Ltd.

The defendant argues that he does not fall under either of these scenarios. He submits that he has always been in occupation of the land in dispute with the licence of Malawi Railways Ltd who sold the land to him. Consequently, he has never needed the consent or licence of the plaintiff in order to continue occupying the land.

In *Bristol Corporation v Persons unknown* [1974] 1W.L.R. 365, Pennycuick V-C held that it is clear beyond a peradventure that RSC Order 113 applies to cases where a person

who is alleged to be a trespasser was previously on the premises by licence. Therefore if all that the defendant were saying is that he occupied the land in dispute on the licence of Malawi Railways Ltd, the plaintiff's predecessor in title, as such he cannot be evicted using the summary procedure under this Order, I would have been quick to say that his reasoning is grossly erroneous. In my view the licence to occupy the premises granted by Malawi Railways Limited expired and/or terminated, not when the property was sold to the plaintiff as held by the learned Assistant Registrar, but rather when the plaintiff, being the person now entitled to possession of the property, demanded possession thereof from the defendant. From that point onwards the defendant can lawfully occupy or continue to occupy the property only with the licence or consent of the plaintiff.

But that is not all that the defendant is saying. His argument goes further. He says he is entitled to occupation because he owns the servant quarters, the same being part and parcel of the property he purchased from Malawi Railways Ltd. His claim for occupation is therefore not based on licence or consent but on ownership. He says he is entitled to possession in his own right.

As I have already indicated both parties have exhibited layout plans/maps for the residential area which contain conflicting information on what the parties' properties consist of. The learned Assistant Registrar preferred the map exhibited by the plaintiff to the location plan exhibited by the defendant and held that the servant quarters in dispute is part of the plaintiff's property and accordingly entered judgment for the plaintiff. With respect to the learned Assistant Registrar, it is my considered view that there is not enough evidence on the affidavits to support his preference. The dispute as to which of the maps and or location or deed plans is correctly depicting the parties' properties, in my view, cannot be resolved on the basis of the affidavit evidence. There is need, in my view, to establish whether the boundaries of the properties are as demarcated by Malawi Railways Ltd or not. If the boundaries were maintained when selling the properties then the defendant might be making a rightful claim but if they were not then the plaintiff's claim might be right. In this respect it may be necessary to ascertain the positions of the beacons marking the boundaries of the two plots. It may also be necessary to establish whether the properties were sold as described during the valuation exercise or not. It is therefore obvious to my mind that there is a real dispute which cannot be resolved on affidavit evidence available on the case file. There is need for a full trial.

Where the plaintiff is aware of a real dispute with the occupier, he should not use the summary procedure under RSC Order 113, *Filemart Ltd v Avery* [1989] EG 92. The dispute in the instant case was very apparent to the plaintiff. He knew that the defendant is claiming ownership of part of his land, the servant quarters. The plaintiff should not therefore have proceeded under this Order. In my judgment, with due respect to the learned Assistant Registrar, this matter is outside the ambit of RSC Order 113.

In the circumstances, and for the reasons I have given, the appeal succeeds. I set aside the order of possession made by the learned Assistant Registrar. In terms of RSC Order 28, r.8, I order that the matter should continue as if begun by writ. The parties are at liberty to let the affidavits stand as pleadings or to serve new pleadings. Costs, both here and

below, are for the defendant.

Made in chambers at Blantyre this 31st day of August 2004.

J Katsala
JUDGE