

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 286 OF 2005**

**BETWEEN**

BENSON TEMBO.....PLAINTIFF

AND

FINANCE BANK OF MALAWI LTD...1<sup>ST</sup> DEFENDANT

ASLAM GAFFAR.....2<sup>ND</sup> DEFENDANT

**CORAM:** CHIMASULA PHIRI, J.

Miss H. Phiri, of Counsel for the plaintiff

Chalamanda, of Counsel for the 2<sup>nd</sup> defendant

Jere, Clerk to the Court

**RULING**

***Chimasula Phiri J,***

This is an application by the 2<sup>nd</sup> defendant seeking to set aside an order of mandatory injunction that was granted to the plaintiff. The application was held and granted on 12<sup>th</sup> July 2005 but reasons for the order were reserved and will be dealt with in this formal ruling.

## **Background**

The plaintiff applied for a mandatory order of injunction which sought to compel the 1<sup>st</sup> defendant bank and any other person in occupation of 0.4616 hectares of land situate at Chilembwe village in Mangochi district particularly described and delineated on Survey Deed Plan number 9657/98 in a lease registered under Deed Number 77305 in favour of Mrs Gladys Freda Hytenget and mortgaged to the 1<sup>st</sup> defendant bank under Deed Number 77724 to surrender the possession of the said hereditaments to the plaintiff. The plaintiff further sought an order of injunction restraining the 1<sup>st</sup> defendant bank from selling the said land to any person and transferring the same to third parties without the plaintiff's assent. There was some pendulum tripartite movement of processes between the plaintiff and the New Building Society and the 1<sup>st</sup> defendant bank. Finally on 7<sup>th</sup> October 2004 the administrator's of the deceased estate of Gladys Hytenget called on the 1<sup>st</sup> defendant bank that they wanted to redeem the property and had brought with them a cheque in full settlement of the outstanding liability with the 1<sup>st</sup> defendant bank. In view of the fact that the New Building Society was not proceeding to pay the balance of the purchase price for the sale of the property to the plaintiff and further that the 1<sup>st</sup> defendant bank was selling the property in exercise of its right of sale as chargee, the 1<sup>st</sup> defendant bank deemed it fit to accept the redemption of the property. The 1<sup>st</sup> defendant bank contended that it did not sell the property to another person but merely discharged its interest in the property after the purpose for which the 1<sup>st</sup> defendant's bank was selling the property in exercise of its right of sale as chargee, the 1<sup>st</sup> defendant bank deemed it fit to accept the redemption of the property. The 1<sup>st</sup> defendant bank contended that it did not sell the property to another person but merely discharged its interest in the property after the purpose for which the 1<sup>st</sup> defendant's interest had been satisfied.

Nonetheless the Court ordered on 13<sup>th</sup> April 2005 that the plaintiff be allowed to proceed with the purchase of the property. The Court granted a mandatory injunction order that the 1<sup>st</sup> defendant bank should complete sale of the property to the plaintiff within 60 days. The Court also granted an injunction order restraining the 1<sup>st</sup> defendant bank from selling the property to third parties. Lastly the Court granted a mandatory order of injunction requiring the 1<sup>st</sup> defendant bank and/or any other person in possession of the said property to surrender the same to the plaintiff within 21 days after completion of the sale.

In the execution of the Court's order, the plaintiff obtained an order of eviction against the 2<sup>nd</sup> defendant on 6<sup>th</sup> June 2005. The order reads partly as follows:-

“it is adjudged that Mr Aslam Gaffar who is currently occupying the cottage on the said property do vacate and surrender the same to the plaintiff's possession in accordance with the said order dated 13<sup>th</sup> April 2005 with costs.”

The second defendant was all along not a party to the proceedings and was very surprised with the order of eviction since he was in occupation of the property.

On 23<sup>rd</sup> June 2005 the 2<sup>nd</sup> defendant was granted leave to apply to set aside judgment order of 13<sup>th</sup> April 2005. The application was filed on 29<sup>th</sup> June 2005 and held on 12<sup>th</sup> July 2005. The application is supported by an affidavit of the 2<sup>nd</sup> defendant. He has deponed that he is the person in possession and occupation of the property called Nadi's Cottage identified by Deed Plan Number 77305 at Chilembwe Village in Mangochi. He came to possess and occupy the property when he was offered the same and bought it from the administrators of the deceased estate of the original owner of the property one Gladys Frendah Chawala (alias Hytengent.) He stated that when the plaintiff sued the 1<sup>st</sup> defendant bank, the 2<sup>nd</sup> defendant was not joined as a party to the proceedings although he was in occupation of the property. He knew nothing of the proceedings and was surprised with the order of eviction. The 2<sup>nd</sup> defendant has contended that at the time the plaintiff commenced his proceedings the property was no longer in the possession of the 1<sup>st</sup> defendant bank because the administrators of the deceased estate of Gladys Frendah Hytengent (Chawala) had exercised the right of redemption. There is a letter dated 3<sup>rd</sup> November 2004 from the 1<sup>st</sup> defendant bank exhibited which partly reads as follows-

“We advise that while the debt in our books has been repaid, there are legal fees in respect of M/s Chagwanjira and Company that have to be paid by you.”

This letter is addressed to the Administrators of the estate of late Gladys Chawala (Hytengent).

The 2<sup>nd</sup> defendant contended that at the time the proceedings were commenced, the orders prayed for by the plaintiff were incapable of enforcement in that:-

- (i) Having divested its interest in the property the 1<sup>st</sup> defendant bank could not be ordered to transfer the property to the plaintiff
- (ii) Not being in possession of the property the 1<sup>st</sup> defendant bank could not be called up to surrender possession of the property to the plaintiff or any third party
- (iii) Having no powers of sale in respect of the property, after the mortgage redemption, to restrain the 1<sup>st</sup> defendant bank from selling to a third party was nugatory and irrelevant.

Further, that at the time of commencement of the proceedings, the plaintiff knew or ought to have known that the property had been sold to the 2<sup>nd</sup> defendant but chose to ignore this relevant and crucial fact.

Furthermore, the 2<sup>nd</sup> defendant stated that he has a substantial interest in the property as follows:-

- (i) He was offered the property by the administrators of the estate of Gladys FrenDAH Hytengent at K4,850,000.00 and paid for it in full.
- (ii) He has invested a lot of money in renovating the property.

The 2<sup>nd</sup> defendant has an honest belief that with such a huge investment in the property and substantial interest it was almost mandatory to join him to defend his interest. Further, that the deliberate non-joinder of the 2<sup>nd</sup> defendant meant a deliberate intention to ambush him with the order of eviction. The 2<sup>nd</sup> defendant prayed that the judgment order be set aside to allow him to defend his interest.

The plaintiff opposed the application. There is no specific affidavit in opposition sworn by the plaintiff.

Both lawyers submitted skeletal arguments. On the facts as narrated by the 2<sup>nd</sup> defendant, the plaintiff has stated that at the time of commencement, the plaintiff was not aware that the 2<sup>nd</sup> defendant was in occupation of Nadi Cottage situate on the land in dispute. The finding of the Court on this aspect is that there is no evidence offered by the plaintiff that he was not aware. He should have sworn an affidavit to assert his position. Even if the court were to believe the plaintiff's assertion that he was not aware that the 2<sup>nd</sup> defendant was in possession and occupation, the conduct of the plaintiff was sloppy and if he were an industrious and honest person he ought to have easily discovered and known that the 2<sup>nd</sup> defendant was in possession and occupation. For a person to have a sure title to land he should trace the root title 40 years backwards. Before commencing the proceedings the plaintiff should have known in advance the consequences of his proceedings *vis avis* the 1<sup>st</sup> defendant and other third parties in the likes of the 2<sup>nd</sup> defendant. The plaintiff deliberately and wilfully closed his eyes to reality and the law. This Court will not accept his claim that he was not aware that the 2<sup>nd</sup> defendant was in occupation. It is stressed that the plaintiff was aware or ought to have known that the 2<sup>nd</sup> defendant was in occupation.

The plaintiff has submitted that under Order 15 Rule 6 particularly provision 15/6/8 a plaintiff who conceives that he has a cause of action against a defendant he is entitled to pursue his remedy against that defendant alone. He cannot be compelled to proceed against other persons who he has no desire to sue. The plaintiff has cited the case of Dollfus Mieg etc vs Bank of England [1951] Ch. 33 Counsel for the plaintiff has submitted that the principal objectives of joinder of parties are:-

- (i) to prevent multiplicity of proceedings and to enable court to determine disputes between all parties in one action –vide: Byrne v Brown (1889) 22 QBD 657. Montgomery v Foy, Morgan and Co. (1895) 2 QB 321.
- (ii) to prevent the same or substantially the same questions or issues being tried twice with possibly different results.

In the views of this court, the plaintiff was unreasonable not to have made inquiries as to who was in occupation of the property. He could have avoided multiplicity of actions by joining the party in occupation of the property. Perhaps the plaintiff thought that if the person in actual possession were ambushed he would have no remedy or weapon to fight back. Order 15 Rule 10 of the Rules of Supreme Court provides that without prejudice to Rule 6, the Court may at any stage of the proceedings in an action for possession of land, order any person not a party to an action who is in possession of the land (whether in actual possession or by a tenant) to be added as a defendant. An application by any person for an order under this rule may be made *ex parte*, supported by an affidavit showing that he is in possession of the land in question, and if by a tenant, naming him. The affidavit shall specify the applicant's address for service. A person added as a defendant by an order under this rule, shall serve on the plaintiff a copy of the order giving the added defendant's address for service. The application can be made even after judgment has been signed and execution issued – Minet v Johnson (1890) 63 LT 507. Indeed on 13<sup>th</sup> June 2005 the Court ordered that Mr Aslam Gaffar be joined as 2<sup>nd</sup> defendant in these proceedings. Further on 23<sup>rd</sup> June 2005 the Court ordered that the judgment order dated 13<sup>th</sup> April 2005 be stayed. On the same date the Court granted leave to the 2<sup>nd</sup> defendant to apply to set aside the judgment order dated 13<sup>th</sup> April 2005. There can be no doubt that for the 2<sup>nd</sup> defendant to have a chance to meaningfully participate in these proceedings, after being added as a party, he should be given a chance to challenge the judgment order which was passed without his knowledge and participation. The 2<sup>nd</sup> defendant should be given an opportunity to state the nature and extent of his interest in this property *visa vis* the claims of the plaintiff. The plaintiff's counsel has submitted that the court does not make a practice of depriving a successful litigant of the fruits of his litigation. The case of National Bank of Malawi Ltd vs D. Nkhoma t/a Nyala Investment – MSCA Civil Appeal Case No. 6 of 2005 is cited. *Prima facie*, a successful litigant should not have his funds locked up just because there is a pending appeal. The 2<sup>nd</sup> defendant's counsel has submitted that this case is relevant in circumstances, where rights of both parties have been adjudicated upon by the Court after listening to presentations of each party's case. In the present case it will not be legally prudent to employ the above authority on account of the fact that the 2<sup>nd</sup> defendant's side has not been heard at all. It is the views of this Court, in agreement with counsel for the 2<sup>nd</sup> defendant, that the 2<sup>nd</sup> defendant is entitled to defend

his rights in the property as a matter of right being a person in actual possession of the land at the time of commencement of action by the plaintiff.

In the circumstances this Court allows the application by the 2<sup>nd</sup> defendant and hereby sets aside the judgment order dated 13<sup>th</sup> April 2005. The 2<sup>nd</sup> defendant is given 14 days from 12<sup>th</sup> July 2005 to serve his defence.

The costs of this application shall be in the cause.

**MADE IN** Chambers this 18<sup>th</sup> day of July 2005 at Blantyre.

Chimasula Phiri  
**JUDGE**