



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 2583 OF 2002**

**BETWEEN:**

**KONDWANI KAZEMBE..... PLAINTIFF**

**-AND-**

**GOODNEWS ESTATE AGENTS AND TWO OTHERS .....1<sup>ST</sup>  
DEFENDANT**

**MR WAWANYA t/a LANDED PROPERTY AGENTS .....2<sup>ND</sup> DEFENDANT**

**INDEFUND ..... 3<sup>RD</sup>  
DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE H.S.B. POTANI  
Chikaonda of Makuta and Co, Counsel for the Plaintiff**

Dr Mtambo of Dr M.C. Mtambo Law Firm, Counsel for the 1<sup>st</sup> and 3<sup>rd</sup>  
Defendants

Mpaka of Chagwamnjira and Co, Counsel for the 2<sup>nd</sup>

Defendant

Nsomba, Court Clerk

Ms Chiphwanya, Secretary/Typesetter

### **JUDGMENT**

This matter arises from the sale of a house to the plaintiff by the 1<sup>st</sup> defendant on instructions from the 3<sup>rd</sup> defendant which sale allegedly proceeded on the basis of a valuation report made by the 2<sup>nd</sup> defendant. By an amended statement of claim dated June 3, 2005, the plaintiff claims the following:

1. ***Rescission of an indenture of transfer of lease  
Damages for the expenses incurred in acquiring and going into and out of the house  
Return of K600,000.00 being purchase price of the house***
2. ***Further or any other relief the court may deem fit***
3. ***Costs of this action.***

The facts of the case are not largely in dispute. The plaintiff is an employee of the Electricity Supply Company of Malawi (ESCOM). The 1<sup>st</sup> defendant, as its name suggests, is an estate agent, so too the 2<sup>nd</sup> defendant who is also a Chartered Valuation Surveyor. The 3<sup>rd</sup> defendant is a financial institution.

In the year 2001, the plaintiff decided to purchase and own a house using a Housing Loan Scheme offered by his employer. As he then was based at Nkula Dydro Power Station, he asked a relation of his, a Mr O.C. Mlozi, who works for the Department of Lands in Blantyre to assist in identifying a suitable house in the city of Blantyre. Within a short time, Mr Mlozi

directed the plaintiff to Mr G.R. Mphande, Managing Director of the 1<sup>st</sup> defendant who was selling a house situated at a place known as Chilobwe on behalf of the 3<sup>rd</sup> defendant. The plaintiff eventually met Mr Mphande and the two agreed in principle that the plaintiff could go ahead to buy the house. Again on account of being based at Nkula away from Blantyre, the plaintiff asked his younger brother, Oliver Kazembe to accompany Mr Mphande to see the house. The brother reported back that although he was not allowed by the occupant to view the inside the house looked good externally. Subsequently, a formal offer was made to the plaintiff through a letter dated September 3, 2001. By letter dated August 4, which in actual sense should have been dated September 4, the plaintiff accepted to purchase the house at a consideration of K600,000.00. Eventually payment and transfer of ownership were duly effected.

According to the plaintiff, as he was to take possession of the house it was discovered that it was built with unburnt bricks yet during the negotiations leading to the sale, he was made to believe that it was built with burnt bricks. It was possible to notice the unburnt bricks on those parts of the house where the main switch and kitchen unit had been removed by the previous occupant thereby exposing the inner layer of the wall as the plaster had fallen off. Upon this discovery, the plaintiff told the 1<sup>st</sup> and 3<sup>rd</sup> defendants that he was no longer interested in the house and that he needed a refund of the purchase price. According to the plaintiff, he rejected the house because in terms of the valuation report he had seen relating to the house which he tendered in evidence as EX P3, the house was built with burnt bricks and it was on the strength of that assertion that he decided to buy the house. The valuation report was allegedly made by the 2<sup>nd</sup> defendant; an allegation denied by the 2<sup>nd</sup> defendant.

The pleadings and the facts plainly show that the basis of the plaintiff's action is that before purchasing the house, he was made to believe that it was built with burnt bricks when in fact it was not. In legal parlance, the plaintiff is alleging misrepresentation. *Cheshire and Fifoot's Law of Contract*, 9<sup>th</sup> Edition on page 248 defines a misrepresentation as follows:

***“A misrepresentation is simply a representation that is untrue.”***

According to the learned authors a representation is a statement of fact made

by one party to a contract to the other which, while not forming a term of the contract, is yet one of the reasons that induces the other party to enter into the contract. Thus a misrepresentation is a statement of material fact made before the conclusion of a contract with an intention that it should be acted upon but turns out to be untrue.

In their defence, the 1<sup>st</sup> and 3<sup>rd</sup> defendants deny making any misrepresentation to the plaintiff as alleged. They aver that the plaintiff never acted on any valuation report containing the alleged misrepresentation as they did not engage any valuer to prepare any valuation report for purposes of the sale the subject of this action. As for the 2<sup>nd</sup> defendant, he denies to have prepared the valuation report containing the alleged misrepresentation and further pleads that if at all such a report was made, it was not relied upon by the plaintiff in entering the contract.

The question that is central to the determination of the matter is whether or not the plaintiff was induced into entering the contract on the strength of the valuation report he tendered in evidence as EX P3 which according to the plaintiff described the house as one made of burnt bricks. In answering this question, the court would first wish to observe that the valuation report in issue is dated July 1999. The agreement between the plaintiff and the 1<sup>st</sup> defendant for the purchase and sell of the house was reached in September 2001. It raises serious doubts that a valuation report prepared in July 1999 could be useful and relevant to a sale agreement reached some two years later in September 2001. Besides, it is the undisputed evidence of the defendants that the valuation report was required by the 3<sup>rd</sup> defendant for a different purpose altogether and that was in relation to a loan application by one James Hastings Dyeratu who previously owned the house. This tends to lend credence to the assertion by the 1<sup>st</sup> and 3<sup>rd</sup> defendants that the valuation report was never shown to the plaintiff or his younger brother during the negotiations leading to the sale of the house and therefore could not have induced the plaintiff to purchase the house. Further, the court also feels more inclined and persuaded than not to believe the 1<sup>st</sup> and 3<sup>rd</sup> defendants that before the sale was concluded, the valuation report was not shown to the plaintiff because both the offer letter from the 1<sup>st</sup> defendant and the acceptance letter from the plaintiff make no mention of it at all. Observably, the offer letter makes reference to an attached mortgage deed.

Surely if the valuation report was relevant to the transaction the offer, letter would have more likely than not similarly made reference to it.

The question may arise as to how the valuation report found itself in the possession of the plaintiff if it was not given to him by the defendants during the negotiations leading to the sale of the house. In their respective testimonies, Mr Goodson Robert Mphande (DW1) and Mr James Ferguson Undi (DW3) explained that the report was given to the plaintiff on March 6, 2002, well after the sale was concluded when he was contemplating commencing this action after expressing dissatisfaction with the condition of the house and the price he was made to pay. Mr Undi to buttress the assertion that the valuation report was only given to the plaintiff on March 6, 2002, tendered in evidence some notes made in his diary on that day showing various engagements and duties he executed on that day among which was a meeting with the plaintiff during which the valuation report was featured.

It is in the light of the foregoing that the court comes to the conclusion that on the totality of the evidence, the plaintiff has failed to establish, on a balance of probabilities, that his decision to buy the house the subject of this action was induced by a valuation report containing a misrepresentation. The plaintiff's action is therefore dismissed with costs to the defendants.

PRONOUNCED in Open Court this day of ..... 2009, at Blantyre.

H.S.B. POTANI

JUDGE