



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO: 54 OF 2014

BETWEEN:

SAMS CHICHERE BALAKASI.....CLAIMANT

AND

JESSICA SOMANJE (NEE MZAZA NKHATA).....1<sup>st</sup> RESPONDENT

PELLIE MZAZA NHATA.....2<sup>nd</sup> RESPONDENT

KASUNGU MUNICIPAL COUNCIL.....3<sup>rd</sup> RESPONDENT

CORUM: JUSTICE RUTH M. CHINANGWA

Mtupila Counsel for Claimants

Khonyongwa Counsel for Respondents

Nyirenda Court Clerk

**RULING**

**1. Background**

Through an originating summons the claimant claimed the following:

- a) A declaration that he is the bonafide purchaser for value and without notice of property known as plot number KU/218/A also known as plot number KU 403/13.

- b) A declaration that as a bonafide purchaser for value and without notice and without notice the applicant is the rightful owner of the said property known as plot number KU/218/A also known as Plot number KU403/13.
- c) A declaration that as the owner of the said plot the applicant is entitled to have the property changed into his name.
- d) An order compelling the 3<sup>rd</sup> Respondent to effect change of ownership in favour of the applicant.

On 9<sup>th</sup> June 2017 the parties through their legal practitioners entered into a consent order. On 20<sup>th</sup> October 2020 an injunction was sought to allow the tenant occupying the property in question to continue doing so. The injunction was granted in this court.

## **2. Issue for Determination**

The matter proceeded with submissions for the court to determine the following issues:

- a) Whether the applicant is a bonafide purchaser of the property plot number KU218/A in Kasungu.
- b) Whether the consent order made between the applicant and the 2<sup>nd</sup> respondent is valid and still in effect.
- c) Whether the applicant is acting in contempt of court by not complying with the consent order.

This court notes that the above issues were only filed by the 2<sup>nd</sup> respondents counsel. Other documents if filed by the other parties are not before the court. This happens to be a common problem in the registry and with a little diligence documents could be placed on the court file timely and orderly.

## **3. Analysis of Law and Evidence**

It is this courts view that the matter is premature before the court for several reasons.

First the other parties in this matter have not filed or have had their documents misplaced if filed on the issues to be determined by the court as discussed above.

Secondly, a matter under the new rules has a defined and simple process apart from interlocutory applications which may come in between the course of hearing. Once summons have been filed and served the next steps are filing of defence, application for summary


judgement or court mediation, then trial if mediation fails. This matter seems not to have followed the stipulated procedure.

4. Third, even if for arguments sake the procedure was followed, this court is of the view that the issues raised for determination are triable issues raising factual matters and the court would have to hear the parties. On whether one is a bonafide purchaser or not the court cannot make the said decision without hearing the parties. In addition, on whether the consent order is valid or not is also a triable issue. It is trite law that a consent order is as good as any judgement that may be entered after full trial. If a consent order is to be set aside it can only be done within the confines of the law. In **Shiptrade International Company Ltd v Transglobe Produce Exports** [1997] 1 MLR 87, the court stated that, 'a judgment or order by consent is binding on the parties until set aside. It also acts as an estoppel (*Kinch v Walcott* [1929] AC 483; *Law v Law* [1905] 1 Ch 140, at 158). The parties can appeal against it. They, however, need the leave of the court. The order can be set aside, but only by a fresh action on the same premise as would invalidate a contract (*Huddersfield B Co v Lister* [1895] 2 Ch 273; *Re S American Co* [1895] 1 Ch 37, at 44). A court has no jurisdiction to vary a consent judgment or order made previously in that court and therefore the only means open to a party to set aside a consent order or judgment on fraud, mistake or misrepresentation is by a fresh action for that purpose (*de Lasala v de Lasala* [1980] AC 546'. So to prove validity of a consent order one has to question fraud or mistake or misrepresentation and the same can only be done on hearing both parties.

#### 5. Finding

The application is dismissed. The parties are to appear before the court for directions.

Pronounced this 13<sup>th</sup> May 2021 at LILONGWE



R.M CHINANGWA

JUDGE