

Esnart Khomba v Dorothy Gatoma and Another

Land Cause Number 93 of 2023

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Allan Hans Muhome
Cause Number:	Land Cause Number 93 of 2023
Date of Judgment:	April 15, 2025
Bar:	Mr Patrick Kalanda, Counsel for the Claimant Mr Fostino Maele and Mr Patrick Kalimbuka, Counsel for the 1st Defendant. 2nd Defendant: Unrepresented and absent

Head Notes

Land Law - Right to Property - Bona fide purchaser for value without notice - A purchaser must make reasonable inquiries to qualify for the defence.

Land Law - Right to Property - Endorsement of sale by traditional authority - Cannot be considered proof of ownership for real property.

Land Law - Trespass - Justification of entry - Consent from a third party with no title does not justify possession.

Civil Procedure - Costs - Costs follow the event unless otherwise ordered - Parties to bear their own costs

Summary

The Claimant, residing in the United States, brought this claim to the High Court, Principal Registry, against the Defendants concerning a residential property in Blantyre that she had purchased in 2014. The dispute arose after the Second Defendant, a friend of the Claimant, who was entrusted to assist with a boundary dispute, fraudulently sold the property to the First Defendant. The Claimant sought damages for trespass, mesne profits, and a declaration of her ownership. The First Defendant argued she was a *bona fide* purchaser for value. The Second Defendant did not file a defence, and a default judgment was entered against him. The Court was tasked with determining whether the First Defendant qualified as a *bona fide* purchaser and whether her occupation of the property constituted trespass.

The Court found in favour of the Claimant. The Court determined that the First Defendant did not meet the conditions of a *bona fide* purchaser for value without notice. The decisive rationale was that she failed to make reasonable inquiries, specifically by not engaging with the 'tenants' who were occupying the boys' quarters on the property, and that a valuation report or utility bills were not proof of ownership. The Court also held that while the First Defendant's initial entry might have been justifiable due to a stakeholder meeting resolution, her continued occupation was no longer legally justifiable in light of the judgment. The claims for damages for trespass and mesne profits were dismissed as being unsupported by the law on the given facts. The Court ordered the First Defendant to permit the Claimant to inspect and take inventory of the house immediately, and to hand over the property within 30 days. Each party was ordered to bear their own costs.

Legislation Construed

- Constitution of the Republic of Malawi (1994) (s 28)

Judgment

1. The Claimant, who is based in the United States of America, owns a residential house at Chilore Village Traditional Authority Kapeni in Blantyre. She bought the land from Ben Mkwinda, about 2014. However, there were disputes about the true boundaries of the property. The Claimant's friend, the 2nd Defendant, intervened to help but ended up selling the property to the 1st Defendant. The Claimant is claiming damages for trespass, mesne profits and declarations granting her ownership of the property. The 1st Defendant, states that she did all she could to establish ownership of the property before she could pay for it. That she is a bona fide purchaser for value. The 2nd Defendant did not file any defence and Judgment in default was entered against him.

2. The Claimant testified that in 2014 she bought the land from Ben Mkwinda and started construction of a house. The Sale Agreement was exhibited as EK 1. However, there were disputes about the true boundaries of the property. The Claimant's childhood friend, the 2nd Defendant, intervened to help as he was working for the State House. He used to buy cement and claim the money later from the Claimant. Davie Chandilanga and his family were taking care the property and around 2020, he informed the Claimant that the 2nd Defendant was building a brick wall and tiling the house. The Claimant called the 2nd Defendant to stop the same but instead he moved in and all efforts to remove him failed. He started demanding K11 million from the Claimant which she refused to pay, later learning that the 2nd Defendant had sold the house to the 1st Defendant.

3. In cross-examination, the witness agreed that the State House had nothing to do with the property and that approach was wrong. She agreed that the resolution following a stakeholders meeting was that the 2nd Defendant would repay the 1st Defendant then the 1st Defendant would vacate the house. She did not know if the purchase sum was repaid as resolved. That he instructed his brothers to remove the iron sheets but ordered their replacement to allow the release of her brothers from police custody.

4. In re-examination, she stated that the 2nd Defendant was reported to the Chief and no Court proceedings were commenced to evacuate him. There were no receipts for the K11 million that the 2nd Defendant demanded and so no payment was made.

5. The evidence of Mervis Kamole was meant to show that the 1st Defendant received the sum of K4 million from the 2nd Defendant as part repayment of her money. The 1st Defendant confirmed this fact to the Court.

6. Davie Chandilanga and Wesley Mzima corroborated the Claimant's story. In particular, the latter, who is a brother to the Claimant, produced minutes of a meeting held with Senior Group Village Headman Chiwembe, exhibited as WN 2. At that meeting, it was resolved that the 2nd Defendant and Senior Group Village Headman Chiwembe were wrong to connive to sale the property to the 1st Defendant. That the 2nd Defendant would pay back the money collected for the sale of the property to the buyer by 24th April 2022. That the buyer would vacate the property as soon as the money was repaid to her.

7. In cross-examination, the witness agreed that when Chiefs sign sale agreements in relation to land, they approve of the sale to be legal. He admitted that when the 2nd Defendant was staying in the house, he did not commence court action, as presently, neither did he remove the iron sheets as he did with the 1st Defendant. He was not sure if the purchase sum was repaid as resolved and so agreed that the 1st Defendant would stay in the house until paid back her money. In re-examination, it was emphasized that the 2nd Defendant was reported to the Chief for his illegal occupation of the property.

8. Maganizo Chikafa testified that he became Village Headman Chilole from April 2020. He was aware of the dispute and that Senior Group Village Headman Chiwembe admitted to witnessing the sale of the Claimant's property irregularly. That he was told that the Senior Group Village Headman paid back K400,000 which he received for endorsing the sale.

9. The first Defendant testified that she used her pension proceeds to buy the property herein from the 2nd Defendant who claimed to be the owner. That the 1st Defendant was staying in the house which was still under construction whereas 'tenants' were residing in the boys' quarters. He had a valuation report, water and electricity bills in his name per exhibits DG 1, DG 2 and DG 3. The sale was endorsed by Senior Group Village Headman Chiwembe and payment of K15 million was made per exhibits DG 4, DG 5 and DG 6. The 1st Defendant occupied the property on 1st January 2022, when she immediately got claims from the Claimant's brothers that the property belonged to the Claimant. The brothers removed the iron sheets and only replaced them after Police intervention.

10. In cross-examination, the witness insisted that the valuation report and utility bills proved ownership of the property in favour of the 2nd Defendant. This was also verified by the Senior Group Village Headman Chiwembe who is senior to Village Headman Chiwembe. That the 2nd Defendant referred to the occupants of the smaller house as tenants. That the tenants were seldom at home and so she did not meet them to verify the true ownership of the property before paying the purchase price. She admitted that meeting them was important. That she is still in the house awaiting a refund from the 2nd Defendant as resolved and not as owner of the house.

11. In re-examination, she stated that she was paid K4 million and so a balance of K11 million is still due from the 2nd Defendant, and that is why she is still in occupation of the property. She insisted that she did not meet the tenants as they were unavailable.

12. To reinforce her story, the 1st Defendant called her son in law, George Banda, who essentially corroborated her evidence. In cross-examination, he confirmed that the first payment was made after inspecting the house twice. He was inconstant on the number of occasions that he saw a lady and children by the smaller house within the compound. That having met the 2nd Defendant, it took about three days for the 1st Defendant to pay the first payment which was used to buy more building materials for the house. That the 2nd Defendant's brother used to sleep in the house. That he met Davie Chandilanga on 27th December 2021 when he was alerted that the house belonged to the Claimant. He confirmed that the utility bills tendered in Court were not the ones that were used to verify ownership of the house. In re-examination, the witness maintained that he saw the lady in the smaller house only once as she was barely home. She was selling vegetables at the market.

13. At close of trial, the Court received written submissions from Counsel, for which the Court is grateful. The standard of proof in civil matters is on a balance of probabilities and the burden of proof lies on he who asserts the affirmative, in this case the Claimant: see *Commercial Bank of Malawi v Mhango* [2002-2003] MLR 43 (SCA).

14. The right to property is well entrenched under section 28 of the Republican Constitution of Malawi (1994) as discussed by the Supreme Court of Appeal in *Attorney General v MCP and Others (The Press Trust Case)* SCA [1997] 2 MLR 181. At the centre of the dispute herein are the actions of the 2nd Defendant who, with the helping hand of the Senior Group Village Headman Chiwembe, sold the property to the 1st Defendant knowing too well that it belonged to the Claimant. There is no evidence, on record, suggesting that the Claimant lost ownership of the property at any point. In any event, the general rule is that one cannot pass a better title than he himself has – see *Bishopgate Motor Finance Corp. v Transport Brakes Ltd* [1949] 1 KB 322.

15. What may need to be investigated further is the question whether the 1st Defendant, in the circumstances, can be said to be a bona fide purchaser for value, which is an exception to the general rule. Bona fide purchaser for value without notice – is a term used to refer to an innocent party who purchases property without notice of any other party's claim to the title of that property: *Pilcher v Rawlings* [1872] 7 Ch. App. 259.

16. In *NBS Bank v Mkada and Others* [2011] MLR 223 at 229, the High Court stated as follows on the conditions one must satisfy as a bona fide purchaser for value without notice:

(a) They must have given consideration in money or money's worth;

(b) They must have had no notice, actual or implied, of interests affecting title to the property. They will be bound by equitable interests of which they may in fact be ignorant but whose existence they would have discovered had they acted as a prudent person of business, placed in similar circumstances, would have discovered...

17. This Court disagrees with the 1st Defendant's assertion that she is a bona fide purchaser. First and foremost, in cross-examination, she admitted that she is still in the house awaiting a refund from the 2nd Defendant as resolved and not as owner of the house. More importantly, the inquiries that she made left out a key party to the transaction, being the tenants occupying the boy's quarters. Had these been asked about the ownership of the property, it should have been easy to discover that the property was owned by someone, other than the 2nd Defendant, who was, but a conman. The 1st Defendant knew that the 2nd Defendant was staying in Lilongwe and not in the house in question. She should have therefore inquired more. To say the least, a valuation report and utility bills cannot be proof of ownership of real property. Neither does the endorsement of the Senior Group Village Headman Chiwembe, which as we see from the evidence, was driven by self-interest.

18. On the claim for trespass, trespass is understood as an unjustifiable intrusion by one person upon land in possession of another: *Munthali v Mwakasungula* [1991] 14

MLR 298. On the facts, the 1st Defendant occupied the property upon payment of a purchase sum to the 2nd Defendant. She has retained possession curtesy of resolutions of a meeting involving all stakeholders, including the Claimant's representative. The key resolution was that she would vacate the property upon receipt of the balance of the purchase price from the 2nd Defendant by 24th April 2022. There are also criminal proceedings in the lower court allowing her to remain in occupation. All of this lead to a conclusion that her 'intrusion' to the property has since been legally justifiable. However, the same cannot be maintained in light of the Judgment herein.

19. All in all, the Claimant has proved her case on a balance of probabilities. The 1st Defendant shall immediately permit the Claimant to inspect the house and take inventory pending the 1st Defendant's hand over of the property to the Claimant within 30 days from the date hereof. Her remedy, unfortunately, lies against the 2nd Defendant.

20. The claims for damages for trespass; mesne profits and loss of income are hereby dismissed as they are not supported by the law, on the given facts. Each party shall bear their own costs.

Made in Open Court this 15th April, 2025.