

IN THE MALAWI SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

MSCA CIVIL APPEAL NO. 23 OF 2015

(Being High Court Principal Registry Civil Cause No. 253 of 2012)

BETWEEN

JEAN CHIRWA.....APPELLANT

AND

ALEXKA HOLDINGS LIMITED.....RESPONDENT

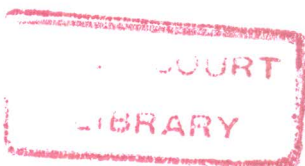
Coram: Honourable Justice E.B. Twea SC, JA
Honourable Justice R.R. Mzikamanda SC, JA
Honourable Justice A.C. Chipeta SC, JA
Mpaka..... for the Appellant
Msisha SC..... for the Respondent
Mthunzi (Mrs).....Recording Officer

ORDER

Mzikamanda SC, JA (Twea SC, and Chipeta SC, JJA concurring)

This is an appeal against an interlocutory order of Mbvundula J. discharging the respondent from being a party to the proceedings under the above cause number commenced by the appellant in the Court below. In this appeal, the appellant invites this Court to make an order reversing the decision by the Court below in its entirety and dismissing the respondents summons with costs here and below. The Court is further asked to make an order remitting the matter to the High Court for full trial or such other further process as may be appropriate with the respondent as one of the defendants. The respondent challenges the appeal.

There are six grounds of appeal which we reproduce immediately below. These are that:



1. The Honourable Judge in the Court below erred in law when he decided to attempt to resolve under the genus of the summary procedure under Order 18, rule 19 of the Rules of the Supreme Court (RSC) the triable substantive issues of fraud or knowledge of fraud or neglect as to fraud attendant to the registration of the respondent as proprietor over Title Number BC 276 as joined through the pleadings between the appellant and the respondent.
2. The Honourable Judge in the Court below erred in law in failing to apply the tests under Order 15, rule 6(2) of the RSC and under Order 2, rule 2 of the RSC or to answer the key procedural questions raised by the parties as to (i) the necessity of the presence of the respondent as a party to these proceedings or (ii) the existence between the appellant and the respondent of questions or issues arising out of or relating to or connected with the relief claimed in the cause, and (iii) statement of grounds for summons before the Court.
3. The Honourable Judge in the Court below erred in law and acted in breach of the principle of procedural fairness between the Court and parties or the rule of *audi alterem partem* as it applies to issues of law and of fact in civil proceedings by (i) resorting to evidential analysis and doing so with reference only to partial evidence on record on each point considered in judgment on evidence and by (ii) relying on the Court's own private research on legal points on which none of the parties were heard at the hearing of the summons before the Court.
4. The Honourable Judge in the Court below erred in fact in (i) assuming that the dealings between the respondent and the 2nd defendant as transferee and transferor over BC 276 were prior to the annulment of the letters of administration obtained by the 1st defendant, and in (ii) failing to answer the question of the Court below as to whether the 2nd and 5th defendants proceeded to register the transfer title after learning of the fraud herein.

5. The Honourable Judge in the Court below erred in fact and in law in deciding to strike off the respondent as a party to the proceedings before the Court notwithstanding the Court's own finding that the plaintiff's remedy lies only in damages against the respondent and notwithstanding the fact that the appellant seeks such a relief from the defendants as an alternative remedy on the pleadings before the Court.
6. The Honourable Judge in the Court below erred in fact and in law in deciding to discharge the caution entered over property title number BC 276 notwithstanding the lack of identification of any reason at law in the summons before the Court or in the ruling of the Court below as to why the caution should be removed.

In arguing the appeal, counsel for the appellant said he would focus on ground one which he believed would cover all the other grounds of appeal. The main issue was whether the respondent having been added as a party to these proceedings was properly removed by the Court below. According to counsel for the appellant, there were two regimes for consideration since the application appeared to have been made under Order 18, rule 19(a) and Order 15, rule 6 of the RSC. The other was the removal of the caution based on section 28(1) of the Registered Land Act. Counsel argued that the Court below departed from the pleadings when it ordered the removal of the respondent as a party and the setting aside of the caution under the Registered Land Act. The Court need only have a prima facie view of the relevant law and not detailed consideration because the parties had joined issues which would only be resolved at full trial. Had the Court below done so it would not have removed the respondent as a party to the proceedings and would not have struck off the register the caution that had been entered on the land register. The Court below departed from the pleadings and sought to examine facts which, as matters turned out, it did not have.

On the opposing argument that fraud had not been specifically pleaded as against the respondent, counsel stated that fraud was comprehensively located in the matter by indicating circumstances which constitute fraud. Instead the learned judge created substantive questions not itemized in the pleadings and relied on cases which had not been cited by the parties. His Lordship did not employ any criteria under Order 15, rule 6 of the RSC but instead went beyond the pleadings.

Indeed the appellant is also claiming damages in the proceedings as an alternative claim against all the parties including the respondent. The removal of the respondent as party represents unjustified protection of the respondent from these proceedings where there is an alternative claim of damages. Counsel thus prayed that the respondent remain party to these proceedings as there is reasonable cause of action pleaded under Order 18, rule 19(a) of the RSC and that there are issues that need investigation at full trial under Order 15, rule 6 of the RSC. Counsel implored us to accept that fraud goes to the root of land dealings and therefore nullifies all dealings. That Messrs. Tembenu, Masumbu and Co. acted for both the respondent and FDH Bank means that the parties were in the know regarding the fraud as Messrs. Tembenu, Masumbu and Co. could not have opened their eyes with respect to one of the parties and closed them with respect to the other. There was in fact an affidavit of Mr. Kara on record which was in support of the plaintiff's case but the Court below failed to resort to it.

Senior Counsel for the respondent drew the attention of the Court to the chronology of events leading to the present proceedings. He pointed out that when the proceedings first commenced, the respondent was not a party even as a default judgment was entered on 3rd May 2013. At that point no action was taken to rectify the register. Earlier, there had been an injunction obtained on 1st December, 2012 which Messrs. Tembenu, Masumbu and Co., had vacated when they acted for FDH Bank Limited. Thereafter the amended statement of claim only makes reference to the respondent in paragraph 14 as fifth defendant by saying that the 2nd and 5th defendant registered a transfer which was affected by fraud. In paragraph 3 of the statement of claim, the plaintiff is unable to assert notice of fraud as against the respondent although she does assert as against the 2nd defendant in the case, acting for FDH Bank Limited. The pleadings attempt to bring a fraudulent dealing link between the 1st defendant and the 5th defendant through Messrs. Tembenu, Masumbu and Co. who acted for both the 2nd defendant and the 5th defendant. Although paragraph 14.5 of the statement of claim alleges restraint of the 2nd and 5th defendants by the injunction from dealing with the property, reference was to 2nd defendant FDH Bank Limited from dealing with the property and not the 5th defendant, being the respondent, as it was not yet a party to the proceedings. The question in this appeal is whether the respondent, as the 5th defendant, had notice of the alleged fraud such that it should be made a party to the proceedings. Senior Counsel submitted that the answer would be in the negative, considering the import of section 32 of the Registered Land Act and the ruling by Kalembela J vacating the

injunction. According to Senior Counsel, the issues did not affect the respondent even if the case may be that FDH Bank Limited became aware of the alleged fraud. He expressed the view that if there was any negligence, it ought to be attributed to the plaintiff for not rectifying the register after the order had been ignored. The 1st and 2nd defendants remained on the register regarding the charge and the Deceased Estate (Wills and Inheritance Protection) Act does not alter section 32 of the Registered Land Act. The suggestion that if there had been a search, the respondent should have found a fraud is not supported as the plaintiff did not plead that there was rectification of the register.

Again the Court below was entitled to look at relevant cases even though the same were not cited by the parties. The evidential matters the Judge looked at were on record and were never objected to. Order 15, rule 6 of the RSC would not preclude the court from considering the material on record and the fact that the plaintiff chose not to put in an affidavit is not a relevant consideration.

The court should not have just looked at a prima facie case but should have looked at, as it did, the pleadings and the material that was there to strike out. Ideally ground should be laid out in the summons but in this case the grounds were laid out in the affidavit which included section 32 of the Registered Land Act and that is what the court considered.

While the pleadings asserted fraud against the 1st defendant, they did not assert fraud against FDH Bank and the respondent.

It is trite that an appeal from the Court below to this Court is by way of rehearing. Thus, the materials before this Court will be subjected to fresh scrutiny and this Court is free to make its own conclusions without being bound by the findings made by the Court below. We have considered the submissions by both sides. There were detailed references to certain provisions of the Registered Land Act and other laws. We think that for purposes of this appeal we should stay clear of the issues that must be resolved by the Court below at full trial. We think that this appeal can be disposed of within a narrow campus. We will deal only with those materials that we consider necessary for purposes of resolving this appeal against the interlocutory ruling of the Court below. In any event, the appeal was mainly argued on ground one. We do recognize that Senior Counsel prepared himself and argued for the respondent on all grounds of appeal. We are

mindful that what is at issue in this appeal is whether the respondent should remain a party to these proceedings after being so added by the appellant or should be struck off as a party as ordered by the Court below. The striking off of the caution is also appealed against. Substantive issues in the case are yet to be dealt with at a full trial in the Court below.

It is to be observed at the outset that the default judgment by Mwaungulu J, as he then was, on 3rd May 2013 made under Order 19, rule 12 of the RSC as read with Order of Leave to Enter Judgment dated 19th April, 2013 as against 1st and 4th defendants namely, Noreen Chirwa and E & E Construction Limited respectively, was quite comprehensive and fairly detailed. It was adjudged in paragraph 2 that “the 1st defendant’s acquisition of the letters of administration in Probate Cause No. 361 of 2000 be and is hereby declared null and void for having been obtained fraudulently”, in paragraph 3 that “any usage to which the 1st and 4th defendant put the said letters of administration on the register of properties Title Number Blantyre Central 276 and/or title number Nyambadwe 358/3 affecting proprietorship of either of the said properties is subject to the rights and interests which are unregistered but enforceable against the said lands”, and in paragraph 4, that “an order be and is hereby made revoking the letters of administration dated 3rd May 2000 issued in Probate Cause No. 361 of 2000”.

The judgment further ordered the 1st and 4th defendants, within 21 days, to account for their usage of the revoked letters and for their profits over Title Number Blantyre Central 276 and Nyambadwe 358/3 pursuant to such letters and restore to the estate of Maria Fatima Aurora Chirwa any such profits. The judgment constituted part of the record that was before the Court below and all parties and the Court must have had notice of the judgment. Any further proceedings in the matter had to take into account that judgment since it remained in force. Indeed Mr. Kara, counsel for the respondent in the Court below, indicated to the Court that he was aware of the judgment and did not serve other parties to the case on account that there was already the judgment against them.

It is apparent that Mbvundula J. did not adequately and appropriately consider the judgment by Mwaungulu J., as he then was, when he made the ruling striking out the respondent as a party and revoking the caution that was registered. We are of the firm view that had the learned Judge adequately and appropriately considered the said judgment, he would have arrived at a different conclusion on the application to strike out the respondent as a party and removing the caution.

We observe that Mbvundula J had placed reliance on an earlier ruling in the same case as made by Kalembela J. The earlier order by Kalembela J vacated an injunction relating to disposal of the land in question even with full knowledge of the judgment of 3rd May 2013 entered by Mwaungulu J., as he then was. That earlier order cannot be supported in all the circumstances of the case and we think this fact should have been clear to Mbvundula J. We also consider Kalembela J's treatment of the judgment of 3rd May, 2013 in his ruling on vacating injunction as wanting. There was an unjustified restrictive interpretation of that judgment by both Kalembela J and Mbvundula J. Having found that the order joining the respondent as a party to the proceedings was made by another Judge and having established that the judgment on file found prior transactions relating to the land to have been tainted with fraud, Mbvundula J. could possibly not have found that there was no cause of action against the respondent who transacted after the Court had entered judgment on the same land and should not have nullified the order joining the respondent as a party. There was insufficient evidence before the Court below to enable it to rule whether the fraud with which the property was tainted affected the title the respondent obtained subsequently. Proof of strength or weakness of the appellant's case against the respondent would only be through trial yet to come.

It is also surprising that the Court below having been satisfied that under the relevant law the appellant's remedy as a person suffering damage by an irregular exercise of power of sale by the respondent under a surety charge, if such is proved, lies only in damages against the respondent, could still go ahead and strike the respondent out as a party to the proceedings. It should have been obvious to the Court below that the only way the appellant could get such damages was by making and maintaining the respondent a party to the proceedings.

Again, in the light of the judgment we do not think that any argument that the appellant may have slept on her rights or any attempts on the part of the respondent to use the law as a shield would advance the case in its favour. We do not find the injunction and its setting aside to be of any consequence because the judgment that the letters of administration were revoked for being tainted with fraud remains in force and is on the case record for all who care to see. No title would have passed to those who purported to transact in the land as they must be taken to have been aware of the judgment of 3rd May, 2013 rendering the letters of administration void for

being fraudulent. In **Dyson Yusufu V Chrissy Yusufu** MSCA Civil Appeal No. 19 of 2012 the Supreme Court of Appeal found that a sale of property done before the conclusion of a court case could not have been done in good faith. See also **C.K. Mwale and C.D. Nkhalamba vs L.N.K. Banda** MSCA Civil Appeal No 18 of 2009. We think that judgment by Mwaungulu J., as he then was, renders the issues of injunction, rectification or sleeping on one's rights on the part of the appellant as unnecessary considerations for resolving this appeal. It is particularly telling that FDH Bank Limited and the respondent transacted with full knowledge of the judgment of 3rd May 2013 and using the same legal house of Messrs. Tembenu, Masumbu and Company.

Indeed after the judgment by Mwaungulu J., as he then was, which found that the dealings in the land in question were tainted with fraud, the parties to the proceedings, including FDH Bank Limited, must be taken to have actual knowledge of the fraud in their dealings with the land. In any event we do not think that FDH Bank Limited can, in the circumstances of this case and at this stage of the proceedings, claim to have priority as chargor, when the same was nullified by the judgment of 3rd May 2013.

We agree that despite that the appellant did not file an affidavit to the specific application that fell for consideration, there was ample evidence on record, including from the appellant, which the learned judge should have considered in resolving the matter.

We want to point out here that adding a party to proceedings may be done at any time through appropriate procedure and that the adding of a party takes effect as if the added party was a party from the commencement of the matter. Accordingly, the argument that while the pleadings asserted fraud against the 1st defendant, they did not assert fraud against FDH Bank Limited and the respondent cannot stand.

We also want to point out that a judge dealing with a matter is entitled to consider relevant law and case authorities even though the same may not have been cited by the parties. The focus on the part of the judge is to deliver justice according to law and not merely to determine winners

and losers. We agree with Senior Counsel for the respondent that on the law the Court is not restricted to what the parties bring before it. Indeed while parties and counsel may define the dispute, they cannot define the law for the Court. We do not think that this derogates from the time honoured principle that parties to a case are bound by their pleadings and that a judge will decide a case on the basis of the pleadings by the parties. With very limited exceptions, parties do not plead the law. They plead evidence. A judge is not entitled to raise an issue and then take it upon himself or herself to attempt to answer that issue which then forms the basis of the decision in the case. Yet the judge is expected to be a master of the law on the issues argued before him or her by the parties. In the case at hand we are satisfied that the judge was mindful that he was dealing with the issues raised by the parties even when he referred to cases not cited by the parties.

As demonstrated above, there is a strong case for the respondent to remain a party to these proceedings. The fact that there is an alternative claim of damages further strengthens our view in that regard. We think that the respondent must remain a party to these proceedings and that the caution registered must remain on the register until the matter is resolved to finality. The trial in the Court below must proceed with the respondent as a party and the caution must remain on the register. The appellant gets the costs of this appeal here and below. We so order.

Pronounced in open court at Blantyre this 19th day of July, 2016



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HONOURABLE JUSTICE E.B. TWEA SC, JA



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HONOURABLE JUSTICE R.R. MZIKAMANDA SC, JA



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HONOURABLE JUSTICE A.C. CHIPETA SC, JA