

# Blantyre City Council and another vs Luka Milanda and another Land Cause Number 5 of 2024

## Judgment

<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice Allan Hans Muhome
<b>Cause Number:</b>	Land Cause Number 5 of 2024
<b>Date of Judgment:</b>	January 08, 2025
<b>Bar:</b>	For the 1st Claimant: Ms Aisha Lourenco and For the 2nd Claimant: Mr Louis Ulaya  For the Defendants: Mr Mukeya Chirwa and Mr Henry Jiva

1. The 1st Claimant ('BCC') is a local authority responsible for governing the City of Blantyre and it is the lessor of Title Number Lunzu 1/186 (Plot Number SL 2/72/25) ('the property'). Sometime in February 2022, the property was leased to some crafty gentleman answering to the name Bright Chaupi Silavwe ('the deceased'). About July 2023, the deceased processed all paperwork and the property was leased and registered in the Land Registry to his name. On the

sidelines, the deceased went out on a marketing campaign intended to transfer the lease in the property. He was extremely successful in that regard as he managed to sale the property to two buyers at the same time: the Defendants for a sum of K26 million (paid on 5th July 2023) and the 2nd Claimant for a sum of K35 million (paid by his bank through a mortgage facility on 2nd August 2023).

2. On the part of the Defendants, immediately upon payment of a deposit to the deceased, they went to BCC where the deceased's ownership of the property was confirmed and an Application for Change of Ownership Form was filled and a fee of K140,000.00 was paid. They commenced renovations to the property and made all the finishes suitable for occupation and are currently in occupation of the property. They also changed utility accounts.

3. On the part of the 2nd Claimant, he agreed with the deceased that the property would be handed over upon completion of the renovations. Meanwhile, as at 25th July 2023, the deceased transferred the lease in the property to the 2nd Claimant and he is currently the registered leasee in the Land Registry.

4. As fate would have it, the deceased committed suicide sometime in September 2023, hence these proceedings. The Claimants' claims are that the Defendants are illegal occupiers and illegitimate buyers of the property. They claim damages and an order of permanent injunction restraining the Defendants from encroaching, trespassing or otherwise interfering with the 2nd Claimant's title and costs of this action.

5. The Defendants deny the claims, stating that they purchased the house from the deceased in an inhabitable state and took possession of the same, before the 2nd Claimant. The Defendants also filed a counter-claim against BCC that it has negligently omitted or willfully or fraudulently failed to process the lease in favour of the 2nd Defendant while fully aware of the existence of the 2nd Defendant's Application for Change of Ownership. Particulars of the fraud or negligence were stated and the attendant loss. BCC denies the claims.

6. The first witness for the Claimants was Henry Dinala, an Assistant Estates Officer at BCC. He adopted his witness statement stating that as at 26th July 2023, the property was owned by the deceased per Certificate of Search exhibited as BCC 1 and Transfer of Lease exhibited as BCC 2. He stated that the 1st Defendant took possession of the property without first obtaining a grant of development permission hence BCC issued a Stop Notice, BCC 3, under the Physical Planning Act which the Defendants ignored. He further testified that the Defendants are still illegally occupying the property. In cross-examination, the witness admitted that an Application for Change of Ownership was filed by the deceased in favour of the 2nd Defendant on 5th July 2023 and a fee of K140,000 was duly paid. The witness admitted that this information was also independently confirmed by a report made by the Estates Inspector for BCC exhibited as LM 7.

7. The 2nd Claimant testified that in June 2023 he inspected the property in the company of the deceased and it was unoccupied. NBS Bank who would finance the purchase through a mortgage also inspected the property and produced a report dated 23rd June 2023, exhibited as MC 1. The deceased begun the lease process with BCC, per WhatsApp conversations between him and the witness

exhibited as MC 2. The deceased offered the 2nd Claimant the property by a letter dated 25th July 2023 exhibited as MC 3. A sale agreement was made between the deceased and the 2nd Claimant exhibited as MC 4. The agreement was not signed by both parties but that is of no consequence to the outcome of this matter.

8. NBS Bank paid the deceased a total sum of K35 million in two instalments, in September and October 2023 and a charge was created per exhibits MC 5, MC 6, MC 7 and MC 8. The deceased undertook to handover the house soon after completion of the renovations, which were underway. However, the 2nd Claimant was later informed that the deceased had committed suicide and when he sought to occupy the house he found that the 1st Defendant was already in occupation. In cross examination, the witness testified that when he inspected the house it was unoccupied but there was a guard employed by the deceased. He only knew that the house was sold to the 2nd Defendant when he attempted to occupy it. There was not much in re-examination.

9. The third witness for the Claimants was Joe Chinkwapulo, an estate agent, who identified the property and facilitated its sale to the 2nd Claimant. His testimony was not helpful in resolving the dispute herein.

10. In defence, the 1st Defendant adopted his witness statement and stated that about 5th July 2023 he entered into an oral agreement with the deceased to buy the property at a purchase price of K26 million which was paid in instalments per exhibit LM 1b. The agreement was later reduced into writing on 28th July 2023

per exhibit LM 1a. The images of the property at the time of sale were exhibited as LM 2. He stated that he was buying the property on behalf of the 2nd Defendant, her aunt, who was resident in the United Kingdom. He exhibited a power of attorney as LM 3. The Court observed that the power of attorney was defective having not been properly executed before a Notary Public, neither was it registered in the Land Registry nor was stamp duty paid. However, this has no bearing on the outcome of this case.

11. That on 23rd June 2023, he conducted a search with BCC where the deceased's ownership of the property was confirmed and an Application for Change of Ownership was submitted dated 5th July 2023, per exhibit LM 5, together with a payment of K140,000 a receipt of which was exhibited as LM 6. The deceased handed over the property to the witness on 31st July 2023. He commenced renovations and receipts of the building materials were exhibited as LM 9. Images of the renovated house were exhibited as LM 8 and utility bills in the name of the 2nd Defendant were exhibited as LM 10. On 8th September 2023, the witness was surprised to find the same property being advertised by the deceased on a WhatsApp Group and he reported the deceased to Ndirande Police Station. The WhatsApp advert was exhibited as LM 11. About 15th October 2023, the witness learnt that the deceased had subsequently sold the same property to the 2nd Claimant and it was registered in the 2nd Claimant's name.

12. In cross examination, the witness admitted that when he made the initial deposit on 5th July 2023, the sale agreement had not yet been signed and so the sale was incomplete. That when he took possession of the property on 31st July 2023, the sale was still incomplete as some instalment was outstanding and the

deceased was in the process of formalizing the transfer. The witness stated that, at the time of occupation, he did not know that the property was registered in the name of the 2nd Claimant on 25th July 2023. That a search was not conducted in the Land Registry.

13. The last witness was Agness Kandodo, the 2nd Defendant in this matter. She also adopted her witness statement and stated that she got to know about the property through the social media per exhibit AK 1 and instructed the 1st Defendant to purchase the same on her behalf. She corroborated the 1st Defendants story. In cross examination, she stated that she did not see the essence of appointing a lawyer to handle the transaction, as she deemed it straight forward, at that time. There were many questions in relation to the authenticity of the power of attorney, which this Court found irrelevant to the resolution of the dispute herein as it is legally acceptable to orally instruct someone to buy a property on behalf of another. The formalities follow later. The witness stated that at the time that the sale agreement was signed on 28th July 2023, she was not aware that the property had since been registered in the name of the 2nd Claimant on 25th July 2023. She denied being negligent for failing to conduct a search.

14. 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 Claimants: see *Commercial Bank of Malawi v Mhango* [2002-2003] MLR 43 (SCA).

15. 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 deceased who sold the property to the 2nd Claimant and the 2nd Defendant at the same time. This Court believes that even if the 2nd Claimant is the paper owner of the property, the interests of justice demand that the property be held to belong to the 2nd Defendant. Here are the two reasons for this.

16. Firstly, On the part of the Defendants, immediately upon payment of the deposit on 5th July 2023, way before the 2nd Claimant paid a deposit, they went to BCC where the deceased's ownership of the property was confirmed and an Application for Change of Ownership Form was filled and the requisite fee of K140,000.00 was paid on the same day. On 31st July 2023, the Defendants took possession of the property and commenced renovations. They also changed utility accounts and are in occupation to date. Whilst sympathizing with the 2nd Claimant's predicament, this Court opines that it would be unfair to dispossess the 2nd Defendant of her property which she bought in good faith without notice of the deceased's rather defective title: see *Pilcher v Rawlins* (1872) LR 7 Ch App 259. Megarry, R., Sir and Wade, H.W.R., *The Law of Real Property*, London: Stevens & Sons Limited, (1984), 5 ed., p.105 authoritatively state that possession is a root of title to and in land. This was also emphasized in the Ruling of Kondowe J. in *Kawalazi Estate Company Limited v Patani Gondwe and Others* Civil Cause Number 272 of 2021. The Defendants who are in possession of the property shall therefore remain therein as prayed in their counter-claim.

17. Secondly, BCC's own members of staff facilitated the sale of the property to the 2nd Claimant and the Defendants, simultaneously. This was fraudulent and no Court in this land will allow a person to keep an advantage he has obtained by fraud. Fraud unravels everything: *Lazarus Estates Limited v Beasley* [1956] 1 QB. 702. It is clear from the evidence of Henry Dinala, BCC's Assistant Estates Officer, that the deceased approached him in June 2023 with intention to sale the property to the 2nd Claimant. He also acknowledged that the deceased, on 5th July 2023, filed an Application for Change of Ownership in favour of the 2nd Defendant and a fee of K140,000 was duly paid to BCC. The witness admitted that this information is also independently confirmed by a report made by the Estates Inspector for BCC exhibited as LM 7. In the circumstances, BCC cannot succeed in their claims as they were complicit.

18. Counsel for the Claimants argued that there was no agreement between the deceased and the Defendants because by the time they took possession of the property on 31st July 2023, there was a balance to be paid and the paper work was incomplete. This Court disagrees with this as the moment one has a valid contract for sale the vendor becomes in equity a trustee for the purchaser: see *Lysaght v Edwards* (1876) 2 Ch D. 499; *Mathews Mahata v Malawi Housing Corporation* Civil Case No. 628 of 2005 and this Court recent decision in *Dilipkumar Popatlal v Jayendra Jivan Kanabar and Another* Land Cause Number 354 of 2012.



19. The 2nd Claimant may have engaged the deceased prior to the Defendants per NBS Bank inspection report of 23rd June 2023, exhibited as MC 1 and the WhatsApp conversations between the 2nd Claimant and the deceased exhibited as MC 2. However, the 2nd Claimant's payment was made way after the Defendants had made theirs and more importantly, taken possession. This Court is of the view that equity would favour the Defendants in the circumstances.

20. It is therefore the conclusion of this Court that the Claimants' case has not been proved on a balance of probabilities. The Defendants' counter-claim succeeds, in the main. A declaration is hereby made that the 2nd Defendant is lawfully entitled to ownership and possession of the property. In keeping with section 139 of the Registered Land Act, the Land Registrar shall rectify the Register by cancelling the 2nd Claimant's registration as owner of the property and instead recording the 2nd Defendant as the title holder of Title Number Lunzu 1/186, within 30 days from the date of this Judgment.

21. An Order of specific performance is hereby granted compelling BCC to issue a lease over the property in favour of the 2nd Defendant, within 30 days from the date of this Judgment. The claims for damages and mesne profits from both parties are without merit and are hereby dismissed. Considering the unique facts of this case and the unfortunate role played by the deceased, each party shall bear their own costs.

22. Made in Open Court this 8th January, 2025.