Christopher Katopeka Kamanga v Yohane Malliot

Judgment

Court:	High Court of Malawi
Registry:	Commercial Division
Bench:	Honourable Justice Trouble Kalua
Cause Number:	Commercial Cause Number 348 of 2020
Date of Judgment:	September 02, 2025
Bar:	Zapinga, Counsel for the Claimant Chidothe, Counsel for the Defendant

1. The Claimant commenced the present proceedings against the Defendant, claiming specific performance of a contract for the sale of land, compensation for loss of use of land in the 2019 – 2020 growing season, a declaration stopping the Defendant from trespassing on the Claimant's land and costs of the action. The Defendant denies being liable to the Claimant as claimed or at all.

2. The Claimant's case is that he purchased 11 hectares of land from the Defendant at a total price of K5,500,000.00 which he paid for in full.

Subsequently, the Defendant alleged that the land had been incorrectly measured and requested that it be re-surveyed. However, at all times that a date was set for the land to be re-surveyed the Defendant was nowhere to be seen. As a result, the Claimant lost out on the use of the land which was being cultivated by different people, hence these proceedings.

3. The Defendant, on the other hand, states that after the sale herein, he became suspicious of the measurement of the land which had been done by the Claimant's wife whom the Defendant believed, at the time of the sale, was a land surveyor. When re-measured it was discovered that the land was more than 11 hectares. The land was in fact 24 hectares. Other 8 villagers from whom the Claimant had bought land also discovered that their respective pieces of land had been incorrectly measured in the same fashion. It was the Defendant's prayer that the 11 hectares that had been paid for be given to the Claimant but that the rest of the land be given back to the Defendant.

4. By an Agreed Order executed on 7th August 2023 the parties agreed to an order which provided in part, as follows:

i. That the size of the customary land situate at Falao Village in the area of Traditional Authority Mwadzama in Nkhotakota District which forms the subject of the present proceedings, should be reassessed by an independent land surveyor to be appointed by both parties.
ii. That the appointment of the Surveyor should be done within 14 days from the date of issuance of this order.

5. The land having been re-surveyed in terms of the above agreed order, the parties then limited the question to be determined by the Court by a subsequent Agreed Order issued on 24th October 2023. It provided as follows:

i. That the Claimant and the Defendant made an agreement on 31st December 2016 in which the Defendant sold 11 hectares of land situate at Falao Village in the area of Traditional Authority Mwadzama in Nkhotakota District at the price of K5,500,000.00

ii. That, however, upon engaging an independent surveyor to re-ascertain the size of the land which is the subject of the present proceedings, it was found that the actual size of the land is 24 hectares.

iii. Thus, the issue which remain unresolved is with respect to the extra 13 hectares of land. [emphasis supplied]

6. The issue, as agreed by the parties, is about the extra 13 hectares. But, what about them? What was it that the Court was being asked to decide about the 13 hectares? Well, unfortunately, the Agreed Order didn’t come out quite clear on the exact question for resolution relating to the extra 13 hectares. The fact that the parties entered into an agreement for the sale of land is not in dispute. The agreement was for 11 hectares. And that the land in issue herein is, as a matter of fact, 24 hectares.

7. From the parties' pre-trial check lists and submissions the issue before us revolves around the following broad questions: whether or not the Defendant intended to sell to the Claimant 11 hectares of land and that the extra 13 hectares do not form part of the sale agreement; or put conversely, whether the parties intended to transact on the entire piece of land irrespective of the mistaken measurements and, whether or not the Claimant is entitled to buy off the extra 13 hectares, or put conversely, whether or not the Defendant can be compelled, by order of specific performance, to sell to the Claimant the entire 24 hectares.

8. In his opening address to the Court at trial, the Claimant stated that he paid for 11 hectares of land from the Defendant. When the land was subsequently re-measured, it was discovered that the land was in fact 24 hectares. The Claimant therefore wanted to pay for the 13 extra hectares but the Defendant refused to accept payment. The Claimant considered that refusal to be a breach of contract. The Court was therefore being invited to determine whether the extra 13 hectares were part of the contract such that the Claimant has to pay to the Defendant the balance on the purchase price.

9. The Claimant called four witnesses, namely Christopher Katopeka Kamanga, Lyton B. Mateyu, James Chimchere and Batson Masona. The Defendant, on the other hand, called three witnesses, namely Yohane Malliot, Dyson Mchere and Moses Victor Mbawa.

10. The issue for determination herein having been limited by the Agreed Order referred to above, we shall not, for brevity, reproduce all the evidence tendered herein. That will not be necessary. Suffice to say that it is in evidence, and undisputed, that at the time of the sale of the land herein, the Claimant brought with him a surveyor. A lady. Unknown to the Defendant the surveyor was the Defendant's wife. We note that the 'wife turned surveyor' was not called to testify. We do not know what her qualifications in land surveying are. Nor her experience. All we know is that she measured the land herein and certified it to be 11 hectares. The land was in fact 24 hectares. This was not an isolated incident. PW2 stated that on the day the land in issue was re-surveyed, the parties remeasured different other pieces of land that the Claimant had bought from different people. There were disputes all over. There were about 7 different people with an exact similar problem. And in all these cases the surveyor was the one brought by the Claimant. His wife. In the case of one Maxon Mbawala, for instance, the surveyor recorded the land to be 1.8 hectares and an agreement was executed on that basis. The land was found to be 7 hectares upon remeasurement by an actual land surveyor from the Nkhotakota District Council. In the case of one Mateyu Nkhoma the surveyor recorded the size of the land as 4 hectares and, again, on that basis an agreement was executed. Upon remeasurement, the land was in fact 12 hectares. In the case of one Raphael Chimwalire, the Claimant's lady surveyor measured and recorded the land to be 1.6 hectares. It was a whopping 39 hectares. And in the case of the Defendant's land, when the surveyors hit the 11 hectares mark, the Defendant refused to proceed with the exercise beyond that point. He had sold the Claimant 11 hectares and that was all the hectarage he was willing to have remeasured. The rest of the land was his, he said. As mentioned above, the land measured 24 hectares in total.

11. In civil matters like this one the burden of proof rests on he who asserts. It is not the duty of the other party to disprove those assertions. The rule, ei qui affirmat non ei qui incumbit probatio (proof rests on he who affirms not he who denies) was approved by the House of Lords in Joseph Constantine Line v Imperial Smelting Corporation [1942] AC 154 where Lord Maugham said at page 174:

“The burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule which applies is ei qui affirmat non ei qui incumbit probatio. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.”
Numerous local authorities have reaffirmed the above to be the position at law. Kapanda J (as he then was), for example, adopted the rule in Burco Electronics Systems Limited v City Motors Limited [2008] MLR (Com) 93 at p111.

12. It is, again, settled that the standard of proof in civil matters is on a balance of probabilities. (see Personal Injury Cause Number 902 of 2016: Ernest Alumando v Naming’omba Tea Estates Limited (High Court) (unreported) per Tembo J. These propositions of law, as correctly submitted by both parties, are trite.

13. It is also settled that generally a document speaks for itself. One cannot introduce parol evidence to contradict a document. see Civil Cause Number 2380

of 2003: Kamwendo v Bata Shoe Company Malawi Ltd. (unreported), Commercial Cause Number 134 of 2013: CFAO Malawi Ltd v NBS Bank Ltd and Naming'omba Tea Estates Ltd (unreported) both cited with approval by Katsala J (as he then was) in Commercial Cause Number 21 of 2021: Builders Suppliers Company Limited v The Registered Trustees of the Christian Services Committee of the Churches in Malawi.

14. As it has been decided many a time, at the heart of a contract is the meeting of the minds where the parties willingly and consciously decide to enter into legally binding obligations. For a Court to hold that a contract exists between parties, the Court must be satisfied, generally, of the existence of an offer, acceptance, consideration and intention to create legal relations. Dr Mtambo, J in Joseph Chidanti-Malunga v Fintec Consultants [2008] MLR (Com) 243 at 249 stated:

"For there to be a valid contract, one of the essentials is that there must be an agreement. The agreement is made up of offer and acceptance. An offer is an expression of willingness by one person, the offeror to enter into a relationship with another person, the offeree with an intention that the relationship shall be binding on the offeror as soon as the offer is accepted by the offeree. An acceptance is a final and unqualified assent to all the terms of an offer. It must not treat the negotiations as still underway otherwise it fails as a contract."

Again, Banda J (as he then was) stated in Abeles v Viola 15 MLR 1 at page 4:

“In order to decide whether parties have reached an agreement, it is usual to enquire whether there has been a definite offer by one party and a definite acceptance of that offer by the other party.”
Both authorities were applied with approval by Katsala J (as he then was) in Commercial Cause Number 110 of 2012: Bernhard and Harris Law Consultants (a firm) v Malawi Leaf Company.

15. On the question of interpretation of a document in Commercial Cause Number 78 of 2013: Great Lakes Cotton Co. Limited v CDH Investment Bank Limited, Katsala J (as he then was) stated:

“I find the words used in the clause to be very clear. They do not admit of more than one sensible meaning. In other words, the clause is not ambiguous. As such, there is no need for the court or anyone to look outside the letter of undertaking in order to determine the sensible meaning of the clause, Vitol BV v Compagnie Europeene des Petroles [1988] 1 Lloyd’s Rep. 574. In AIB Group (UK) Plc v Martin [2002] 1 W.L.R. 94 Lord Hutton said:

“It is a general rule in the construction of deeds that the intention of the parties is to be ascertained from the words used in the deed and that, with certain limited exceptions, extrinsic evidence cannot be given to show the real intention of the parties. On occasions this rule may lead to the actual intention of the parties being defeated but the rule is applied to ensure certainty in legal affairs.”

It is my view that the present case does not fall within the limited exceptions because, as I have already said, the words used in the letter of undertaking are very clear and devoid of any trace of ambiguity. So whatever the parties may have discussed and or agreed on which is not contained in this letter of undertaking cannot be called upon in order to determine the intention of the parties as reflected in the letter of undertaking. After all, what we are seeking is to determine the real intention of the parties and not their actual intention.

Further, let me also say that it is a well-known principle of law that a document speaks for itself. One cannot introduce parol evidence to contradict a document. This principle has been accepted and applied by our courts in Malawi, see Kamwendo v Bata Shoe Company Malawi Ltd Civil Cause Number 2380 of 2003 (unreported), CFAO Malawi Ltd v NBS Bank Ltd and Naming'omba Tea Estates Ltd, Commercial Case Number 134 of 2013 (unreported). Parol evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties Jacobs v Batavia and General Plantations Trust [1924]1 Ch 287. In Hashmi v DHL Express [2001-2007] MLR (Com) 319 it was held that oral or extrinsic evidence cannot be tendered to vary or add to the terms of an express contract."

16. The Court's duty, in interpreting a contract, is to objectively ascertain the actual contextual meaning of the words used in the document and not the real intention of the parties. In Commercial Cause Number 78 of 2013: Great Lakes

Cotton Co. Limited v CDH Investment Bank Limited (supra) the Court dealt with the issue and said:

“In Sirius International Insurance Co. v FAI General Insurance Ltd [2004] 1 W.L.R. 3251 his Lordship put it succinctly. He said:

“The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.”

17. The relevant part of the agreement between the parties herein provided as follows:

LAND SALE AGREEMENT

I Yohane Malliot have sold the piece of land/plot 11.0 hectares to Mr Christopher Katopeka Kamanga.
He has paid full settlement of MK5,500,000.00

The parties agree that this was the agreement between them. The language used is clear and unambiguous. It is clear as to both the size of the plot being sold and the consideration. No extrinsic evidence would be necessary to find the meaning of the agreement. It is in plain and ordinary language. The hectarage, as is clear from the evidence, was an important part of the agreement because the purchase price of the land was determined per hectare. In this case, the price was K500,000.00 per hectare, hence the total of K5,500,000.00 for the 11 hectares. The intention, as gleaned from the agreement, as well as the actual agreement between the parties was not only to transact in a piece of land, but to transact on 11 hectares thereof. It was never a sale of 24 hectares. On what basis, then, would the Claimant claim entitlement to 24 hectares when he purchased and paid for 11 hectares only?

18. The Claimant submits that the parties' intention was to transact in the whole piece of land and that therefore the subsequent discovery of this huge discrepancy in the hectarage is of no consequence such that he is entitled to the equitable remedy of specific performance, compelling the Defendant to sell to him the whole 24 hectares. The question, however is, which other contract can the Defendant be compelled to perform other that the one the parties executed herein for the 11 hectares? There is no other contract to be performed herein. Equity, as we understand it, is never meant to be used to contradict the law. Equity acts in aid of the law. Supplementing and completing the law, providing remedy where the law is unable to. Equity, as they say, follows the law. Aequitas sequitur legem. Where the law is clear one cannot invoke equity to by-pass well established legal principles. The principles on the interpretation of agreements are clear. We do not need to look at other evidence to deduce what the agreement between the parties herein was. It was a sale of 11 hectares of land.

There is no way equity would confer on the Claimant ownership of 24 hectares. Equity is fairness. It would not be fair for the Claimant to have 24 hectares when the agreement was for 11 hectares.

19. In any event, were we not told that he comes to equity must come with clean hands? Is it not the position that he who seeks equity must do equity? The uncontroverted evidence herein is that the Claimant's, wife masquerading as a land surveyor, undermeasured the Defendant's land with the result that 24 hectares was almost taken for the price of 11. She did the same thing with many other land owners that had agreements with the Claimant. It is easy to conclude that the wife did not know what she was doing. But no. We are of the view that she knew exactly what she was doing. So too did the Claimant. He knew exactly what his wife was doing. They were, in our view, in cahoots to reap off unsuspecting villagers of their land by grossly underpaying for huge parcels of land. These are dirty hands. The Claimant has no business being anywhere near equity. He shouldn't be inviting the Court to make an equitable order in his favour in the circumstances. The conduct of the Claimant herein is such that we would be slow to exercise our discretion in his favour.

20. Therefore, as to the question what happens to the extra 13 hectares the answer is simple. Nothing. They remain the Defendant's property as they have been all along. The Claimant bought and the Defendant agreed to sale 11 hectares. And that is all the Claimant is entitled to and no more. The Defendant has no desire to sale to the Claimant the extra 13 hectares. And he cannot be compelled to do so. Neither at law nor in equity. The Defendant's continued occupation and use of the extra 13 hectares does not amount to trespass. The

parties intended to transact on 11 hectares of land and not 24 hectares of land. We so hold.

21. In conclusion therefore we find and hold that the Claimant’s claim over the extra 13 hectares herein is without basis. This action is therefore dismissed with costs to the Defendant to be assessed by the Registrar if not agreed upon by the parties.

Pronounced at Lilongwe in open Court this 2nd day of September 2025.