

Dilipkumar Popatlal v Jayendra Jivan Kanabar and Another Land Cause Number 354 of 2012

Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Allan Hans Muhome
Cause Number:	Land Cause Number 354 of 2012
Date of Judgment:	December 23, 2024
Bar:	For the Claimant: Mr Alinane Kauka For the Defendants: Mr Bernard Ndau and Mr Chifuniro Chaponda

Background

1. The second Defendant (the company) is a family company involved in real estate business. The first Defendant (Mr Kanabar) is one of the shareholders and directors in the company. Among the landed properties owned by the company is

some property known as Mount Pleasant Inn, sitting on Plot Number BC 327 (Title Number Blantyre Central 327), in the City of Blantyre (the Property), which is the subject of the dispute herein.

2. Whilst their family relationships were cordial, the Claimant claims that by some oral and written agreement, Mr Kanabar agreed to transfer the Property to him at a consideration of USD325,000. The Claimant alleges that he made part payment of USD160,000, K720,000 and K100,000 and improved the Property at a cost of K31,132,136.82. That the Defendants have breached the said agreement by refusing to transfer the Property to the Claimant and have threatened the Claimant with eviction notices, enforcement of which was prohibited by an injunction in December 2012. The Defendants deny all the claims and depone that the Claimant himself reneged or abandoned the said sale agreement when he failed to pay the balance of the purchase price and later entered into a lease agreement then proceeded to occupy the Property, as a tenant.

The Claimant's Evidence

3. The Claimant is resident in the United Kingdom and testified via a video link per this Court's Order. He adopted his witness statement as evidence in chief together with 24 exhibits marked DKP 1 to DKP 24. He testified that around 1997, an oral agreement was entered into between himself and Mr Kanabar for the transfer of ownership of the Property at USD325,000.00. That he transferred to Mr Kanabar's offshore bank account the following sums: USD25,000 on 2nd

December 1998; USD50,000 on 10th April 1999 and USD85,000 on 10th September 2000 per exhibits DKP 1 – DKP 7. He also made cheque payments of USD10,000 (K720,000) and K100,000 per exhibits DKP 8 and DKP 9. That following the initial payment of USD185,000, Mr Kanabar allowed him to occupy the Property in May 1998. However, the Property had a dilapidated structure as detailed in a memorandum from the Claimant to Mr Kanabar, dated 7th July 1998 (DKP 10) and that it was orally agreed that the purchase price would be revised downwards.

4. The Claimant stated that he undertook various reconstruction, development and improvements to the Property with the Defendants' full knowledge and acquiescence. He spent a total of K31,132,136.82 per exhibits DKP 18 – 23. That by April 2002, Mr Kanabar sent city rates bills to the Claimant, being the new owner, for settlement, per exhibits DKP 11 – 17. That he obtained a building loan from NBS Bank for K30 million per exhibit DKP 24. The Property was used as a collateral and Mr Kanabar as surety guarantor. Sometime in December 2008 and January 2009, the Claimant defaulted on the loan repayments and Mr Kanabar, without consulting him, paid off the entire loan balance. Mr Kanabar then demanded a reimbursement in the form of a lease agreement which he entered into with the 2nd Defendant. He has since repaid K7,271,601.69 to clear the amount paid by Mr Kanabar to the bank.

5. In cross-examination, he testified that the oral agreement to purchase the Property was based on trust. He admitted that he took possession of the Property before paying anything towards the purchase price. He occupied the Property on 23rd May 1998 and stayed for 8 months without making any payment until

December 1998, when the first instalment was paid. He stated that he refused to pay the balance of the purchase price for 23 years because the Defendants refused to refund the expenses he incurred in renovating the Property. He agreed that the NBS bank loan was settled by the Defendants at K43.2 million with his knowledge and he 'handed back the property' expecting a refund of his expenses on renovations made to the Property, which the Defendants have refused to honour, to date. He further admitted that some of the renovation expenses may have been incorrect as they included chlorine for a swimming pool and 26 bicycles for his workers. He insisted that he was forced into signing a tenancy agreement and paid rentals which he considered to be part of the purchase price. He made an allegation that the rental arrangements were meant to avoid taxes. There was not much in re-examination.

The Defendants' Evidence

6. Mr Kanabar adopted his witness statement as evidence in chief together with 15 exhibits marked JJK 1 to JJK 15. He testified that the Property is owned by the company per Certificate of Lease exhibited as JJK 1. The Property was transferred to the witness per Certificate of Lease dated 2nd August 2000 (JJK 3) and later back to the company per exhibit JJK 4. The transfer followed the decision by the company to redeem a loan that had been obtained by the Claimant from NBS Bank using the Property as collateral. The witness testified that in 1998 there was a verbal agreement to sale the Property to the Claimant on 'as is basis' for a sum of USD325,000.00. The Claimant occupied the property in May 1998 and made total deposits of USD160,000 and K820,000 between December 1998 and September 2001.

7. That in 2005, the Claimant informed the witness that he wanted to make renovations to the Property to turn it into a hospitality business. The Defendants had no reservations as the same would assist the Claimant to increase his revenues and pay off the balance of the purchase price. In 2007, the Defendants permitted the Claimant to obtain a loan of K30 million from NBS Bank, using the Property as collateral, for its improvements. There was no agreement that the cost for such developments would be refunded by the Defendants.

8. By 2009, the Claimant had manifested his intention not to be bound by the agreement to buy the Property by failing to pay further instalments on the purchase price, despite various reminders. He also failed to honour loan repayments with NBS Bank and the Property was at risk of repossession. It was therefore agreed that the company would pay off the loan sitting at K43,255,824.16 and that initial deposits towards the purchase price would be treated as rentals for the period of May 1998 to June 2009 per email exchanges exhibited as JJK 6, JJK 8 and JJK 9. A formal lease agreement was signed by the parties for a period of three years, exhibited as JJK 5. The Claimant paid rentals for 16 months (K7,261,124.00) and fell into arrears to date. A reduction in rentals exhibited as JJK 12, did not help matters. Thus, an eviction notice was issued in October 2012 (JJK 15). However, by December 2012, the Claimant commenced the present action and obtained an injunction against the eviction.

9. In cross-examination, he admitted that the Claimant made renovations to the Property including construction of a swimming pool. He stated that the purchase

price was agreed to be paid within reasonable time which for him would be no more than 5 years. He agreed that the Defendants were presently willing to receive the balance of the purchase price, however, previously there was no extension of time within which the Claimant should have fully paid the same. In re-examination, the witness maintained that the claim was for rentals plus interest.

10. The second defence witness was Roopal Hariprakash Kanabar who is also a director in the company. She adopted her witness statement as evidence in chief together with 10 exhibits marked RK 1 to RK 10. Her testimony was not materially different from that of the first Defendant and therefore this Court will not rehearse the same.

11. During trial, the Claimant's Counsel objected to the admission of documents RK 6B, RK 7, RK 9, JJK 8, JJK 9, JJK 11 and JJK 12, which were not listed in the Defendant's list of documents as required by Order 15, rr. 5 and 15 of the Courts (High Court) (Civil Procedure) Rules 2017. However, this Court believes that the Claimant has not suffered any prejudice and so the impugned documents have been admitted in evidence.

The Issues

12. A summary of the issues that this Court has to determine is as follows:

- (a). Whether there was an agreement for sale of the Property at USD325,000;
- (b). Whether the Claimant made substantial improvements that amounted to K31,132,136.82;
- (c). Whether the Claimant repudiated the sale agreement and entered into a tenancy agreement;
- (d). Whether the Claimant owes the Defendants a sum of K43.2 million being the NBS loan settlement.

Burden of Proof

13. 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 per *Miller v Minister of Pensions* [1947] All ER 372.

Whether there was an agreement for sale of the Property at USD325,000;

14. The evidence from both parties confirms that there was indeed an agreement, initially oral, that the Property would be sold to the Claimant for a sum of USD325,000. Subsequent e mails and various notes confirm the verbal

agreement. The evidence further establishes that the Claimant made payments towards the purchase price as follows: about December 1998 USD160,000; on or about 27th June 2001 -K720,000 and on or about 27th September 2001 - K100,000.

Whether the Claimant made substantial improvements that amounted to K31,132,136.82;

15. The Claimant presented evidence of the expenditure of K31,132,136.82 on the renovations to the Property over a longer period of time than that in relation to the K30 million NBS Bank loan of 2007. This Court finds that the Property cannot be said to have been sold on 'as is basis' considering that the terms of the sale were still underway. The evidence on record shows that the Defendant permitted the Claimant to occupy the Property in May 1998 without making any payment. Thereafter, the Claimant complained about the state in which the Property was and asked for a revision of the terms of the agreement according to the memorandum dated 7th July 1998 exhibited as DKP 10. This was way before the first instalment was paid in December 1998.

16. That said, the Claimant conceded that some of the renovation expenses may have been incorrect as they included chlorine for a swimming pool and 26 bicycles for his employees. The sum of K31,132,136.82 was not specifically pleaded as special damages and therefore must fail. However, improvements that were made by the Claimant to the Property are taken care of by the final Order in this Judgment.

Whether the Claimant repudiated the sale agreement and entered into a tenancy agreement;

17. There is evidence from Mr Kanabar suggesting that the Claimant abandoned the agreement to buy the Property sometime in 2009. The Claimant admittedly failed to pay further instalments on the purchase price, despite various reminders. He also failed to honour loan repayments with NBS Bank and the Property was at risk of repossession. In his own emails, the Claimant accepts that he is better off continuing as a tenant having breached the sale agreement. In exhibit JJK 6, an email from the Claimant dated 25th May 2009, the Claimant addressed Mr Kanabar as follows: ‘...I believe these are not arrears from our side in any form, but rather penalties for exiting early and as the new entrants into the takeover, I believe you must pay the asking sum into your valuation of the Property and become the new owners of the new loan with Natbank. We then begin paying rentals from 1st June, 2009 as per our arrangement.’ (Emphasis supplied) On 29th June 2009, the Claimant also writes an email exhibited as JJK 8 where he categorically states that ‘...We consider ourselves as mere tenants now...’

18. The Court has earnestly considered the above evidence in the light of the parties’ initial relationship which was based on their religious and family relations. The Court observes that the Defendants had an upper hand and the Claimant cannot be said to have truly repudiated the sale agreement having made a handsome deposit and substantial improvements to the Property. In

Mgogo v Malawi Housing Corporation [1999] MLR 178 it was held that where a party to a land sale agreement pays a deposit that party becomes an equitable owner of the land, and that where time for completion is not of the essence or is not fixed, the party will be allowed to pay the balance and have the land transferred to him.

19. On the facts of this case, this Court finds that time was not of essence and neither was it fixed by the parties. The Defendants allowed the Claimant to occupy the Property without paying a penny in May 1998. The Claimant made a payment of USD25,000 in December 1998 and other staggered payments in 1999 and 2001. The first Defendant testified, under paragraph 29 of his witness statement, that in 2007, 9 years later, he was keen to see the Claimant pay off the outstanding balance of the purchase price to complete the sale. He graciously facilitated the NBS loan and permitted the Claimant to continue renovations to the Property. This means that the first Defendant cannot be heard to state that the purchase price should have been made within five years, being a reasonable time, according to him.

20. The Defendants are caught by the doctrine of proprietary estoppel which traces its roots to the case of Dillwyn v Llewelyn [1862] EWHC Ch J67. Thus, if A encourages B to believe that B will have an interest in property (or acquiesces knowingly to B's assumption) and B acts to his own detriment because of A's representation or acquiescence, proprietary estoppel will require A to make good the representation. The Claimant is therefore entitled to a permanent injunction order restraining the Defendants from evicting him.

21. Having considered the background to this matter, this Court finds that the tenancy agreement was unfairly imposed on the Claimant and it cannot be enforced against the Claimant. In any event, rent or mesne profits were not specifically pleaded and no Judgment can be pronounced on facts not pleaded or a cause of action not before the Court: see Yanu-Yanu Co. Ltd v Mbewe (S.C.A) 10 MLR 417. Furthermore, the lease agreement exhibited as JJK 5 is inadmissible as no stamp duty was paid: see section 18 of the Stamp Duty Act and neither were the formalities under sections 40 and 103 of the Registered Land Act followed. In the light of the failure to comply with these legal requirements, it cannot be said that there was a valid lease agreement: see the conclusions of nyaKaunda Kamanga J (as she then was) in Matindi Business College v Registered Trustees of Kwacha Trust Land Cause Number 46 of 2013. This Court therefore orders that the purported rentals paid by the Claimant shall form part of the purchase price.

Whether the Claimant owes the Defendants a sum of K43.2 million being the NBS loan settlement;

22. The parties agree that the Defendants settled the NBS loan in the sum of K43.2 million which the Claimant has not repaid. However, the Defendants did not plead the same and so this Court cannot address it: see PTK Nyasulu v Malawi Railways Ltd 16(1) MLR (SCA) 394. The sum of K7,271,601.69 aimed at clearing the loan shall be considered as part of the purchase price.

Disposal

23. The Claimant's action therefore succeeds and this Court makes the following Orders:

(a). An injunction is hereby granted, restraining the Defendants from evicting the Claimant;

(b). The Claimant shall pay the balance of the purchase price, less rentals and sums aimed at clearing the loan, at the equivalent United States Dollar ruling rate on the day of payment, within 30 days from the date of this Judgment (without interest);

(c). In the event that the Claimant fails to pay the balance, the Defendants shall pay the Claimant a refund of the deposits plus the value of the improvements made to the Property. A registered valuer shall be engaged, at the cost of the Defendants, to undertake the valuation exercise within 30 days and the payments shall subsequently be made to the Claimant, 14 days from the date of the valuation report;

(d). Any further issues on assessment or timelines shall be resolved by the Registrar. Each party shall bear their own costs of this action.

