



REPUBLIC OF MALAWI  
MALAWI JUDICIARY  
**IN THE HIGH COURT OF MALAWI**  
MZUZU DISTRICT REGISTRY  
MISC. CIVIL APPLICATION NO. 44 OF 2013\_

**BETWEEN**

**R. KABAGHE AND 14 OTHERS .....**  
**PLAINTIFFS**

-and-

**THE REGISTERED TRUSTEES OF..... 1<sup>ST</sup>**  
**DEFENDANT**  
**THE SEVENTH DAY ADVENTIST CHURCH**

**THE REGIONAL COMMISSIONER FOR LANDS..... 2<sup>ND</sup>**  
**DEFENDANT**

**Coram: Honorable Mr. Justice D.T.K. Madise**  
Mr. L. Mbulo Counsel for the Plaintiffs  
Mr. W. Chirwa Counsel for the Defendants  
Mr. A.M. Mhone Official Interpreter

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**Madise, J**

# **JUDGMENT**

## **1.0 Introduction**

**1.1** On 26 August 2013 the Plaintiffs in this matter commenced these proceedings by way of originating summons under Order 5 rule 3 RSC seeking several declarations challenging the 2<sup>nd</sup> Defendant's decision to grant a lease to the 1<sup>st</sup> Defendant over a piece of customary land at Bangamoyo Village, T/A Mwaulambia in Chitipa District. The Defendants opposed the summons and called the Plaintiffs to strict proof.

## **1.2 Orders and Declarations sought**

- 1) A declaration that the 1<sup>st</sup> Defendant has no authority whatsoever to grab the piece of customary land over which right of usage has always been enjoyed by the Plaintiffs herein after it was passed unto them time immemorial by the area's traditional leaders.
- 2) An order that the 2<sup>nd</sup> Defendant cannot grant lease to the 1<sup>st</sup> Defendant on a piece of customary land it has no permission to right usage by the Plaintiffs.
- 3) An order that the 1<sup>st</sup> Defendant vacates from the Plaintiffs' piece of customary land forthwith.
- 4) An order of permanent injunction restraining the Defendants, either by themselves, their agents, servants, or whomsoever acting under their authority from grabbing the Plaintiffs' piece of customary land over which they have had the right of usage and occupation since time immemorial.
- 5) An order for costs.
- 6) Any such order as the court deems appropriate in the circumstance.

## **2.0 The Facts**

**2.1** According to the affidavit evidence, there is a piece of land at Bangamoyo Village, T/A Mwaulambia at Chitipa Boma. The Plaintiffs alleged

they were allocated this piece of customary land by the local chiefs in 1986. No such local chief was mentioned or called to substantiate this claim. That the 2<sup>nd</sup> Defendant, the Regional Commissioner of Lands (N), allocated this piece of land to the 1<sup>st</sup> Defendant and he is currently processing a lease.

**2.2** It is stated that from the month of July 2013 the 1<sup>st</sup> Defendant has been chasing the Plaintiffs from the piece of land. The Plaintiffs told the Court they have nowhere else to go if the 1<sup>st</sup> Defendant is allowed to remain on the land. This is according to the affidavit of I.R. Kabaghe on behalf of 14 others which was filed in support of the summons.

**2.3** In response Julius Kalambo filed an affidavit in opposition to the affidavit in support of the summons. His reaction was that the land in question has been in the 1<sup>st</sup> Defendant's possession and occupation since 1960. That the same was given to the 1<sup>st</sup> Defendant by Village Headman Mkombanyama. He tendered a documented history of the said land (**JK1**). According to Kalambo the 1<sup>st</sup> Defendant started the process of leasing the land in 1996 and the same was not objected to by Village Headman Mkombanyama and T/A Mwaulambia as per the form for application for lease (**JK2**).

**2.4** That it was in 2006 when the Plaintiff started claiming the piece of land in question. The matter was referred to Village Headman Mkombanyama who ruled in favour of the 1<sup>st</sup> Defendant (**JK3**). Being unsatisfied with this judgment they went to the District Commissioner for Chitipa who again rules in favour of the 1<sup>st</sup> Defendant. The District Commissioner then wrote T/A Mwaulambia to assist in ensuring that the judgment was complied with (**JK4**).

**2.5** On 8 June 2007 local chiefs in the area signed an agreement confirming that the land in issue belonged to the 1<sup>st</sup> Defendant and that the Plaintiffs had no right of use and occupation (**JK5**).

### **3.0 The Issues**

There are three main issues for determination before me.

- (1) Whether the piece of land in question belongs to the Plaintiffs.
- (2) Whether the 1<sup>st</sup> Defendant has encroached into the said piece of land.
- (3) If not whether the 1<sup>st</sup> Defendant can process a lease over the area.

#### **4.0 The Law and Evidence**

**4.1** The burden and standard of proof in civil matters is this: He/she who alleges must prove and the standard required by the civil law is on balance/scales of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his case as in the nature of things, a negative is more difficult to establish than a positive. Where at the end of the trial the probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty. Whichever story is more probable than NOT must carry the day.

#### **Order 113 r 1 RSC**

*Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.*

**4.2** In University of Essex vs. Djalal and Others [1980] 2 A1 ER 742, 744, Lord Justice Buckley said:

*The jurisdiction under RSC Order 113 is restricted to making a possession order limited to the particular area which can be said, in the circumstances of the case, to be*

*occupied by a person or persons without the licence or consent of the owner.*

**4.3** It is settled law that the Order does not provide a new remedy but rather a new procedure for the recovery of possession of land, be it customary, private or public land which is in wrongful occupation by trespassers.

**4.4** There is a difference between customary land, private land and public land. I will proceed to define these types of land. Section 2 Land Act:

- 1) Customary land as all land which is held, occupied or used under customary law but does not include any public land.
- 2) Private land is defined as all land which is owned, held or occupied under a freehold title or a lease hold title, or a certificate of claim or which is registered as private land under the Registered Land Act.
- 3) Public Land is defined as all land which is occupied, used or acquired by the government any other land, not being customary land or private land

**4.5** Title and ownership of customary land

Section 25 of the Land Act is the starting point.

*All customary land is hereby declared to be the lawful and undoubted property of the people of Malawi and is vested in       perpetuity in the President for purpose of this Act.*

**4.6** Section 26 of the same Act provides that.

*The Minister shall subject to this Act and to any other law for the time being in force administer and control all*

*customary land and all minerals in, under or upon any customary land for the use or common benefit direct or indirect of the inhabitants of Malawi*

*Provided that a chief may subject to the general or special direction of the Minister authorize the use and occupation of any customary land within his area in accordance with customary law.*

**4.7** Customary land has been defined in Section 2 Land Act as all land which is held, occupied or used under customary law but does not include public land. Customary law is also defined as customary law in the area concerned. It is therefore trite from the reading of the above that chiefs have been given the mandate (general or specific) to authorize the use of customary land within their area of jurisdiction.

**4.8** It is important to state right at the outset that there is nothing like ownership of customary land in this Republic. Customary land is for communal use and inhabitants of Malawi must use and occupy the said land for their benefit as directed by their chiefs. Strict legal ownership of customary land is therefore alien to our Constitution and all laws under it. In more specific terms my senior brother Mzikamanda, J as he then was in VH Zakeyo Chunga vs. Nowell Jere, Civil Cause No 176 of 2000, Mzuzu High Court, (unreported) held that:

*In short the law does not provide for individual title or ownership of customary land. The present law envisages communal ownership of customary land. The law would therefore find it strange for any individuals to claim title or ownership of a parcel of customary land.*

**4.9** An inhabitant of Malawi is perfectly entitled under law to use and occupy customary land within an area as authorized by the local chiefs. However in administering the use and occupation of customary land chiefs must be guided by the Constitution. It is therefore against the law to deprive any person the right to use and occupy customary land without any justification. Indefinite individual usage and occupation of customary land is permissible under the laws of inheritance in Malawi.

## **5.0 The Finding**

**5.1** In this matter, I have before me affidavit evidence in support and in opposition to the originating summons. The Plaintiffs have simply said local chiefs allocated them the said piece of land in the 1980s. No chief has been mentioned. No chief has been called to file an affidavit in support. No single document has been presented before court to substantiate their claim on a balance of probabilities.

**5.2** The 1<sup>st</sup> Defendant on the other hand has presented before me a well documented history (**JK1**) of the arrival of the Mission and how the Village Headman Mkombanyama allocated them the land in question in 1960. The 1<sup>st</sup> Defendant has tendered in Court the “*judgment*” that Village Headman Mkombanyama made in favour of the 1<sup>st</sup> Defendant over the same piece of land.

**5.3** The 1<sup>st</sup> Defendant has also presented before Court a letter from DC Chitipa (**JK4**) pleading with TA Mwaulambia to ensure that the decision to have the Plaintiffs vacate the area was complied with. Finally there is before me an agreement (**JK5**) made by all local chiefs including TA Mwaulambia and the SDA Church putting to rest once and for all the dispute between the Plaintiff and the Church. I have looked at the evidence and the law and I come to the conclusion that the Plaintiffs are not saying the truth. On a balance of probabilities I rule in favour of the Defendants.

**5.4** In this matter no grant or lease has been issued in favour of any party in these proceedings. If that were the case the determination of this matter could have been straight forward as section 40 Land Act imposes a presumption of legality on the face of it.

Section 40 Lands Act provides as follows:

*In any proceedings before a court in which the question arises as to whether or not any land is public land, private land or customary land, a certificate purporting to be signed by the minister shall be prima facie proof that the land is public and private of customary land as the case may be.*

**5.5** This Court however takes judicial notice of the fact that the process to obtain a lease involves consultations with chiefs on behalf of their subjects. This process allows chiefs and their subjects to voice out their concerns over the granting of a lease to an applicant. Where there is no objection, a District Commissioner of the district where the land is situated will then write to the Regional Commissioner for Land for that region of the outcome of the consultation.

**5.6** In this matter before me, I find nothing in the evidence to compel me to even think or suggest that there were no proper consultations during the processing of applying for the lease in question. The Plaintiffs have not led evidence to suggest that the process was flawed or that the 1<sup>st</sup> Defendant did anything outside the ambit of the law.\_

Section 30 Land Act

*Nothing in this Act shall be construed as preventing the application of the Customary Land (Development) Act to*

*any customary land and the subsequent registration of such land under the Registered Land Act*

### Section 5 Land Act

*(1)The Minister may make and execute grants or leases or other disposition of public or customary land for any such estates, interest or terms and for such purposes and on such terms and conditions as he may think fit*

### **6.0 Conclusion**

**6.1** The position of T/A Mwaulambia and the office of the District Commissioner Chitipa are co-joined in supporting the 1<sup>st</sup> Defendant's claim. On a scale of probabilities the Defendant's story makes more sense than the lies being orchestrated by the Plaintiffs. The Plaintiffs were allocated another piece of land to settle in order vacate the disputed land. They do not want to move. This must not be allowed.

**6.2** In conclusion therefore, I find no evidence that the 1<sup>st</sup> Defendant in conjunction with the 2<sup>nd</sup> Defendant grabbed a piece of customary land from the Plaintiffs. The said piece of land the Plaintiffs' are occupying belongs to the 1<sup>st</sup> Defendant. The Plaintiffs have no right whatsoever under law to remain on the piece of land except with the 1<sup>st</sup> Defendant's consent. The Plaintiffs can only remain on the said land if the 1<sup>st</sup> Defendant so wishes. However in this matter it is evident the 1<sup>st</sup> Defendant wants the Plaintiffs to leave the land. I further find no evidence that the process of applying for a lease was characterised with illegality. I therefore find that this action must fail with costs

**Pronounced** in Open Court at Mzuzu in the Republic on 9 February 2016

Dingiswayo Madise  
**JUDGE**