IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL APPEAL NO. 81 OF 2007

BETWEEN

JEFULE GUBUDU …….…… APPELLANT

AND

BERNARD CHIPENI …… RESPONDENT

CORAM : HON. JUSTICE CHOMBO

: Appellant, Unrepresented, present
: Respondent, Unrepresented, Absent
: Kabaghe, Court Reporters
: Njirayafa, Court Interpreter

JUDGMENT

This is an appeal emanating from the determination of the lower court on a dispute for land. The appellant has filed 7 grounds of appeal in Chichewa which are summarized as follows in English:

1. that the lower Court determined the case without visiting the disputed land.

2. that the lower Court chose to ignore the traditional authorities who had visited the disputed land and heard evidence of all stake holders prior to the proceedings in Court.

3. that the lower Court refused to read documentary evidence submitted in Court.

4. that the Court was biased in determining the matter.

5. that the lower Court created a hostile environment for the appellant with the intention of intimidating him so that he would fail to give evidence without fear.

6. that he has been owner of the said garden for 45 years and his parents planted different types of trees and he has no other garden.

7. that the Court should carry out proper investigations as to the rightful owner of the garden.

The appellant submitted in court that at the time he was born in 1962 his father was already using the garden. It was his evidence that his father started using the garden in 1958 and his father died in 1975 and that his father was still using the garden at the time of his death. Twenty three years after the death of his father and before the death of the respondent's father he was cultivating in that garden and there were no disputes. The respondent was served with the summons but did not come to court so the court proceeded in his absence.

In order to deal with the appeal exhaustively it will be necessary to deal with each ground of appeal separately.

1. It is alleged the matter was determined without going to see the disputed garden. It should be borne in mind that the Court is not obliged to visit every cite unless the court finds it necessary. The Court can decide a case purely on the evidence before it as did the lower Court. It is on record that

the Chiefs that first determined the case in the respondent's favour had visited the garden and ruled that the garden belonged to the respondent. The same Chiefs gave evidence before the lower Court and they testified that the garden belongs to the respondent. When the Court therefore decided not to visit the garden there was no miscarriage of justice.

2. Chiefs not called as witnesses. The appellant expected the Court to call the Chiefs as witnesses. Going through the record I see that the Court invited the appellant to call his witnesses. Indeed he called some of the Chiefs as witness. It should be remembered that each party is supposed to call its own witnesses and its not the court that calls witnesses for the parties unless the court would like to hear particular evidence from a particular witness. So it was not up to the Court to call Chiefs like Pinji, Kaphuka, Chakachadza and Kachere. After the respondent was invited to call his witnesses he decided not to call these.

3. That Court refused to receive documentary evidence. Going through the Court record I do not find any recording where the appellant submitted or tried to submit his documentary evidence. It is not clear at which point the appellant tried to submit the evidence. I am not in a position therefore to comment much on this matter. It is also not clear whether the appellant is referring to the lower Court or to the Court constituted by the Chiefs as having refused to accept the documentary evidence. I fail to see why and how the Court could have done that. In any way there is no proof that the appellant tried to submit the same.

4. I will deal with grounds 4 and 5 together.

   The appellant alleged that the Court was biased against him and that the Court threatened and intimidated him so that he should not give his testimony freely. I have gone through all the evidence on record and do not find evidence of the said bias or intimidation as alleged by the appellant. The Court gave both parties an opportunity to state their case and call any number of witnesses. The point has not been elaborated and with no evidence on record the Court is at a loss about the circumstances that prevailed in Court at that time to drive the appellant to draw these conclusions; if it did happen the Court is saddened to learn about such incidences.

5. The appellant states that he was born in 1962 and the appeal was filed in 2007 so he could not have used the land for 45 years as he submitted because he was too young to have used it that long. The appellant could not have started using the garden from the day he was born. He states that his parents were using the same garden.

I have looked at the evidence on record and the witnesses involved, most of them are Chiefs or people directly connected with the land in question. Whilst each party has shown good grounds for laying claim to the land in dispute there can only be one owner thereof. The Court must therefore, with good reasoning make its determination.

The appellant alleged that the matter has not been tried before the Chiefs. But this evidence is not entirely true. The evidence on record actually shows that there were several times at which several Chiefs discussed the issue and decisions were made and that was before the matter went to Court. The first time the matter was tried by several Village Headmen, Group Village Headmen and Chief Kaphuka, who found that the garden actually belonged to the respondent. After the death of the respondent's father, with the assistance of Group Village Headman Chakachadza the appellant grabbed the garden from the respondent and started using it.

Evidence on record is to the effect that the grandfather of the respondent was using the garden before all these problems started. After the respondent's grandfather died, the garden was not being used and the father of Village Headman Esaya started using it until the father of the respondent came to claim the garden from the father of Village Headman Esaya. The garden was given back to the father of the respondent and he was using it until his death in 1998 and this matter resurfaced.

The appellant, then a defendant in the lower court called witnesses. The first witness, Peterson Sandramu testified that the garden was founded by his elder brother who, after cultivating for a number of years, left it and went to South Africa; and it was then that the father of the respondent grabbed the land. This evidence however contradicts with the evidence of the second witness, Ephraim Khumathe also summoned by the appellant who testified that it was his father who opened the garden in the early 1960's and that in 1972 was when the

appellant started quarrelling with his uncle about the garden and in 1973, Khumathe's family lost the garden to the appellant's family.

The evidence of the appellant himself is that his parents started using the garden in 1958 and at the time of his birth in 1962 he found that his parents were using the garden. He testified that the squabbles over the garden only started in 1998 after the death of the respondent's father. The three witnesses, who were supposed to tell the same story all, came up with different stories about the garden, making it difficult for anybody to know what the truth of the matter is and believe them as credible witnesses. It should be remembered that these were two witnesses called by the appellant but their evidence not only contradicted each other but contradicted even that of the appellant himself. What this says to the Court is that it is difficult to know the truth of the matter from these three witnesses. On the other hand, the respondent and all the witnesses called by the respondent speak of the same thing. Based on these facts I find therefore that the respondent, who was the complainant in the lower court, made out his case in a credible manner. It was on this ground that the lower Court found that the land belongs to the respondent.

The appellant submitted that he was not allowed to cross-examine witnesses in the lower court because, according to him, he had not brought his witnesses before Court. I was therefore surprised to find that after each witness, both for the respondent and his own, the record of the lower court indicates that the appellant did cross-examine all the witnesses. It is not known therefore what the appellant really meant when he said that he was not allowed to cross-examine the

witnesses. Either the appellant does not fully understand what cross-examination means or he sought to mislead the Court. I find no base for this allegation.

It has already been pointed out that the appellant had stated on appeal that the matter has not been tried by the Chiefs. But the record shows that Traditional Authorities Esaya, two Kaphukas and Kachere and Group Village Headman Pinji, have all had some experience with the case and given their decisions. When therefore the appellant put as one of his grounds of appeal that the Chiefs were not involved in this matter he was not telling the truth. This however, went against the credibility of the appellant, who, based on the facts before, I found may not be reliable.

On the basis of these findings I must therefore find that the garden does belong to the respondent and not the appellant. I therefore dismiss the appeal and uphold the finding of the lower court.

MADE in Court this 19th June 2008.

E.J. Chombo

J U D G E