



JUDICIARY

**IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
SITTING AT PHALOMBE
CIVIL APPEAL NUMBER 12 OF 2006**

BETWEEN:

MRS CHRISSY PHELANIPLAINTIFF

- AND -

MR KENNETH C WANJEDEFENDANT

CORAM: THE HONOURABLE MR JUSTICE J. S. MANYUNGWA
Mrs Chrissy Phelani, present, unrepresented
Mr Kenneth C Wanje, present, unrepresented
Mr Nthondo – Official Interpreter

J U D G M E N T

Manyungwa, J

By a writ of summons, the plaintiff Mrs Chirssy Phelani claimed encroachment a piece of land by the defendant Mr Kenneth Wanje, the defendant herein. Both the plaintiff and the defendant were unrepresented. The defendant however denied the claim. I must state at the outset that this matter originally came into this court as an appeal by the defendant against

the decision of the First Grade Magistrate Court sitting at Chinani which went in favour of the plaintiff. However, when the appeal came into this court; he said judgement was set aside since it was noted that under Section 39 of the Courts Act, Courts of Magistrates do not have jurisdiction to deal with any matter when ownership to land is in question. It is on that basis, that I set aside the lower court's judgements and ordered a fresh trial.

The plaintiff 4 witnesses whilst the defendant called three witnesses.

PW was Mrs Chrissy Phelani, from John village, T/A Chiwalo Phalombe District. She told the court that she has a piece of land which she uses as a garden in the area of village headman Maulidi which she inherited from her aunt Mrs Kameko who told her to use the said garden. She said she was shown boundaries of the said garden, and that this was in 1986 - 88, and that she begun tilling the said land. In or around 1991 the witness got married, and the husband too was shown the boundaries of the garden by Mrs Kameko, which followed the contours and that for quite a long time the two enjoyed cultivating on the said land in quite enjoyment. Troubles begun in 1995, in that Mr Chigandu, who is also known as Mr Wanje, the defendant herein came to the plaintiff and asked her about the boundary of her garden,

and the witness told him that she was tilling the land following the contour and then the defendant informed the witness that the part on which there were no ridges belonging to him. Later, towards the end of that year, the witness said she saw the defendant coming again, and he told the witness that there was a problem with the boundary whereupon the witness told him that, she was just following the boundary as was the case with her grandparents, and the defendant not being satisfied took the issue to the village headman, who after hearing the two sides ruled that the boundary was as being used by the plaintiff, that it was intact. The matter then went to Group village headman Chimwere, who asked the parties to meet at the *locus in quo* and after examining the issues the said Group Village headman showed the parties their own sides and advised them to be cultivating on their gardens according to the earlier boundary. The defendant not being satisfied, he took the matter to Traditional Authority Chiwalo, who upheld the ruling by the Group Village Headman. When the two parties returned to the village, the defendant hired some people and put them in the plaintiff's garden. Upon seeking this, the plaintiff then went to the Traditional Authority who gave her a letter to the Magistrate Court, which equally upheld the Traditional Authority's ruling. The witness said she was

surprised later to see a messenger coming with a letter summoning her to this court.

In cross – examination, by the defendant the witness explained that the boundary between her garden and the defendant's is on the east and west. The witness stated that her garden was in the middle and that Mrs Jali, who was the defendant's aunt could witness because her garden is near the plaintiff's. the witness told the court that she came to possess and use the land when she was 12 years old and that both the village headman, and the GVH and the Traditional Authority said the same thing that the parties were to follow the boundary and that Group Village Headman attended the hearing at the Traditional Authority. The witness told the court that the land was at first one big piece of land but that it was later divided because Mrs Jali found the plaintiff's parents and so Mrs Jali's garden is on the right while the defendant is on the left, and the plaintiff is in the middle. She said she was the first to cultivate the garden.

PW2 was Wilford Manawira of Chimwere Village Traditional Authority Chiwalo, Phalombe. He told the court that he is a substance farmer, and that he stays in Chimwere Village, that he was the Group Village headman. The witness told the court that the parents to PW1 came in 1962 and settled at

Maulidi village and they asked for a place to build and to cultivate. So they were given the land and they stayed there peacefully until the said parents returned to Chiringa, and they left behind Mrs Kameko and Mrs Phelani, and after Mrs Kameko got married, she left the garden to Mrs Phelani, the plaintiff. Then in 1964, Mr Wanje came to Maulidi village and he also asked for a piece of land. The witness explained that the one who actually came at the time was Mr Sande, who was a grandfather to the witness. The said Mr Sande was given a place to build and also a place to cultivate, close to the plaintiff's garden. The defendant was on the left and the plaintiff on the right. The witness explained that the parents of the two sides were cultivating the land without any problems. Later, Mr Sande died, and the place was left to Mr Wanje, who later left it because the land was water logged, but the plaintiff remained on the land. Then after the flash – floods that hit Phalombe from Michesi Mountain, the plaintiff began cultivating rice, and then the defendant also came back and began cultivating rice. Then in the year 2005, the witness received a letter from village headman Maulidi on the dispute that had arisen, and so the witness called the parties and after visiting the land in question, he discovered that the issue between the two parties was not the whole garden but just the boundary and so in consultation with village headman Maulidi, they divided the land into two

halves to which the parties herein agreed. Then later the defendant came to the witness and asked for a letter to take to the Traditional Authority Chiwalo and so the witness, together with village headman Maulidi, the plaintiff and the Mrs Kameko gave their testimony. The defendant was also present. At the end, the Traditional Authority gave a judgement that upheld the earlier verdicts.

In cross – examination the witness explained that the plaintiff was the one who brought an appeal from the ruling of the village headman, because although the defendant agreed with that ruling, he continued to cultivate on the side of the plaintiff, and so when the village headman saw that the defendant failed to abide by the ruling, he referred the matter to the Group Village Headman, the witness herein.

The witness further explained that he was in court as a witness and as Group Village Headman Chimwere. The witness further explained that although Mrs Jali was the defendant's witness at that hearing, she was honest enough to tell the gathering that the land under dispute belonged to the plaintiff. The witness stated that he has been involved in a number of cases involving the defendant's side and that whilst others were resolved others remained

unresolved. The witness disputed that he had not taken away the defendant's land to convert the same to a dam.

PW3 was Mrs Theresa Kameko, Mang'anda Village, Traditional Authority Chiwalo, Phalombe. She told the court that she stays at Mang'anda Village and that she is a subsistence farmer. The plaintiff is her niece and that the defendant is her niece. The witness explained that Mr Matengula her grandfather came to Phalombe from Chilinga in 1962 and he requested for a place at Maulidi Village to build and he later requested for a place to cultivate. The witness explained that they were there herself, her mother and her elder sister before the defendants came. The witness gave a sketch plan of the land, which showed the plaintiffs garden in the middle surrounded by Makaluwasa on top the defendant on the left and Mr Masasa on the bottom and the defendant's grandchildren on the right. Further, the witness explained that they had cultivate the land for a long time, later the grandfather to the defendant approached Group Village Headman Maulidi who gave them the other portion. So it happened that the 1st, 2nd and 3rd village headmen Maulidi died, and so in 2005 when the new Chief was installed that is when the witness saw the plaintiff coming and complained that the defendant had encroached into her land. Then later the defendant accused, the plaintiff of having encroached the boundary, and later heard

that the defendant had gone to complain at village headman, at which there was no agreement, and to the defendant took a letter, and since a proper quorum was not formed, then later the plaintiff complained, and the Group Village Headman apportioned the land accordingly and shared both to the plaintiff and the defendant. Then later, they saw the defendant coming with contractors who invaded the plaintiff's garden. Then the matter went to Traditional Authority Chiwalo who upheld the earlier ruling.

In cross – examination, the witness told the court that it was his grandfather who requested for the garden, and that he later gave it to Mrs Phelani, the plaintiff. The witness repeated that it was the Traditional authority who upheld the earlier ruling.

PW4 was Mrs Grace Wala, of Maulidi Village Traditional Authority Chiwalo, Phalombe. She was village headman Maulidi and she told the court that she knew both the plaintiff and the defendant.

The witness stated that in 1992, the grandparents of the plaintiff came to Maulidi village and asked for a place to build. They were given a place to build and a place to farm. In 1964, there came the defendants grandparents

who were given a piece of land close to the plaintiff's land. The grandfather, of the defendant Mr Sande (the Pastor) was given land which he divided, which he subsequently divided, that on the left for his children and that on the right for his relatives. The witness stated that the parents of both the witness and the defendant lived peacefully without problem. Then after the parents died, and the parents of the plaintiff moved there were no problems. The plaintiff was left with the garden, and there were no disputes. Surprisingly after some time, the witness saw the plaintiff coming and said that she was being accused of jumping the boundary. Later the defendant also came to complain. Later the plaintiff and her people and the defendant and his people met and the witness demarcated the boundary. Later the defendant complained that he wanted to go to Group Village Headman, and so he was given a letter. The Group Village Headman demarcated the land in half, and when the defendant appealed to the Traditional Authority upheld the Group Village Headman's ruling.

In cross – examination, the witness told the court that although both the plaintiff and the defendant came to complain on the same day it was the plaintiff who came first. The witness said the group Village Headman in demarcating the land, he took a portion from the plaintiff's land and another

from the defendants land and made a contour between which was to act as a boundary. The village headwoman said she is number 4 in her family lineage as village headman. She however confirmed that the Group Village Headman was at the Traditional Authority.

The first defence witness was Kenneth Chigandu Wanje of Maulidi Village, Traditional Authority, Chiwalo Phalombe. He told the court that he stays at John Village, Traditional Authority, Chiwalo, Phalombe, which is just next to Maulidi Village. The witness told the court that from 1960 his grandparents went to Maulidi Village from Migowi after they retired. The Grandparent's name was Rev. Sande of CCAP (retired) and that at that time the witness was 1 year old. This information was merely relayed to him by his mother. The witness told the court that when Rev. Sande was given the land he divided it to his children and his relatives, and that the one who gave him the land was Chimatiro who was then village headman Maulidi. In 1991 there came the flash floods (Napolo) and so people stopped farming, then later people returned to the land and so after their return they found that the plaintiff was in the middle, and there was also Mr Seven who was subsequently removed. Then the plaintiff went to the village headwoman, who allowed her to stay. When the matter went to the Traditional Authority,

according to the witness, the Traditional Authority said that a persons garden cannot be in the middle.

In cross – examination, the witness said that even if thee were to request to titles in Nambazo, they would find that the witness came to the land in 1960. The witness told the court that it was not him who found the plaintiff on the land. When asked as to what is in the middle of the land, the witness said there was nothing. The witness however admitted that Mrs Jali is on the left, and Makaluwa on the other side of the road, and when asked as to what is on the other side of his garden he said he did not know. He however said it was the Group Village Headwoman who added the plaintiff’s land.

DW2 was Jessie Sande (Miss) of Maulidi village, Traditional Authority Chiwalo, Phalombe. She told the court that the late Reverend Sand was her father and that the defendant was her son, and that she knew the plaintiff.

The witness told the court that her father took her mother from Chigumula in Blantyre to Migowi Presbytery, where they stayed up to 1937, until he decided to get his own land. So in 1960 he went to Traditional Authority Nazombe asking for a place, and so the said Chief told him that he would check with his chiefs, so he went to Chimwere who said he had no land.

Finally the said Reverend went to village headman Maulidi so he was given land. In 1963 the family went to Phaloni at Maulidi Village. The reverend was well received and he was given a very big portion of land and so they were given a place to cultivate at Thundu where they cultivated maize but later they shifted to rice. The witness explained that in 1963 no many people were there, so later some people like the relatives of the plaintiff came in 1978 to own the place across the road. Then later the father of the plaintiff came and begun gardening within the land, but later he moved away and the land was returned to the witness's parents in about 1995, they saw the plaintiff coming and tiling the land, and so the plaintiff overstepped the boundary, so the witness and her people went to complain to village headman Maulidi, and then the matter went to Group Village Headman Chimwere, who then extended the boundary, then they went to the Traditional Authority, who said they should not overstep the boundary. The witness told the court that it is not her who wrote down the history but her father.

In cross – examination, the witness admitted that 1962 comes first that 1963, and that it was not Mrs Matengula who came first to the place but Mrs Nyadani. The witness maintained that it was her people who came first on

the land and that the witness people found them. The witness admitted that in the middle of the land there is the plaintiff, Mrs Makaluwa and Mai Masanza, and Mrs Jali. The witness drew a sketch plan which showed that the plaintiff's garden is in the middle. The witness agreed that her drawing is in full agreement with that of the plaintiff which also placed her garden in the middle. The witness told the court that, they were told to follow the boundary by the Traditional Authority Chiwalo.

DW3 was Mr Pundani Hiyalala, who stays at Mang'amba village. He told the court that he just sees that the plaintiff stays at Chimwere Village, as well as the defendant, and that he knew the defendant's house. The witness stated that at one time Mrs Sande, DW2 employed him but that he had forgotten the time, and that he stayed with her for 3 years, his colleague only died in 2006, and that he only left his work 2 years ago. Later the witness heard that there was a dispute.

In cross – examination, the witness said that he only left his employment with DW2 in 2006, and that he did not know the plaintiff. When asked as to whether just being a casual labourer for DW2 as to whether he could give testimony as regards title he said 'yes' and that he was called as a witness to

show that he worked there. When asked whether in 2006, the plaintiff's garden was there he said it was not, and he said it was because he was employed. The witness however was unable to tell the court as to who came to the place first, and neither could he know when the plaintiffs grandparents came.

This is all the evidence that the court heard and from this evidence there are certain facts that are established which the court finds as facts as follows. Both the plaintiff and the defendant own pieces of land which are close and share boundaries.

The question for the determination of this court is whether the plaintiff has and owns a piece of land at Maulidi village and whether she has unilaterally extended the boundary into the defendant's land? The plaintiff's testimony is that she has a piece of land which shares boundary with the defendant. The grandparents to the plaintiff came to the land in the early 1960's and according to DW2 it was in 1961 while PW3 and PW4, they came to the land in 1962, well before the defendant's parents. The witness told the court that she inherited this piece of land from her aunt in or around 1989 and that in 1986 when she begun tilling the land. In 1989 due to the floods that hit

the area the defendants vacated the land, and that the plaintiff and her husband continued to cultivate the land until 1995 in quiet enjoyment. In the year 1995, the defendant began causing troubles about the boundary and the matter was taken to village headman Maulidi, and later to Group Village headman Chimwere. It is important to state here that both the village headman Maulidi and Group village headman Chimwere testified and told the court that they demarcated the land according to the boundary. This ruling was upheld by the Traditional Authority Chiwalo. Both, the village headman and Group Village Headman confirmed the fact that it was the plaintiff's people/grandparents who were the first to come to the place and not the defendants, the village headwoman Maulidi actually told the court that she was at Maulidi village, when the plaintiff's grandparents came, so too was she available when the defendant's grandparents came. She was a young girl then but that it was the plaintiff's grandparents who came first, hence the reason why the plaintiff's garden being found in the middle. Now, it can be seen that although the defendant in his testimony wanted the court to believe that his people came first and further that the plaintiff has no garden there, this testimony is sharply contradicted by the testimony of village headwoman Maulidi, PW4 and Group Village Headman Chimwere DW2 who both testified that the plaintiff's grandparents were the first to

come and that the plaintiff has a garden at Maulidi village and further that the two had been involved in settling this dispute which went all the way to the Traditional Authority Chiwalo who agreed with their ruling. Further, it is the finding of the court that the testimony of both DW1 the defendant herein, and DW2 Miss Jessie Sande, on the time the plaintiff's grandparents settled on the land can not be believed, this is because it is clear, they were not there at the time as their grandparents had not yet arrived on the scene according to the testimony of village headwoman Maulidi and Group village Headman Chimwere. These are the custodians of our culture, and in as far as customary land is concerned, they know its history, they way it has been handled over from one generation to the other. Further, as was demonstrated in this court when DW2 Miss Sande was asked to draw a sketch of the relative positions of the gardens in respect to each other, her sketch was almost the same to that of the plaintiff. Both showed that the plaintiff's garden is in the middle. Further, it is the finding of the court that the plaintiff has been cultivating on the said land since the 1980's and the defendants can not turn around today to claim the land, when the evidence is clear that the said land belonged to the plaintiff's grandparents way before the defendant's grandparents came onto the land. Furthermore, it was also clear to this court, that DW3 Mr Pondani Hiyalala was a staged witness who

was couched to come to this court to deceive it. There was nothing that he knew, and clearly he was not a truthful witness, as such his testimony was unreliable, and this court can not place any weight on it whatsoever.

In these circumstances and by reason of the foregoing, it is the finding of this court that the plaintiff has ably demonstrated that she the garden in between the defendant's garden on the left and the defendant's garden on the right is hers and further that in this court's judgement the proper boundary between the plaintiff's garden and that of the defendant is as was demarcated by the village headman Maulidi and Group Village Headman Chimwere. I so find, and I give judgement for the plaintiff to continue cultivating her said piece of land in quiet enjoyment without any disturbance whatsoever from the defendant.

I also condemn the defendants in costs.

Pronounced in Open Court this 25th day of January, 2008 at Phalombe.

Joseph S Manyungwa
JUDGE