IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL APPEAL NO. 42 OF 2006

BETWEEN

MICKSON DAIMON CHISEKA …… PLAINTIFF

AND

CLARA MAJAMANDA …… DEFENDANT

CORAM : HON. JUSTICE MZIKAMANDA

: Mr. Kadzakumanja, Counsel for the Plaintiff
: Legal Aid, Counsel for the Defendant
: ……., Court Reporter
: E.B. Kafotokoza, Court Interpreter

JUDGMENT

This is an appeal from a decision of the First Grade Magistrate sitting at Lilongwe. The appellant is represented by Kadzakumanja of Counsel while the respondent is represented by the Department of Legal Aid. At the time of hearing the appeal there was no one to represent the Department of Legal Aid. The respondent too was not present. Yet there was due service of notice of date of hearing.

The present matter is about ownership or title to land. The story of the claimant of title to land as narrated in the court below was that in 1991 the respondent

rented a house from the appellant until 2003 when the appellant approached her and offered the plot to her for sale. The price asked for was K50,000.00. The respondent had to sell her other plot to buy the present. Initially she paid K30,000.00. She later paid two installments of K4,000.00 and then one installment of K6,000.00. In March 2005 she wanted to pay the balance of K6,000.00 when the appellant said he had changed his mind. He was no longer selling the plot. This left the respondent without a place to stay. She had her children. Her husband had passed away earlier. The appellant said he would pay back the K44,000.00 already paid. As she stayed on the plot waiting she noticed that bricks and stones were brought on the plot. The one who brought the bricks and stones said that he had bought the plot from the appellant. Later a Mr. & Mrs. Nkhoma wrote her a letter ordering her to leave the plot as they wanted to start building a new house. She referred the matter to the Village Headman who summoned all the parties. The appellant did not turn up. Only the respondent and Mr. Nkhoma turned up. When the Village Headman explained to Mr. Nkhoma that the plot was bought by the respondent, Mr. Nkhoma said he had ot been aware. The Village Headman stopped Mr. Nkhoma from further developing the plot until the matter was discussed with the appellant. Mr. Nkhoma nonetheless continued bringing bricks on the plot. The matter was referred to Justice and Peace and finally to police where the appellant was found to be at fault. Later the appellant was threatening the respondent and the respondent referred the matter to court.

The appellant's story in the lower court was that he had offered the house in question for sale to the respondent after she had lived there for some time. He

had offered it at K50,000.00. The respondent said she would sell her other plot from whose proceeds she would pay for the plot. Having sold the other plot she paid K30,000.00 as initial payment. She was to pay the remainder at the end of the following month. She failed to pay. After waiting for a long time he told her that the sale had failed and that he would refund her money. She was thus to revert to paying rentals. Although the respondent insisted that she wanted to finish paying for the house he refused. He also rejected a suggestion from the respondent that he should buy her another plot. After some time he brought the K30,000.00 to the respondent but she refused to take it. The Village Headman had tried to persuade him to allow the sale to go on but he refused. At the time he had gone to court to sue on the matter he learnt that the respondent had already sued. In cross-examination he conceded that the respondent also had paid K14,000.00. He refused to accept the final K6,000.00 payment, saying the sale had failed. Total paid was K44,000.00.

The defense witness in the lower court was wife of the appellant. She said K30,000.00 was paid but K20,000.00 remained unpaid. Then the plot was sold to somebody else. She did not know about the 2nd, 3rd and 4th installments that had been paid to the appellant.

In its judgment the lower court found there was an agreement signed by both parties regarding the sale of the plot. The sale agreement noted that K30,000.00 was paid as initial payment but did not state when the balance would be paid. The court found that a total sum paid was K44,000.00 towards a total cost of K50,000.00. The court found that the appellant was wrong to sell the plot to

another person when the respondent had only remained with K6,000.00 to pay towards the purchase price. The court found that the plot belonged to the respondent whom he ordered to complete the K6,000.00 payment made.

The grounds of appeal are three. The first is that the lower court did not have jurisdiction to hear the matter it being relating to title or ownership of Land. Thus the judgment of the lower court is therefore null and void.

The second ground is that the learned magistrate erred in holding that the sale agreement between the appellant and the respondent still subsisted when it had lapsed by reason of time of payment.

The third ground of appeal is that the lower court erred in holding that the respondent is entitled to repossession of the plot when the said plot had been sold to a third party who had changed ownership. There were skeletal arguments in support.

At the time of hearing the respondent who had engaged the Chief Legal Aid Advocate on the appeal did not turn up nor did her legal practitioner. In fact the only document on file for the respondent is the notice of change of legal practitioner. In the lower court the respondent was unrepresented although the appellant had been legally represented up to a point. Another observation I would like to make is that this matter has been in these courts for sometime now on various applications by the appellant. At no point was the respondent ever

present in the various appearances before the Registrar and appearances before various Judges before the matter landed on my table.

In arguing the first ground of appeal that the judgment of the lower court is null and void for want of jurisdiction Counsel referred this court to Section 39 (2) (a) of the Courts Act which provides that:

> *"No subordinate court shall have jurisdiction to deal with, try or determine any civil matter –*
> (a) *Whenever the title to or ownership of land is in question save as is provided by Section 156 of the Registered Land Act;"*

According to Section 156 of the Registered Land Act, Cap 58:01

> *"Civil suits and proceedings relating to the ownership or the possession of land, or to a lease or charge, registered under this Act, or to any interest in any such land, lease or charge, being an interest which is registered or registrable under this Act, or being an interest which is referred to in Section 27, shall, notwithstanding the Courts Act, be tried by the High Court, or, where the value of the subject matter in dispute does not exceed £200, by the High Court or a subordinate court held by a Resident Magistrate".*

It was observed that the exception provided in Section 156 in relation to subordinate courts only limits it to a court held by the Resident Magistrate. I

agree that the First Grade Magistrate is not conferred jurisdiction under S 156 of the Registered Land Act.

In Monetory value of the land, Section 156 of the Registered Land Act limits it to £200. In this country we no longer use pounds as our currency. It is not clear what £200 officially means as of today. As of 23rd February, 2009 a British pound was equivalent to K223. Which means that £200 would be equivalent to (K223 x 200) which makes K44,300.00. Be that as it may. It is the further argument of the appellant that the sale agreement between the appellant and the respondent was for K50,000.00 which far exceeds the K40,000.00 jurisdiction of a First Grade Magistrate. It was argued that however one looks at the question of jurisdiction in this matter; the First Grade Magistrate who presided over the matter wrongly assumed jurisdiction and all the proceedings were therefore a nullity. Counsel referred to the case of Mauwa v Chikudzu 5 ALR (Mal) 183 which also dealt with the issue of jurisdiction of subordinate courts in relation to title or ownership of Land. In that case Pilie, J. observed that want of jurisdiction is not a matter which can be remedied.

In arguing this ground of appeal counsel also brought up some factual matters which did not constitute the evidence before the lower court namely that the land in question was Plot No. 21/1133 and that it is located under Lilongwe Land Registration District. He then said it is governed by the Registered Land Act.

The question of the jurisdiction of subordinate courts on land matters has come up for consideration in a number of cases, notwithstanding that the provisions of

Section 39 (2) (a) of the Courts Act Cap 3.02 are clear. In some instances magistrates quickly notice the issue of jurisdiction as stated above and refer the matter to the High Court. In Village Headman Zakeyo Chunga v Nowell Jere Civil Cause No. 176 of 2000, Mzuzu District Registry, the First Grade Magistrate was quick to notice that the matter was one of dispute over title to land and not merely one of trespass to land and therefore referred the matter to the High Court. In Mauwa v Chikudzu 5 ALR (Mal) 183 a Resident Magistrate awarded the plaintiff £24. 10s.od as damages for a house and orange trees destroyed by the defendant on the plaintiff's land, and £5 as general damages for trespass. The defendant appealed against the whole of the judgment and one of the grounds of appeal was that the learned Resident Magistrate had no jurisdiction to hear the case and pronounce judgment since title to, or ownership of land was in question. The same Section 39 (2) (a) of the Courts Act fell for interpretation. There was no direct evidence on whether the land was within the category of public land, private land or customary land although the court was able to infer that the land was customary land. In allowing the appeal Pilie, J. had this to say:

> *"It is clear from the record that each party was claiming ownership (in the sense of the rights of use and occupation) of the land in question, and that accordingly, in my view, the jurisdiction of the subordinate court was ousted. Since want of jurisdiction is not a matter which can in any way be remedied, I must with reluctance allow the appeal. I say with reluctance because it is clear from the record that on the merits the learned magistrate came to a decision which was fully justified. It was clear that he found the plaintiff and*

his witnesses truthful and reliable, and that he rejected the evidence of the defendant and his witnesses as being wholly unreliable."

The issue of jurisdiction arose again in the case of Village Headman MacBean Chakwera v Village Headman Mponda Civil Appeal Cause No. 30 of 1997 (Mzuzu District Registry) where Chikopa, J. dealt with in considerable detail the ground of appeal challenging the jurisdiction of a Second Grade Magistrate sitting at Karonga on a matter that concerned title or ownership of land. In interpreting Section 39 (2) of the Courts Act His Lordship considered what the subject matter in dispute was and what its monetary value was. The honourable judge also considered the import of Section 36 of the Land Act which confers jurisdiction over land matters on a Traditional Court. The judge came to the conclusion that although the Traditional Courts were at the attainment of multiparty democracy in this country intergrated into subordinate courts it did not render subordinate courts to have the jurisdiction of the then Traditional Courts. The judge noted that Traditional Courts were governed by the Traditional Courts Act while subordinate courts were governed by the Court's Act, two different pieces of legislation. The Judge also observed that:

"The conclusion in this court's view is inescapable. Subordinate courts do have some jurisdiction over matters of land under the Lands Act. But that land does not include customary land. Only private or public land."

In that case though the honourable judge found that on the facts of that case the lower court had no jurisdiction. What is observable in both the case of Mauwa v Chikudzu (Supra) and Village Headman MacBean Chakwera v Village Headman Mponda (Supra) is that in determining the appeals the court invariably did some analysis of the evidence on record, albeit having been recorded by a court which lacked jurisdiction in the matter. For the question of jurisdiction itself to be resolved the courts had to look at the evidence recorded in the lower court. What is more the courts went further to consider the totality of the evidence.

In the case at hand there is no doubt on my mind that the First Grade Magistrate lacked jurisdiction to deal with ownership or title to the land. This I do find on the clear reading of Section 39 (2) (a) of the Courts Act as well as Section 156 of the Registered Land Act. This finding however does not close the matter. I must also consider the other grounds of appeal. I must also consider the evidence before me for reasons that will become clear in due course.

The second ground of appeal is that the magistrate erred in law in holding that the sale agreement between the appellant and the respondent was still subsisting since the same had been repudiated by the appellant due to lapse of time for payment of the purchase price. In arguing this ground the appellant alluded to principles of contract. Counsel argued that the contract of sale is supposed to have a date of completion of the purchase price. This argument must also be viewed from the point of view of freedom of contract. It is correct to say that if the parties do not specify the date of completion, the completion must be within a reasonable time as per the cases of Samson v Rhodes [1840] 6 Bing NC 261 and Johnson v Humphrey [1946] 1 ALL ER 46. Counsel for the appellant argued that

the first installment of K30,000.00 having been paid towards the K50,000.00 purchase price in February 2003, the balance was to be paid at the end of the next month.

The respondent's evidence was clear that the parties did not have such stipulation in their oral agreement. That the time for completion of payment was left flexible is clearly supported by the appellants own written evidence. Ex P1 where he stated in Chichewa:

> *"Lero pa 17-03-2004, Ine Mickson Daimon Chiseka ndagulitsa plot yanga kwa Mrs Majamanda pa mtengo wa K50,000.00.*
> *Apelekako K30,000.00*
> *Zotsala K20,000.00*
> *M.A. Chiseka (Signed)*
> *Wit. Mrs Chiseka (Signed)*
> *Mrs. Majamanda (Signed)*
> *Wit. A. Dakile (Signed)*
>
> | | |
> |---|---|
> | *Poyamba* | *K30,000.00* |
> | *Kachiwiri* | *K 4,000.00* |
> | *Kachitatu* | *K 4,000.00* |
> | *Kachinai* | *K6,000.00* |
> | | *K44,000.00* |
>
> *Yotsala ndi K6,000.00".*

These were the writings of the appellant himself confirming that he had sold the plot to the respondent on 17th March 2004 at K50,000.00 of which K30,000.00 was paid as 1st installment. He then lists the installments made up to the fourth installment of K6,000.00 before he totaled the installments. He indicated thereafter that the balance to be paid was K6,000.00. This was precisely what the respondent said in her evidence and was never shaken by the appellant. It is not correct to argue that the balance of K20,000.00 was to be paid the following month. Although the appellant purported to argue at first that he only got K30,000.00 as the purchase price he conceded that he also got a further K14,000.00. The appellant and his wife contradicted each other on the amount owing. It is clear that the respondent emerged as a credible witness. The appellant kept receiving the balance in three further installments until when the fifth and final installment was brought to him he refused to accept it, saying he had changed his mind about the sale because he wanted to keep the plot for his children. The appellant clearly never repudiated the contract at any point until the final installment of K6,000.00 was brought to him. The appellant's argument that the other three installments were payments for rental is without support and merit. Clearly the amounts are much higher than the monthly rentals and the figures vary. If the payments were rentals he would not have rejected the final K6,000.00 because that too would have been rentals.

The above analysis shows that the contract never lapsed until the appellant finally said so at the final installment, at a time I would add he had already, and without the knowledge of the respondent, sold the plot to a third party. It was at that

time he then offered to refund the money already paid. The second ground of appeal is not made out and it is dismissed.

The third and final ground of appeal is that the magistrate erred in law in holding that the respondent is entitled to possession of the plot when the said plot had been lawfully sold to one Manja who is a bona fide purchaser for value without notice. In arguing this ground the case of Pilcher v Rawlins [1872] 7 Ch. App. 259 was cited in support of the cardinal rule of law that a bona fide purchaser for value of a legal estate without notice takes it free from any pre-existing equitable interest. Also cited was this court's own decision in Leah N. K. Banda v C.K. Mwale and C.D. Nkhalamba, Civil Cause No. 1381 of 2006 (unreported where the court upheld the principle and ordered that the second defendant should pay damages to the plaintiff, the second defendant having sold the plot to a third party.

The first thing to note is that the respondent is in fact on the plot. It is not as if she is to recover possession. She lived on the plot with her husband and when her husband died in 2005 she continued to live on the plot to date. In fact some of the proceedings on the file related to committal proceedings on the ground that she failed to comply with a stay order of a court that she should vacate the premises. Those proceedings were not taken to their logical conclusion. Be that as it may, the point is that it is not as if the respondent is to be given possession for she is already in possession of the land. It is the appellant who would like the respondent to deliver possession.

On the principle that a bona fide purchaser takes good title it is important that it is a critical point that the purchaser has no notice of an existing equitable interest. A purchaser would be said to have such notice where he fails to take reasonable steps to establish if the land he is buying is not encumbered. In this case the appellant was not living on the plot. It was the respondent living on it. In that case the third party who bought could not be said to have had no notice that someone else other than the seller was in occupation of the plot. Indeed the evidence shows that the purchaser sought to evict the respondent. Even when the respondent and the Village Headman told him that the land was encumbered he continued to bring building materials. That conduct of the third party is not consistent with one without notice of the equitable interest of the respondent. The present case is thus distinguishable from the case of Leah N.K. Band v C.K. Mwale and C.D. Nkhalamba (Supra) on that score. The present case is not one of a bona fide purchaser for value without notice of an existing equitable right. The third ground of appeal cannot succeed. This means only the ground of lack of jurisdiction has been made out.

Two approaches seem to have been taken where the lower court is found to be wanting in jurisdiction. In the Mauwa v Chikudzu case (Supra) Pilie, J. reluctantly allowed the appeal. He took trouble to explain his reluctance as quoted in the paragraph above. In Village Headman MacBean Chakwera v Village Headman Mponda (Supra), Chikopa, J. took a different approach. He said:

> *"The question now is what to do. We have on the one hand clear enough evidence that the appellant has no case on the merits. The*

respondent has. On the other there is the clear fact that the lower court had no jurisdiction. We think the law is clear. Because the lower court had no jurisdiction it means in effect that the proceedings are nullity. They never took place….

However, this court is not unaware that appeals to this court are by way of rehearing. It is clear that the respondent has got a good case on the merits. Whereas the lower court had no jurisdiction to entertain this matter this court has. It also has the power to order that which the lower court could not. Taking all matters into consideration therefore this court is of the view that the justice of this case demands that this court make the order that the lower court in its zeal to do justice made in the absence of the requisite jurisdiction…."

The approach by Chikopa, J. is to be preferred. As the judge was emphatic this is not to right a wrong in the lower court on want of jurisdiction. I would add that such an approach is in no way intended to mitigate the importance of the question of jurisdiction of the subordinate courts. As Pilie, J. was able to say in Mauwa v Chikudzu (Supra) want of jurisdiction is not a matter than can be remedied. This court agrees with the approach by Chikopa, J. for more reasons than one.

Firstly an appeal from the lower court to this court is by way of rehearing. This does not necessarily mean the court has to recall the witnesses to testify. What

the court does is to examine the evidence on record and be able to come to its own conclusions on the facts. That is the approach this court takes, whether a civil appeal or criminal appeal. Arguments made in advancing grounds of appeal do not constitute evidence in the matter and additional evidence can not be brought in through the process of arguing the appeal. If additional evidence is to be brought in, it must be through a court order. In subjecting the evidence on record to fresh scrutiny the court seeks to discover the justice of the matter.

The second reason why the approach adopted by Chikopa, J. is to be preferred is that where the court clearly sees that the justice of the case lies somewhere on the facts it is for the court to deliver that justice. It does not appear just to avoid to deliver the justice of the case when the court sees where such justice lies. In Mauwa v Chikudzu (Supra) Pilie, J. explained his reluctance in allowing the appeal because it was clear from the record that on the merits the learned magistrate came to a decision which was fully justified. At the end of the judgment Pilie, J. said:

> *"Since the appeal is allowed on the ground of want of jurisdiction the respondent is at liberty to bring his suit again in such court having jurisdiction to hear it as he may be advised to bring it".*

This view has the effect of giving the appellant a second chance to defend himself, but more importantly it presupposes that the plaintiff still has the necessary resources to be able to bring up the matter a second time. It is not the position in the present case. The respondent is a person who lost her husband and was

struggling to pay for the house she purchased from the appellant. The appellant knew that the respondent had to sell her other plot to buy the present. In the lower court the appellant was able to engage a lawyer but the respondent had no such luxury of engaging a lawyer. The record further shows that the appellant's first lawyer advised the appellant that he had no defense to the matter and all he needed was to have the matter settled out of court. Perhaps he did not like the advice he got from that lawyer and so he dropped him and pursued the matter. I think it would be unjust for the court to make the respondent struggle to invest more in a matter that clearly is in her favour on the merits. This is why this court would adopt the approach taken by Chikopa, J.

This takes us to the third reason which is that considering all the circumstances of case there is no doubt that the respondent had acquired equitable interest in the land. This court is entitled to look to equity in redressing the situation. This is the point where I also agree with Chikopa, J. that this court is in a position to make such orders as the lower court would probably not have made, based purely on the merits of the case. The Counsel for the appellant argued at one point that the respondent's situation would be redressed in the award of damages. One of the greatest contributions of equity has been to supplement the limited range of legal remedies by introducing a wide range of equitable remedies which can be awarded both to enforce rights which are exclusively equitable and those which are legal (See *Hanbury & Marton. Modern Equity 15th Edn. P. 30. Sweet & Maxwell 1997)*. One of the most significant of these remedies is specific performance, whereby the court orders a party to a contract to perform his

contractual obligations. Cancellations of documents too is another equitable remedy that may be available in a case.

The fourth reason for my adopting the approach of Chikopa, J. is that on the evidence I see that the respondent has justice on her side on the merits of the case. Even if this matter was sent for retrial in another court with jurisdiction, which can only be the High Court in this case, the evidence given in the court below would be given in that court with jurisdiction the inevitable conclusion would be in favour of the respondent. The respondent paid K44,000.00 towards the purchase price and the appellant received all that. There was substantial performance of the contract on the part of the respondent. She is entitled to the land in question. This court orders that the appellant specifically performs his part of the contract by receiving the small balance of K6,000.00 and by executing documents in the favour of the respondents ownership.

The change of ownership done in favour of the third party is a nullity for he was a purchaser who knew or must have known that the land was encumbered. It must be reversed.

It is so ordered.

In this appeal I make no order as to costs.

MADE this 24th day of February, 2009 at Lilongwe.

R.R. Mzikamanda

J U D G E