



REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CIVIL CAUSE NO. 109 of 2010

BETWEEN

PETROS CHAPITA KUWALI

PLAINTIFF

-and-

MALERA KANYASHU

DEFENDANT

CORAM: HON MR. JUSTICE D.T.K. MADISE

Mr. A. Chunga Counsel for the Plaintiff

Miss H. Kaluwa Counsel for the Defendant

Mr. R.S.D. Kahonge/M.K. Luhanga Official Interpreter

Mr. C.B. Mutinti Court Reporter

Madise, J

JUDGMENT

Introduction

By way of originating summons, the Plaintiff took action against the Defendant seeking a declaration from the court that the Defendant's erection of structures on the Plaintiff's piece of land was unlawful on the basis that the said piece of land belonged to him. At filing the summons the Plaintiff also sought an order of injunction stopping the Defendant from further dealing with the piece of land until the determination of the matter. The Court granted the injunction.

The Summons

By this summons under Order 7 Rule 2 RSC, the Plaintiff seeks declarations and orders as follows:

1. A declaration that the Defendant's occupation and erection of structures on the Plaintiff's land is unlawful.
2. A permanent order of injunction restraining the Defendant, her servants or agents from remaining on or further trespassing on the said land and from interfering with the Plaintiff's right to use and occupy the same.
3. An order for costs of this action.
4. Any other order or direction as the court shall deem just and proper.

Affidavit Evidence

Affidavits in Support

The Plaintiff filed two affidavits in support of the originating summons and we reproduce them as filed. The first affidavit is as follows:

I, **Lion Chipuwale Kondowe** of Chipuwale Village, Senior Chief M'bwana, P.O. Box 5 Usisya, NkhataBay hereby make oath and say as follows that:

1. I depone to matters of fact emanating from my personal knowledge.
2. I am the rightful owner of the piece of land in question.
3. The said piece of land belonged to my parents who had been in occupation since 1932.
4. In 1976 I left the place for Lizulu in Ntcheu when I went to do business.
5. My young father was in occupation of the land when I left for Ntcheu.
6. The said young father died and there was no one to take care of the land.
7. The Defendant took advantage of the situation and assumed occupation of our land.
8. In 2004 I came back from Ntcheu and I was surprised to find the Defendant in occupation of our land.
9. When I asked the Defendant to move out of our land, she refused claiming that the land belongs to them.
10. I reported the matter to T/A M'bwana (late) who summoned both parties for a discussion over the land issue.
11. The late T/A M'bwana found that the land belonged to me and advised the Defendant accordingly.
12. Having established that the land is mine I advised the Defendant to move out for I wanted to settle on the same.
13. Seeing that I needed some money for me to build a house I decided to sell part of my land.
14. Before I sold the said land I sought permission from the late T/A M'bwana and I was allowed.
15. Then came the Plaintiff looking for a place in our area to build a computer center.

16. I took him to the late M'bwana who consented that part of the land be allocated to the Plaintiff but at a consideration. See document attached and marked **LK1**.

17. As such the Plaintiff paid a consideration of K25, 000.

18. There is no any relationship between the Defendant and us.

19. The Defendant is occupying the said land without permission from the authority as conceded by the Defendant in paragraph 8 of her affidavit.

The second affidavit is as follows

I, Grace Mulinda of Village Head Mdoyi, P.O. Box 32, Usisya, Nkhata Bay hereby make oath and say as follows that:

1. I am the niece to the late T/A M'bwana.
2. I know Lion Kondowe as my uncle.
3. I adopt the affidavit of Lion Kondowe and say that indeed the land in question belongs to him.
4. I also witnessed the sale of the said land to the Plaintiff. See document attached and marked **GM** for exhibit.
5. I make this deposition believing the same to be true to the best of my knowledge and information and in terms of the Oaths, Affirmations and Declarations Act.

Affidavits in Opposition

The Defendant filed two affidavits in opposition to the summons which we also reproduce as filed. The first one is as follows:

I, **Malera Kanyasu** of Chipuwale Village, T/A M'bwana, Nkhata Bay District hereby make oath and state as follows that:

1. I am the Defendant in this matter and therefore am duty authorized to swear this affidavit.
2. The matters of fact deponed to herein emanate from my personal knowledge.
3. I inherited the piece of land in issue from my mother in 1932 after her demise.
4. I have so resided and used part of the land for cultivation for over 60 years.
5. In 2009, I was approached by the Plaintiff who informed me that he had bought the piece of land in issue from Lion Kondowe and wanted to start developing it.
6. The said Lion Kondowe was not the rightful occupant of the piece of land and it is a distant relation of our family.
7. I made inquiries from him and he referred me to the Tradition Authority M'bwana.
8. I went to the Tradition Authority M'bwana to complain and he ignored by complaint and did not attend to me.
9. There are houses and a garden on the piece of land that belong to me.
10. I have been using the piece of land for a long time without any interruption until the scam by the Plaintiff.

Wherefore I pray to this Honourable Court for:

- (a) That the claim by the Plaintiff be dismissed in its entirety
- (b) Reimbursement of costs of the proceedings.

The second affidavit in opposition to the summons is as follows:

I, **Nyakatale Usisya** of Muwa Village, T/A M'bwana, Nkhata Bay District hereby make oath and state as follows that:

1. I depone to matters of fact emanating from my personal knowledge.
2. I am 89 years old and have resided at the named village since birth.
3. The piece of customary land in issue has been used by the Defendant's parents since 1918.
4. In 1982, the said land was given to the Defendant by the families after the demise of her mother.
5. She has so been using this piece of land up to date.
6. There are three houses and a garden on the piece of land belonging to the Defendant.
7. The named Lion Kondowe has never used the piece of land and he was never in the village until recently.

The Issues

There are basically three issues for determination before this court:

1. Whether the land belongs to the Plaintiff.
2. Whether the Defendant is in lawful occupation
3. Whether remedies sought can be granted in the circumstances.

The Law and Evidence

Title to and ownership of customary land

It is pivotal at this juncture; that we should make mention of the position at law in respect to land matters in this our Republic. **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.

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.

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 and occupation of customary land within their area. It is important to state right at the outset that there is nothing like ownership of or title to customary land. Customary land is for communal use and inhabitants/people of Malawi must use and occupy the said land as directed by their chiefs. Ownership of customary land is therefore alien to our law. In more specific terms **Mzikamanda, J** in Village Headman

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.

Similar sentiments have been made in Anna Botha vs. Yakobe Kumwenda Civil Cause No 28 of 20009 Mzuzu District Registry (unreported) and Florida Mkandawire vs. Village Headman Zulu Civil Cause No 145 of 2008 Mzuzu District Registry (unreported). The position of this matter is now settled law in Malawi.

Was the Plaintiff entitled to buy customary land?

The buying of customary land is alien to our law. As stated earlier on customary land is for communal use. Individuals living in a particular area have the right to the use and occupation of customary land as per the custom of the area. The people appointed under the law to administer and guard the custom of an area in respect to lands matter are chiefs who are mandated to administer customary land generally or specifically on behalf of the Minister of the Malawi Government responsible for land matters. The genesis against the sale of customary land is that the seller has no title to pass. Unless the Plaintiff can show that he had authority to use and occupy the land in issue through other means, any such claim would fail.

My brother **Chikopa, J** made similar sentiments in the case of Mervis Chirwa vs. Faizal Karim and Pwelenje Civil Cause No 9 of 2009 Mzuzu District Registry (unreported)

The question being 'could the Defendant have sold the said land to the Plaintiff'? The answer is in the negative. They had no title or rights of ownership in the land in issue it being customary land. The Umangombas could not have had at the material time any title or right of ownership to pass on to the Plaintiff indeed the first Defendant. In other words they could not have validly sold the land.

.....The Plaintiff cannot in our judgment validly claim ownership of the land in issue by contending that she bought the same from the Umangombas. The Umangombas simply had no land to sale. The Plaintiff could not therefore have bought any land from them.

The law allows only family members in consultation with their chief to pass on usage and occupancy of customary land within a given area. It is like a licence to the use and occupation of the land. However in administering the use and occupation of customary land chiefs must be guided by the Republican Constitution. Chiefs must be fair and just and operate within the provisions of the law without arbitrarily depriving anyone the use and occupation of customary land under the guise of community ownership. If allowed that would be an affront to justice.

Specifically **Section 28 (2), Republican Constitution** clearly states that no person shall be arbitrary deprived of property (includes land). Much as the inhabitants/people of Malawi do not have ownership of title to customary land that in itself does not entitle chiefs to arbitrarily snatch land from their subjects. Chiefs do not own customary land. They simply administer it. Chiefs in any given area have their own land which they can pass on to their heirs or indeed any other person. Customary land belongs to individual families who as a collective make up a village under a chief. Those families can also pass on usage and occupancy to their heirs or indeed any other person. Anything to the contrary will have no justification at law.

In the present case evidence has been presented that the said piece of land was allocated to the Plaintiff by Lion Kondowe. He stated that he had consulted the then late T/A Mbwana. Coincidentally Mr. Kondowe has since ascended to the throne of T/A Mbwana. In his affidavit he stated that his parents inherited this land in 1932. That he also inherited this piece of land from his father who had died at a young age while he settled at Lizulu in Ntcheu in 1979.

When he returned home in 2004 he found that the Defendant had encroached into the land. He referred the matter to T/A Mbwana who advised the Defendant to leave the area. This did not happen. The story as told by Lion Kondowe has been confirmed by Grace Mulinda a niece to the late T/A Mbwana. She further stated that she witnessed the alleged "sale" of the land to the Plaintiff.

On the other hand the Defendant claims she inherited this piece of land in 1932 and that her family has lived on the said land since then. She has

some structures on the piece of land which she built in the 70s. When the dispute arose she went to complaint to T/A Mbwana who simply ignored her. Her story was confirmed by 89 year old Nyakatale Usisya. She stated that the land belonged to the Defendant's parents since 1918 and that Lion Kondowe was never in the village until recently.

Here we have two people claiming use and occupation of the same piece of land. Who then among the two is telling the truth? Which story is more probable than not? Can it be said that the T/A then and now arbitrarily took away this piece of land from the Defendant and gave it to the Plaintiff as claimed by the former?

Burden and Standard of Proof

In civil matters there are two principles to be followed. Who is duty bound to adduce evidence on a particular point and what is the *quantum* of evidence that must be adduced to satisfy the court on that point? The law is that he who alleges must prove. The standard required by the civil law is on a balance of probabilities. 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 the other must carry the day.

Allocation of Customary Land

The present T/A Mbwana who gave this piece of land to the Plaintiff claims he did not give the land on the basis of chieftainship but rather on the basis that the said land belonged to his father. When the matter was allegedly brought to the attention of the then T/A Mbwana (late) he ordered the Defendant to vacate the piece of land. The Defendant claims the T/A did not assist her. The Defendant has not led evidence to

challenge the assertion that the late T/A had ruled on the matter. I seek further wisdom from my elder brother **Chikopa, J** in the Mervis Chirwa case.

The land in issue is customary land. It does not belong to individuals. Individuals only have usage and occupation as sanctioned by Chiefs who are in turn guided by customary land law. Meaning that even at Tonga custom it is still only the Chief who has the authority to grant the licence to use or occupy customary land.

The most Tonga chief should do in order to comply with Tonga customary land law is most likely to consult the family in occupation or use of the land before the land is allocated to others which if truth be told would happen in all instances because and like we said in Sakala's case the use and/or occupation of customary land will not be arbitrary taken away.

In this matter the Chief was involved. He consented to the passing on of usage and occupancy to the Plaintiff. When a dispute arose the same chief ruled in favour of the Plaintiff. It must be emphasized that family members can not deal with land in a manner that is inconsistent with their own custom which is in the custody of local chiefs. Unless it can be shown that there was arbitrary deprivation of land, the involvement of a local chief in customary land matters is not only pivotal but also good at law.

What other piece of evidence is there to support the claims made by the Defendant in this matter? I have searched the evidence and I find the story as told by the Plaintiff and his witnesses to be more probable and I conclude this matter in the following fashion.

conclusion

I'm of the considered view that the Defendant herein is not telling the truth. She took advantage of the absence of Mr. Lion Kondowe when he was staying in Ntcheu. Since there was no one on the piece of land she decided to occupy it without sanction. No chief was involved in this occupation hence there has been no evidence led in rebuttal to suggest the backing of any chief. The current T/A Mbwana passed on the use and occupation of the piece of land not as a chief but rather as the then current user and occupier of the land through inheritance. It is just a coincidence that Mr. Kondowe later ascended to the throne of T/A Mbwana. The passing on of the use and occupation of customary land by family members without the involvement of local chiefs has no effect whatsoever in law.

Whether money was paid is of no consequence as no one can buy customary land. Whatever money was paid was a mere token of some sort as the payment did not go towards the land transaction.

Order

I therefore grant a permanent order of injunction against the Defendant her family members, her servants or agents from interfering in any matter whatsoever with the enjoyment, use and occupation of the said piece of land by the Plaintiff. The Defendant is hereby given 28 days to vacate

from the piece of land. Whatever structures have been erected on the said piece of land after the Plaintiff's occupation must be demolished and no compensation paid. However a reasonable compensation calculated with the assistance of officials from the Ministry of Lands and the District Commissioner's Office in Nkhatabay shall be paid by the Plaintiff within 60 days for all structures which predate the Plaintiff's occupation.

Costs

As much as they follow the event, each party must pay their own costs.

Pronounced in open Court at Mzuzu in the Republic on 2nd November 2011.

D.T.K. Madise

JUDGE.