



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**LAND APPEAL CASE NUMBER 40 OF 2010**

**(Being Civil Cause Number 161 of 2010 in The First Grade Magistrate**

**Court sitting at Thyolo)**

**BETWEEN:**

**DOROTHY VEKENI.....APPELLANT**

**AND**

**BENSON MALIBWANA.....RESPONDENT**

**CORAM: THE HON. JUSTICE MR. S.A. KALEMBERA**

Mr Mlauzi, of Counsel for the Appellant

Mr Mwala, of Counsel for the Respondent

Mr Phwitika, Official Interpreter

**JUDGMENT**

***Kalembera J***

**INTRODUCTION**

This is the Appellant's appeal against the decision of the First Grade Magistrate sitting at Thyolo. The Appellant's father, Solomon Nengolo, died in 1995. He left a will in which he bequeathed his land and property to all his 8 children. The Applicant is one of the children and sued as their representative. The Appellant and her family had been living peacefully on the piece of land left by their father since 1995 to 2010. In June/July 2010, the relatives of Solomon Nengolo, the deceased, led by the Respondent, came from where they had been living all along, to claim



for the same land. Eventually the matter came before the First Grade Magistrate Court sitting at Thyolo. On 23<sup>rd</sup> September 2010 the court upheld the District Commissioner's decision and ruled in favour of the Respondent, and ordered that the Appellant should vacate the land together with her children and go back to her original home. Hence this appeal.

The Appellant filed the following grounds of appeal:

1. THAT the lower Court erred in fact by finding that the Respondent has any right to ownership or possession of the said land when he has no legal or justifiable basis of this claim.
2. THAT the lower Court erred in law by not considering that the Appellant had stayed on the said land for more than 12 years without any interference whatsoever and had therefore acquired the right to ownership of the land by adverse possession.
3. THAT the lower Court erred in fact by clearly deciding against the weight of the evidence before the Court.

And the Appellant prays for the following reliefs:

1. Reversal of the decision by the Court below ordering the Appellant to vacate from the said land together with her family and go back to her original home.
2. A permanent injunction ordering the Respondent and his family to refrain from living or cultivating on the said land and also from interfering with the Appellant and her family from enjoying a peaceful stay on the said land.

## **EVIDENCE**

Three witnesses testified in the lower court.

PW I was the complainant (Appellant), Dorothy Vekani, of William Village, T/A Mphuka, Thyolo District. It was her sworn testimony that their father told them to stay on the land in question since it was given to him by the chief with the help of his father. They have been on this land and using the land since birth.

In cross-examination she informed the court that it was their grandfather who got the land from the chief and gave it to their father. She was not there then but was only told this by her father.

DW I was the Defendant/ Respondent, Benson Malibwana of William Village, T/A Mphuka, Thyolo District. It was his sworn testimony that the complainant/appellant is his brother's daughter. During the 'nsudzulo' ceremony, he offered the widow, complainant/appellant and his late brother's family to stay on until they were ready to go back to their home. According to their custom, the complainant's mother, after the death of her husband, was required to return to her original home.

In cross-examination he reiterated that the land was not bought but that it belonged to their clan. He did not know anything about the complainant's father giving the land to her, and that even the DC's office concluded or decided that the land belongs to the clan.

DW II was Malita Bonongwe (Chief William). It was her testimony that the defendant/respondent and the complainant/appellant agreed to share the land, and she was a witness to that agreement. Later she was surprised that the complainant/appellant had taken the matter to the DC's office.

## **ISSUES FOR DETERMINATION**

The main issue for consideration is whether the Respondent is entitled to the land in question.

## **LAW AND ANALYSIS**

Customary law comprises *'customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that are treated as if they were laws.'*- **Black's Law Dictionary, 8<sup>th</sup> edition.** In Malawi customary laws are recognized by the Constitution as part of the laws of this country. Section 200 of the Republic of Malawi Constitution provides as follows:

*"Except in so far as they are inconsistent with this Constitution all Acts of Parliament, common law and customary law in force on the appointed day shall*

*continue to have force of law. As if they had been made in accordance with and in pursuance of this Constitution:*

*Provided that any laws currently in force may be amended or repealed by an Act of Parliament or be declared unconstitutional by a competent court.”*

Customary law is therefore recognized and enforceable in Malawi under the Constitution as long as it is not inconsistent with the said Constitution. Where customary law is in conflict or inconsistent with the Constitution, it becomes invalid. In the matter at hand, the Respondent contends that according to their Mang'anja custom of kusudzula or nsudzulo (that is where a surviving spouse is discharged from a marriage bond), the mother of the Appellant and her children were required to permanently leave the deceased husband's village and return to their original village- see **Zinga v Zinga and Another [1994] MLR 405**. My understanding of 'nsudzulo' under the Mang'anja custom, is that the widow and her children, if any, are told to leave the village and go to the widow's original village. It does not matter how long the widow would have lived in her late husband's village, or how old she is, or how old their children are. As long as she was there by virtue of her husband, she does not belong there once the husband dies.

It must be borne in mind that the very same Constitution recognizes that policies and legislation of the State shall be aimed at 'recognising and protecting the family as a fundamental and vital social unit.'-section 13(i). Furthermore, the family is recognized 'as the natural and fundamental group unit of society and is entitled to protection by society and the State.'-section 22(1). And 'any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that that discriminate against women, particularly practices such as.....deprivation of property, including property obtained by inheritance.'-section 24(2) (c). The said Mang'anja custom must therefore not go contrary to the dictates of the Constitution, for it, to be applicable and enforceable- see **Mayelane v Ngwenyama and Another, Case CCT 57/12 [2013] ZACC 14**. The Appellant's father died in 1995 and the Appellant and her siblings continued to peacefully stay on the land. It is not clear whether the widow, the Appellant's mother, is still alive. What is clear though, from the evidence of the 1<sup>st</sup> Defendant, is that after the demise of the deceased, the

widow and her children to go back to the widow's original home, as the land belonged to the deceased's clan. It is also clear that it was only from June/July 2010 that the 1<sup>st</sup> Defendant and others have been actively trying to force the widow and her children out of the land under the pretext of the said Mang'anja custom.

I must state that just as the Constitution recognizes and enforces customary law, the same must be followed. However, just like the Constitution stipulates, Customary law, to be enforced, must be in conformity with the Constitution and I must add, it must not result in unfairness and must not inflict injury on others. I am also of the considered view that Customary law is dynamic or fluid and must be applied in context. The widow and the 'children' have lived on this land most of their lives, in fact for the 'children' since they were born. I refer to them as 'children' just to mean they are off-springs of the deceased and the widow, otherwise the Appellant is not a child at law. I had no opportunity to see the Appellant's siblings but having seen the Appellant, am satisfied that they also are not children per se, and even more when we consider that the deceased died in 1995. This means since they were born, they have been on this land, and this land is where they considered home. Otherwise, if they had considered their mother's original village their home, may be this matter wouldn't have been brought to court at all. Now if we were to apply the said Mang'anja custom on these facts and in this context, it would only breed unfairness on the Appellant and the deceased widow and 'children.' After being away from her original village for so long how can she be expected to just pitch up? Will she find any idle land? Will she be received with open hands? It is likely that the Appellant, her mother and her siblings might not easily fit or settle in their mother's original home. They might face hardships and not be able to lead their usual life.

In the matter at hand it would therefore be very difficult to conclude that the said Mang'anja custom reflects the rights and values of our Constitution from which it draws or should draw its legal force. As has already alluded to herein, the Constitution guarantees protection of the family and abhors discrimination against women especially depriving them of property including property obtained by inheritance. Thus, to hold that the Respondent was/is justified under the Mang'anja custom to chase away the widow, Appellant and her siblings, would be counter to the aspirations and values of our Constitution. In the circumstances of this case, and in the circumstances of the Appellant and her family, the said Mang'anja

custom would result in an injustice and thereby inapplicable. I would therefore agree with ground one of the appeal that the lower court erred in finding that the Respondent has any right to ownership or possession of the said land when he has no legal or justifiable basis of that claim. Depriving the widow and her family the deceased's property under the pretext of following custom would definitely lead to gender-based discrimination which is unfair discrimination and unconstitutional.

The Appellant having succeeded on ground one of the appeal, and the Court having found that the said Mang'anja custom is unjust and unconstitutional, it would be an exercise in futility to look at grounds two and three of appeal. The same would just fall off.

All in all, the Appellant's appeal succeeds. The decision of the lower court ordering the Appellant to vacate from the said land together with her family and go back to her original home village is hereby set aside in its entirety. I hereby order and direct that the Respondent and his family is restrained from evicting the Appellant and her family from the said land, and the Respondent is further restrained from living or cultivating on the said land and from interfering with the Applicant and her family from enjoying a peaceful stay on the said land.

Costs are for the Appellant.

**PRONOUNCED** at the Principal Registry, Blantyre, this 23<sup>rd</sup> day of February, 2015.



S.A. Kalempera

**JUDGE**