



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL APPEAL NUMBER 21 OF 2016**

**(Being Civil case number 167 of 2015 before the SGM Court at Nsanje)**

**BETWEEN:**

**DINA DAVIE**

**APPELLANT**

**AND**

**ERNEST CHAMALONDA**

**RESPONDENT**

**CORAM: JUSTICE M.A. TEMBO,**

Appellant, Present and unrepresented  
Respondent, Present and unrepresented  
Mpasu, Official Court Interpreter

**JUDGMENT**

This is this court's judgment following a hearing of this matter on appeal against the decision of the lower court.

The appellant appeals against the decision of the Second Grade Magistrate Court sitting at Nsanje by which the lower court found that the respondent had not encroached into the appellant's customary land.

The lower court arrived at its decision by considering the evidence of both parties. The lower court also considered the evidence of its court marshal who it had sent



to visit the scene of the alleged encroachment. This marshal had visited the scene and produced a sketch map of the disputed gardens and boundaries of the same.

The appellant now appeals against the decision of the lower court essentially contending that the lower court's decision was against the weight of her evidence and further that the lower court did not visit the scene of the dispute but sent a marshal whose sketch map the lower court did not understand.

On hearing civil appeals this Court has the following powers as provided in section 22 of the Courts Act

In a civil appeal the High Court shall have power—

- (a) to dismiss the appeal;
- (b) to reverse a judgment upon a preliminary point and, on such reversal, to remit the case to the subordinate court against whose judgment the appeal is made, with directions to proceed to determine the case on its merits;
- (c) to resettle issues and finally to determine a case, notwithstanding that the judgment of the subordinate court against which the appeal is made has proceeded wholly on some ground other than that on which the High Court proceeds;
- (d) to call additional evidence or to direct the subordinate court against whose judgment the appeal is made, or any other subordinate court, to take additional evidence;
- (e) to make any amendment or any consequential or incidental order that may be just and proper;
- (f) to confirm, reverse or vary the judgment against which the appeal is made;
- (g) to order that a judgment shall be set aside and a new trial be had;
- (h) to make such order as to costs in the High Court and in the subordinate court as may be just.

The appeal is by way of rehearing. That means this Court will subject the evidence before the lower court to a fresh scrutiny. Of course this Court is always mindful that when sitting as an appellate Court it should never lose sight of the fact that the lower court had the advantage of determining the credibility of the witnesses first hand.

This court notes that the lower court had jurisdiction to determine the matter herein as to whether the respondent had encroached into the appellant's customary land.

However, what is most disturbing is that the lower court after determining that it was necessary to visit the disputed land to determine the boundaries it decided not to visit the scene of the disputed land. Instead, the lower court sent its marshal to visit the scene in the company of the parties herein. The marshal then testified in the lower court. This was very wrong and unjust to the parties. This is not the first time this Court has come across this wrong and unacceptable practice. The lower courts must never engage in such a practice. The magistrate must visit the scene himself and take evidence in the usual manner.

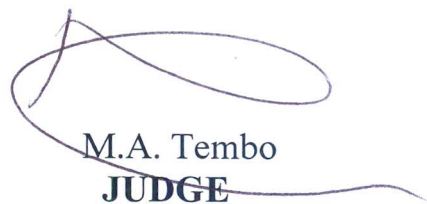
In the first place, the practice of the lower court is wrong and unacceptable because the court marshal is not a judicial officer trained in taking evidence on a visit to the scene of the disputed land. The marshal is not even trained in assessment of evidence. The marshal comes to testify in court and produces a sketch map yet he is not even a cartographer trained in producing sketch maps for the court. This practice tends to bring the courts into disrepute and must stop.

In the circumstances of this matter, this Court finds that the lower court's decision was wrong in principle as it involved evidence that was wrongly taken by a court marshal on behalf of the lower court. The appeal succeeds and the decision of the lower court is accordingly reversed and a retrial is ordered in terms of section 22 (g) of the Courts Act. This court shall therefore not bother to rule on the weight of the evidence herein.

The Chief Resident Magistrate at Blantyre shall try this matter at Nsanje and visit the scene of the disputed land within the next two months in view of the advanced age of the litigants.

Each party shall bear its own costs in the circumstances.

Made in open court at Blantyre this 14<sup>th</sup> July 2016.

  
M.A. Tembo  
**JUDGE**