JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NO. 20 OF 2015
(Being Civil Cause No. 77 of 2014 at First Grade Magistrate's Court Sitting at Phalombe)

BETWEEN

CATHERINE MWALA .....**APPELLANT**

-AND-

JOYCE LIPAYA ..... **RESPONDENT**

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Chagwamnjira, of counsel, for the Appellant
Mr. Mwala, of counsel, for the Respondent
Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J

This is an appeal by the Appellant following her dissatisfaction with the decision of the Third Grade Magistrate's Court sitting at Phalombe (lower court) contained in its judgment dated 19th January 2015. The lower court found for the Respondent.

The Appellant is dissatisfied with the whole judgement of the lower court and he has put forward the following six grounds of appeal:

> *"3.1 The Learned Magistrate erred at law when he failed to appreciate the Appellant's evidence p resented before him.*
>
> *3.2 The Learned Magistrate erred at law by disregarding the existence of the will by using evidence of admission tests as provided for in the CP&EC when this is a civil matter and the said code does not apply.*

3.3 The Learned Magistrate erred at law by not properly applying the law to the evidence presented before the court and misconstrued the said will.

3.4 The court below had no jurisdiction where matters of title to land is concerned.

3.5 The Learned Magistrate erred at law and fact by holding that the dambo belongs to the Respondent despite the evidence by the Appellant that her father left a will which stated that all the lands belongs to his children who had been cultivating on the said land for over 30 years. JI

The appeal essentially raises three issues for the determination, namely, (a) whether or not the lower court had jurisdiction to adjudicate over the present case, (b) whether or not the law of prescription is applicable in the present case, and (c) whether or not the law on intestacy is applicable to the land in question.

Jurisdiction

Counsel Chagwamnjira contended that the lower court did not have jurisdiction to try this case. With due respect to Counsel Chagwamnjira, I am unable to accept that contention. To be fair to Counsel Chagwamnjira, looking at the way the contention was framed, he did not give me the impression that he was convinced of his contention. The contention was framed thus:

> *"4.6.2. The record is clear that this matter was presided over by a third grade magistrate who clearly would have no jurisdiction over land of this magnitude. Since title was in contention, the magistrate court needed to move with caution. JI* - Emphasis by underlining supplied

The wording of the contention tells its own story. On the basis of the wording, the Appellant does not deny that the lower court is vested with jurisdiction to determine the matter that was before it but that it should have moved with caution as title to the land in question was being contested.

The applicable law on the jurisdiction of subordinate courts in respect of customary land is s. 39 of the Courts Act. It might be helpful if the whole section were to be reproduced:

> *"(1) Subject to this or any other written law, in exercise of their civil jurisdiction the courts of magistrates shall have jurisdiction to deal with, try and determine any civil matter whereof the amount in dispute or the value of the subject matter does not exceed-*

(a) In the case of a court of a Resident Magistrate, K2, 000,000;

(b) In the case of a court of a magistrate of the first grade, K1 ,500,000;

(c) In the case of a court of a magistrate of the second grade, K1 ,000,000 ;

(d) In the case of a court of a magistrate of the third grade, K750,000; and

(e) In the case of a court of a magistrate of the fourth grade, K500, 000.

(2) Notwithstanding subsection (1), no subordinate court shall have jurisdiction to deal with, try or determine any civil matter-

(a) whenever the title to or ownership of and which is not customary land is in question save as is provided by section 156 of the Registered Land Act;

(b) For an injunction,

(c) For the cancellation or rectification of instruments,

(d) Wherein the guardianship or custody of infants, other than under customary law, is in question, unless jurisdiction is specifically provided under any written law;

(e) except as specifically provided in any written law for the time being in force, wherein the validity or dissolution of any marriage celebrated under the Marriage Act or any other law, other than customary law is in question;

(/) Relating to the title to any right, duty or office; and

(g) Seeking any declaratory decree. " – Emphasis by underlining supplied

It is clear from a reading of s. 39(2)(a) of the Courts Act that any subordinate court, irrespective of its grade, has jurisdiction to deal with, try or determine title to or ownership of customary land. I am fortified in my view by the Latin maxim "expression unius est exclusion alterious", that is, the expression of one thing is the exclusion of another. Under this maxim, the mention of one thing within a statute, contract, will and the like implies the exclusion of another thing not so mentioned. The maxim, though not a rule of law, is an aid to construction. According to Baron's Law Dictionary, 9th Edition, the maxim has application when:

> *"In the natural association of ideas, that which is expressed is so set over by way of contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment. Thus a statute granting certain rights to "police, fire, and sanitation employees" would be interpreted to exclude other public officers not enumerated in the statute. This is based on presumed legislative intent. As such, a court is free to draw a different conclusion where for some reason this intent cannot be reasonably inferred.* "

The maxim has been repeatedly applied by our courts: see, for example, **Registered Trustees of the Public Affairs Committee v Attorney General and the Speaker of the National Assembly and the Malawi Human Rights Commission, HC/PR Civil Cause 1861 of 2003 (unreported).**

In the matter under consideration, I am satisfied that the maxim applies to section 39 of the Courts Act. I am unable to find reasons for holding otherwise. Accordingly, I reject the contention by Counsel Chagwamnjira that the lower court did not have jurisdiction to try the matter herein.

Law of Prescription

Counsel Chagwamnjira submitted that the Appellant's evidence that she had been in lawful and uninterrupted occupation for twelve years before the Respondent appeared to lay claim on the land went unchallenged. It was argued that such occupation legitimized the Appellant's exclusive occupation, possession and usage by operation of the law. Counsel Chagwamnjira has called in aid s. 135 of the Registered Land Act (RLA) as an example of prescription. The section provides as follows:

> *"(I) Where it is shown that a person has been in possession of land, or in receipt of the rents or profits thereof, at a certain date and is still in possession or receipt thereof it shall be presumed that he has, from the date, been in uninterrupted possession of the land or uninterrupted receipt of the rents or profits until the contrary is shown.*
>
> *(2) Possession of land or receipt of the rents or profits thereof by any person through whom a claimant derives his possession shall be deemed to have possession or receipt of the rents or profits by the claimant.*

(3) Wherefrom the relationship of the parties or from other special cause it appears that the person in possession of land is or was in possession on behalf of another his possession shall be deemed to be or have been the possession of that other.

(4) If a person whose possession of land is subject to conditions imposed by or on behalf of the proprietor , continues in such possession after the expiry of the term during which conditions subsist without fulfillment or compliance with them by such person and without any exercise by the proprietor of his right to the land, such subsequent possession shall be deemed to peaceable , open and uninterrupted possession within the meaning of section 134.

(5) Possession shall be interrupted:-

(a) By dispossession by a person claiming the land in opposition to the person in possession;

(b) By the institution of legal proceedings by the proprietor of the land to assert his right thereto; or

(c) By any knowledge made by the person in possession of land to any person claiming to be the proprietor thereof that such claim is admitted.

(6) No person possessing land infiduciary capacity on behalf of another may acquire byprescription the ownership of the land against such other. "

To buttress his submission, Counsel Chagwamnjira cited the decision of the Supreme Court of Appeal in Mbale v. Magongo, Miscella neous Civil Appeal Cause No. 21 of 2013 [hereinafter referred to as the "Mbale Case"] where the question was whether conversion or adverse possession of land without a proper title had been satisfied and it was held as follows:

At paragraph 90:

"... The Respondent did not bring any evidence of what he had done on the land encroached by him. It's not clear whether he built a house on this land or he was planting crops or he was using the land for pasture. There is simply no evidence of developments or activity of any description ... it was incumbent upon the Respondent to demonstrate to the court all acts of occupation which indicate actual possession coupled with the necessary "animus posssidendi" ...Mr. Chilenga argued that the Respondent should have shown evidence of taking up the land or living on the land or undertaking some activity or development. I agree that there was no such evidence"

And then at paragraph 114:

> *"...to establish actual possession, the squatter, had to show absence of the proper owners consent. He had to show also a single continuous and exclusive possession. In addition, the squatter had to show such acts as demonstrated that having regard to the circumstances and the nature of the land and the way it was commonly used, he had to deal with it as an occupying owner might normally have been expected to do and no one else had done so.* "

Counsel Chagwamnjira argued that, unlike in the **Mbale** Case where the claim of conversion was dismissed because of the Applicant's failure to show *"acts of occupation which indicate actual possession with the necessary animus possidendi* ", the Appellant has advanced undisputed evidence of his family's uninterrupted thirty years occupation, possession and use of the said lands.

The submissions by Counsel Mwala on the issue pertaining to prescription were also concise and brief. He begun by contending that the **Mbale** Case does not apply to the present case. The contention was put thus:

> " *It will be observed that the said case (the Mbale Case) looked at whether conversion or adverse possession applies to land without pro per title.*
>
> *My Lord it will be observed that the land herein has its title under custom. It is not land without pro per title as the Appellants argue. Title to land herein is under custom and therefore the Mbale -vs-Magombo case does not apply as it deals with land with no pro per title"* -Emphasis by underlining supplied by Counsel

Counsel Mwala concluded his submissions on this issue by inviting the Court to note that several requirements must be satisfied for prescription or adverse possession to apply but one such essential requirement has not been met in the present case:

> *One of such requirements is that the use of the said land must be adverse to the interests (possession of the owner)*
>
> *It will be observed that the late Malizani Mmwala had actually sought consent from his clan to be farming on the disputed land. In such circumstances therefore his use of the land in dispute was not adverse. He was given consent.* "

I have considered the submissions by the parties on this issue. The Appellant's argument that he acquired the land in question by prescription lacks merit and it has to be dismissed. The Appellant seeks to rely on s. 135 of the RLA but the said section does not apply to customary land by reason of s. 134 of the RLA. Section 134 of the RLA deals with acquisition of land by prescription and the relevant part thereof provides as follows:

> *"(l) The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of twelve years:*
>
> *Provided that no person shall acquire the ownership of customary or public land."* - Emphasis by underlining supplied

The provisio to s. 134(1) of the RLA is clear: a person cannot own customary land by prescription or otherwise.

Application of testacy or intestacy laws to the land in question

Counsel Chagwamnjira submitted that before his death Malizeni Mmwala left a Will which stated that all his land, which included four gardens and seven dambos, belonged to his four children, including the Appellant. It was thus argued that the lower court should have given effect to the intention of the testator without being bound by the legal requirement that documents must be tendered. Counsel Chagwamnjira placed reliance on s. 11 of the Deceased Estates (Wills, Inheritance and Protection) Act [hereinafter referred to as the "DEWIPA"].

With due respect to Counsel Chagwamnjira, I am at a loss how the Appellant expected the lower court to give effect to a document that has not been verified to be true and valid. It is trite that the usual proof of the contents of a Will is the production of the grant of probate which will contain a copy of the Will by which he is appointed, bearing the seal of the court. This is usually called the probate

In any case, and perhaps more importantly, the application of s. 11 of the DEWIPA does not extend to a Third Grade Magistrate Court. In terms of s. 2 of the DEWIPA, "court" means the High Court or a court having jurisdiction as specified under s. 20 of the DEWIPA, which vests the High Court with jurisdiction in all matters relating to the probate and the administration of estates of deceased persons. It is only with respect to small estates that a court of a resident magistrate or a court of a magistrate of first grade can grant probate and letters of administration.

Counsel Chagwamnjira advanced an alternative argument. It was his contention that having declared that there was no Will with respect to M'mwala's dambos and land the same ought to have been declared intestate not necessarily customary land. He cited ss. 3 and 16 of the DEWIPA to buttress his contention.

Section 3 of the DEWIPA defines intestate property as property in respect of which there is intestacy under section 16, which provides as follows:

> *"If a person dies without having left a will valid under section 6, there shall be intestacy in respect of the property to which he or she was entitled at the date of his or her death.*"

Counsel Chagwamnjira further argued that s. 4 of the DEWIPA prohibits the application of customary law to intestate property. Section 4 of the DEWIPA is in the following terms:

> *"Except as provided for in this Act, no person shall be entitled under any other written law or under customary law to take by inheritance any of the property to which a deceased person was entitled at the date of his or her death. "*

In his response, Counsel Mwala submitted that there was unchallenged evidence that the land in question did not belong to the late Malizani Mmwala and thus, so it was argued, he could not dispose of the same by Will or otherwise. The argument was couched in the following terms:

> *My Lord, it will be observed from the Lower Court's record that it was in evidence and uncontroverted that the land in question did not belong to late Malizani Mmwala when he was alive.*
>
> *It is in evidence that this was tribal land and the late Malizani Mmwala having married in another village, had to seek consent to use this land. This clearly shows that the land was not his*
>
> *We therefore submit that if the land did not belong to Malizani Mmwala whilst he was alive, it cannot be part of his estate when he is dead*
>
> *We therefore submit that the law of intestacy does not apply to the land herein. The land did not belong to Malizani Mmwala.*
>
> *It will further be observed that the Appellants argue that the lower court should have called for the Will to be brought to Court once the Appellant mentioned it*
>
> *My Lord, we submit that even if the Lower Court had called for the Will, it would not have applied as the land did not belong to the deceased. One cannot bequeath that which does not belong to him.* "

Here again, I cannot agree more with Counsel Mwala. It is not in dispute that the land in question was clan land and the late Malizani Mmwala had to seek consent

from the clan to allow him to use the land. The evidence of Loyce Lipaya, Oscar Chapita and Justen Gomani is very clear on this point. Having established that the land in question did not belong to late Malizani Mmwala, the late Malizani Mmwala could not bequeath the same to the Plaintiff or any other person. In the same vein, the land in question could not form part of the intestate estate of the late Malizani Mmwala.

Conclusion

In the final result, premised on all the facts, evidence and principles of law considered, this appeal has failed and it is, accordingly, dismissed with costs.

Pronounced in Court this 10th day of January 2017 at Blantyre in the Republic of Malawi.

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Kenyatta Nyirenda
JUDGE