JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NO. 8 OF 2014
(Being Civil Cause No. 160 of 2011 in the First Grade Magistrate's Court Sitting at Chikwawa)

BETWEEN

LUKA CHATAIKA ..... APPELLANT

-AND-

FRED BUGAYO ..... RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Domasi, of counsel, for the Appellant
Respondent, present and unrepresented
Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

This is an appeal against the decision of the First Grade Magistrate's Court sitting at Chikwawa (lower court) contained in its judgment dated 19th January 2015. The lower court ruled in favour of the Respondent in a land dispute involving the parties herein.

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

> *"i. That lower court failed to apply principles of the Sena Customary law applicable in the area.*
>
> *ii. There was no evidence that the defendant was the owner of the piece land in dispute.*

iii. *The lower court misdirected itself on the evidence given by the Appellant and her nephew and wrongly found that they contradicted each other.*

iv. *The decision is against the weight of the evidence.*

v. *The claim was statute barred."*

The Appellant seeks reversal of the decision of the lower court.

It is trite that when hearing an appeal from a subordinate court under section 20(1) of the Courts Act, this Court proceeds by way of re-hearing of all the evidence that was before the court below, the law applied and the reasoning behind the decision.

The evidence adduced before the lower court can be easily stated. The Respondent (the Plaintiff in the lower court) called three witnesses, namely, the Respondent himself (PW1), Kelita Betchi (PW2) and Eveles Henry (PW3).

PW1 told the lower court that the Appellant is not related to him. PW1's father died in 2003. In 2004, PW1 went to Selemani Village to start cultivating the gardens left by his father. He found the Appellant cultivating one of the gardens (garden in dispute). When he confronted the Appellant, the Appellant said that he had bought the garden in dispute from Oliver who thereafter left for Mozambique. Oliver is not related to PW1. In 2005, the garden in dispute was cultivated by the Appellant's children.

PW1 laid a complaint before Village Headman Selemani. There was no evidence before Village Headman Selemani that the Appellant had bought the garden in dispute. Since Village Headman Selemani was not able to inspect the garden in dispute due to a leg problem, he instructed his wife to inspect the garden in dispute and she confirmed the encroachment by the Appellant.

PW1 later referred the matter to the police but the Appellant refused to appear before them so the police referred the matter to T/A Makhwira who in turn referred it GVH Chikuse. The Appellant, Oliver and the Respondent appeared before GVH Chikuse and Oliver confirmed to have sold the garden in dispute at K25, 000. 00 to PW1. GVH Chikuse ruled in favour of PW1 but the Appellant appealed to Paramount Lundu who also ruled in PW1's favour.

In cross examination, PW1 said that he was given 3 gardens of his late father.

PW2 testified that she was not related to the Respondent but she came to know him many years ago. She said that all she knew is that the garden in dispute belonged to the Respondent's father. She said that when the Respondent went to Selamani Village to claim the gardens of his late father, she is the one who was delegated by her husband to show the Respondent the garden. She did as directed because she knew the boundaries. She said that what surprised her was that she found it already cultivated by unknown person, that's why the Respondent sought the intervention of the traditional leaders.

The testimony of PW3 was that the Respondent is the son of her uncle. She said the father of the Respondent had cultivated the gardens, including the garden in dispute, for many years. By then, she was young. When her uncle died, the Respondent inherited the gardens. She had never seen Oliver at the gardens. The Appellant did not cross examine PW3.

The Respondent called three witnesses, namely, the Respondent himself (DW1), Wyson Chidothi (DW2) and Mailosi Thonje (DW3).

DW1 was the Appellant himself. DW1 stated that he is not related to the Respondent. In 2000, DW1's father bought the garden in dispute from Oliver at the sum of K36, 000. 00. In 2004, the Respondent claimed the garden in dispute from him but he told him that the garden in dispute belonged to him because his father bought it. He called Mr. Thonje, Donald and Paundi who all said that the garden in dispute does not belong to the Respondent. He also called Oliver but the Respondent refused to meet him.

Thereafter, the matter was referred before T.A. Makhwira who ruled in favour of the Respondent. He appealed to Paramount Lundu who ruled in his favour. DW1 tendered a letter (EXD1) from Paramount Lundu.

In cross examination, DW1 said that the matter was not resolved by Paramount Chief Lundu. He conceded that there were two letters from Paramount Chief Lundu saying different versions. While the letter adduced by the Respondent dated 21st December 2010 stated that the garden in dispute belonged to the Respondent, the letter produced by the Respondent dated 11th May 011 is to the effect that the matter was not concluded.

DW2 testified that the Respondent's father was given the garden in dispute in 1986. DW2 actually accompanied the Village Headman during the distribution of

the land that resulted in the garden in dispute, among other gardens, being allocated to the Respondent's father. The garden in dispute shared boundaries with that of Mr. Materekera. After the Respondent's father and Mr. Materekera died, the Respondent inherited the garden of his late father before he claimed that of the late Materekera. In cross examination, DW2 denied knowing that Oliver had sold the garden in dispute to Mr. Materekera.

DW3 stated that the Appellant and the Respondent inherited the gardens of their respective parents. He added by saying the garden belongs to the Appellant.

Having heard the evidence from both parties, the lower court analysed the evidence and made its determination as follows:

> *"Such was the totality of evidence. Now, I pause to evaluate it.*
>
> *It was not in dispute that the complainant inherited the garden of his late father. He was supported by PW2 who was the wife of the village head who gave his father the land and when the complainant claimed it, she showed him because by then her husband was sick. As alluded to this piece of evidence was not in dispute.*
>
> *However, the complainant added that when he went to the garden with PW2 they found that the other part was cultivated by unknown person. When he caused inquiries, he realised that Mr. Oliver had sold it.*
>
> *The defendant conceded before this court that his father bought it at K36, 000. 00, while the other witnesses for the defendant simply said the defendant inherited the land of his father.*
>
> *My view is that the defendant is correct to say that his father bought the land from Oliver. The defendant never called Oliver as his witness. I do not know if he is alive or not.*
>
> *I have said more than once before this court and I will not stop saying that customary land is not for sale. Traditional leaders are aware about this but the practice is still going on.*
>
> *There is no doubt the sale which was done between Oliver and the father of the defendant was illegal. We are not here to enforce illegal sales.*
>
> ***Therefore having carefully looked at the totality of evidence and considering the standard of proof in Civil Cause, I find that the land belongs to the complainant. Costs to the complainant."***

Time to turn to the applicable law as it stood at the time the matter was before the lower court (the Court is fully aware that there is now in place a new legal regime governing land matters). Sections 25 and 26 of the Land Act are relevant. Section

25 of the Land Act provides that all customary land is property of the people of Malawi. The section further vests customary land in perpetuity in the President for purposes of the Land Act. Section 26 of the Land Act reads:

> *"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."*

The terms "customary land" and "customary law" are defined in section 2 of the Land Act. Customary land means all land which is held, occupied or used under customary law but does not include public land. Customary law is defined as customary law applicable in the area concerned. Based on a reading of the two definitions, one may safely conclude that chiefs have been given the mandate to authorize the use of customary land within their respective areas.

However, it is important to bear in mind that there is nothing like ownership of customary land. Customary land is for communal use and inhabitants of Malawi must use and occupy the said land for their benefit but as directed by their chiefs. Strict legal ownership of customary land is therefore alien under our laws. As was aptly put by Mzikamanda J, as he then was, in **VH Zakeyo Chunga v. Nowell Jere, HC/Mzuzu District Registry Civil Cause No 176 of 2000 (unreported)**:

> *"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."*

Further, in administering the use and occupation of customary land chiefs are required to be guided by the Constitution. In the words of Mzikamanda J, as he then, in **Milton N. Msofi v. V/H Chikutu Banda [2007] MLR 246**:

> *"A chief who administers and controls customary land according to customary law is bound by the Republican Constitution which provides for equal protection to all people of Malawi……..*

> *Although a chief has power to allocate and reallocate any piece of customary land for use and occupation, such powers must be exercised while respecting the constitutional provisions."*

Having critically considered the facts and the applicable law, it is time to turn to the grounds of appeal.

That lower court failed to apply principles of the Sena customary law applicable in the area

This ground was not pursued: Counsel Domasi did not advance any arguments in respect of this ground. As a matter of fact, even the skeleton arguments did not address this ground of appeal.

There was no evidence that the Respondent was the owner of the piece land in dispute

This ground lacks merit. The lower court made a clear finding that it was not in dispute that the Respondent inherited the garden in dispute from his late father. The finding was premised on the evidence of the Respondent, PW2, PW3 and DW2.

The lower court misdirected itself on the evidence given by the Appellant and her nephew and wrongly found that they contradicted each other

A perusal of the Court record shows that whilst the Appellant testified that his father bought the garden in 2000 from Oliver at K36, 000. 00, the respective testimonies of his nephew and the other defence witness were otherwise: they stated that the Appellant inherited the garden in dispute from his father. Clearly, there is big contradiction between the evidence of the Appellant and that of his witnesses.

The decision is against the weight of the evidence

Counsel Domasi submitted that the lower court erred in reaching a decision that was against the weight of evidence. It might not be out of place to quote in full the submissions by the Appellant:

> ***"ASSESSMENT***

On page 3-4 of the lower Court Judgment, the magistrate wrote:

> *'My view is that the defendant is correct to say that his father bought it at MK36, 000 while the other witnesses for the defendant simply said the defendant inherited the land of his father.*
>
> *I have said more than once before this Court and I will not stop saying that customary land is not for sale. Traditional leaders are aware but the practice is still going on. There is no doubt the sale which was done between Oliver and the father of the defendant was illegal. We are not here to enforce illegal sales.*

With due respect to the magistrate, this conclusion was too sweeping. It is not necessarily illegal to sell land. The truth is that no-one can pass legal title to another on customary land because that land legally belongs to the president. However, a land user has a right to transfer 'the right of using the land to another person'.

Further, the court unnecessarily dwelt on the question of buying instead ascertaining how the parties acquired the land. The evidence clearly shows that the parties acquired the land from their parents.

CONCLUSION
In conclusion we state that:

(a) Customary land (use, possession, control etc) is transferable to any other person in several ways including sale.

(b) The said sale is possible because there is 'private ownership' in customary land even though it is inherently communal. This transfer can only be achieved by the private owner.

(c) As such, the Appellant's father rightly bought the land from Oliver."

In his oral submissions, Counsel Domasi sought to expound on his argument that customary land can be transferable by means of a sale:

> *"In transferring, what it means is that the use, occupation and enjoyment of the land will be assumed by person X instead of person Y. The conditions for the transfer are not given. We strongly believe that such transfer may be done as a result family relationship, friendship, leasing, borrowing, or even selling to any Malawian."*

I have carefully considered the submissions by Counsel Domasi and I am unable to accept the assertion that the transfer can be by means of a sale. These are very strange submissions and they go against the clear provisions in the Land Act and the leading authorities thereon: See **Mervis Chirwa v. Faizal Karim and**

Pwelenje, HC/Mzuzu District Registry Civil Cause No. 9 of 2009 (unreported), Hon. David Faiti v. Saulosi Kandindo, HC/PR **Civil. Cause No. 1412 of 2005**

(unreported), Jayshree Patel v. Khuze Kapeta and Kaka Holdings Ltd, HC/PR Civil Cause No. 3277 of 2003 (unreported) and **Nicco J.G. Kamanga v. Jossianne le Clerq and Regional Commissioner for Lands, HC/PR Civil Cause No. 2829 of 2006 (unreported).**

In **Mervis Chirwa v. Faizal Karim and Pwelenje, supra,** Chikopa, J, as he then was, was confronted with the question of whether or not customary land is legally capable of being sold:

> *"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...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."*

I have critically considered the facts in the present case. The main thrust of the Appellant's case is that his father bought the garden in dispute from Oliver. However, no evidence whatsoever was laid before the lower court as to how Oliver could have validly passed on usage and occupancy of the garden in dispute regard being had to the fact that there was unchallenged evidence that the Respondent inherited the garden in dispute following the death of the Respondent's father.

Having gone through the evidence adduced before the lower court, it is my holding that the decision of the lower court cannot be faulted. The decision is not against the weight of the evidence. In this regard, Ground of Appeal No.4 has to fall by the wayside.

The claim was statute barred

With due respect to Counsel Domasi, this ground of appeal is misconceived. The undisputed evidence is that (a) the Respondent's father died in 2002, (b) the Respondent went to Selemani Village to start cultivating the gardens, including the garden in dispute, in 2004 and (c) the Respondent commenced the case in 2011.

In the premises, I fail to understand how the claim by the Respondent could have been caught by section 6 of the Limitation Act which requires a party claim dispossession of land to do institute an action within twelve years from the date of the dispossession. In any case, the Appellant did not plead that case was statute barred.

All in all, the Appellant's claim could not be sustained in the court below and it must similarly fail in this Court. I, accordingly, dismiss the appeal with costs.

Pronounced in Court this 8th day of June 2017 at Blantyre in the Republic of Malawi.

enyatta Nyirenda
JUDGE