



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL CASE NUMBER 07 OF 2017

BETWEEN:

FRED VICTOR MBEWE

APPELLANT

-AND-

ALBERT KUCHUWI

RESPONDENT

CORAM: THE HONOURABLE JUSTICE JOSEPH CHIGONA

MR FRED VICTOR MBEWE, THE APPELLANT (UNREPRESENTED)

MR FELIX KAMCHIPUTU OFFICIAL COURT INTERPRETER

CHIGONA, J.

JUDGMENT

This is an appeal from the lower court (principal resident magistrate court) against a decision that was made by the principal resident magistrate. Being dissatisfied with the decision, the appellant, Mr Fred Victor Mbeve lodged the present appeal. I am very well aware that an appeal of this nature is dealt with by way of rehearing.

The grounds of appeal as outlined by the appellant, in vernacular language are that the place where the respondent built his house is a public place where during the Malawi Congress Party there was a road that was being used by the public. That as a result of the buildings, a place they called cabinet was destroyed and that the appellant's motor vehicle that was parked at his home deteriorated due to lack of a road. That chiefs and Member of Parliament of the area tried to resolve the issue in favour of the road but the respondent could not take any of it. The appellant states that people are having serious

During the hearing of the appeal, the appellant was the only witness. Suffice to mention that the respondent did not attend the hearing despite service. I am aware of the standard of proof in civil cases, as well stated by Denning J, as he then was in the case of **Miller V Ministry of Pensions**¹, when he said the following:

"That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in criminal cases. If the evidence is such that a tribunal can say 'we think it more probable that not' the burden is discharged but if the probabilities are equal it is not".

During the hearing of the appeal, the appellant told the court that where the respondent has built his houses, there was a road during the United Democratic Front regime and that the place was named Cabinet. He told the court that his house/place was just opposite Cabinet. He said people have been using the road when going to Cabinet. The appellant told the court that he parked his motor vehicle at his place due to scarcity of fuel. Once the respondent commenced construction of his buildings, the appellant was unable to move out his motor vehicle so much so that the motor vehicle has deteriorated while parked at his place. The appellant told the court that both chiefs and Member of Parliament for the area failed to convince the respondent to destroy his buildings to create access road for the public. He told the court that the house was constructed in 1999. He told the court that up to now, the people around have no access road.

In essence, the above was the unchallenged evidence from the appellant. Let me state that in his judgment, the principal resident magistrate, in dismissing the appellant's case held that the appellant slept on his rights as he did not take action against the respondent when he commenced construction of his buildings. It was the determination of the lower court that the appellant slept on his rights and that he was caught by the delay. The lower court then dismissed the case without looking at the merits. The lower court gave the parties 14 days to appeal to the High Court.

I am of the humble view that the decision that was appealable to the High Court is the decision to dismiss the case on the ground that the appellant delayed in bringing the action to court. As already indicated, the lower court did not even consider the merits of the case. I am of the considered view, therefore that appellant was to appeal against that lower court's decision to dismissing the appeal on the ground that the appellant delayed in seeking justice. The appellant was supposed to put across grounds explaining the delay as noted by the lower court. Instead, the appellant, looking at the grounds of appeal, is not appealing against the decision of the lower court. But rather, the appellant is appealing against the substantive case which the lower court did

¹ [1947] 2 ALLER 372

not resolve. In other words, I have discovered that the appellant has not filed any grounds of appeal touching on the decision of the lower court. In my humble opinion, there are no grounds of appeal in this case. I therefore dismiss the appeal in its entirety.

As if that is not enough, I have noted that the subject matter in this case is public land. The appellant is not claiming that piece of land but rather he is fighting for the access road. I am of the view that the decision by the respondent is not only affecting the respondent alone. I doubt if the appellant has the mandate to bring the present action.

All in all, the appeal is dismissed in its entirety.

Each party to bear its own costs.

PRONOUNCED IN OPEN COURT THIS 10TH DAY OF JULY 2018 AT CHICHIRI, BLANTYRE.


JOSEPH CHIGONA
JUDGE