



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRAR**

**CIVIL APPEAL NO 34 of 2016**

Being civil cause number 21 OF 2015 in the  
Senior Resident Magistrate Court sitting at Thyolo)

**BETWEEN**

**RHODA BANUEL.....APPELLANT**

**-AND-**

**DAVIES KACHIKONDO..... 1<sup>ST</sup> RESPONDENT**

**EDDA KACHIKONDO.....2<sup>ND</sup> RESPONDENT**

**CHEZA KACHIKONDO ..... 3<sup>RD</sup> RESPONDENT**

**CORAM: THE HON. JUSTICE D.T.K. MADISE**  
Mr. Kaira, Counsel for the Appellant  
Counsel for the Respondent absent  
Respondent Absent  
Mr. M. Manda, Official Interpreter

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**Madise, J**

**JUDGMENT**

## **1.0 Introduction**

- 1.1 The Appellant in this matter first appeared before the Senior Resident Magistrate court sitting at Thyolo. She had taken summons for possession of land against the Respondents. The court below dismissed her action for want of satisfactory evidence. Being unhappy with that ruling, she now appeals to this court against that judgment
- 1.2 I'm mindful that appeals in this court are by way of rehearing of all the evidence that was before the court below, the law that was applied and the reasons for the decision. An appellate court will therefore look at all that which took place in the court below. The Respondents and their lawyer did not attend the appeal hearing and no reasons were given for their nonattendance. The Appellant filed an affidavit of service and I allowed her to present her case.

## **2.0 The Grounds of Appeal**

- 2.1 The lower court erred at law by applying customary law on inheritance of deceased estate or land contrary to section 4 of the Deceased Estate (Wills inheritance and Protection) Act.
- 2.2 The lower court erred in fact by holding that the Defendants who never lived in the Appellant father's land had the right to inherit their deceased's land in the presence of immediate family members like the Appellant.
- 2.3 The lower court erred at law for awarding deceased property to nephews of the deceased at the expense of the rightful heir the Appellant and her siblings who were the children of the deceased.
- 2.4 The lower court erred at law for depriving the deceased's direct dependents of their father's land for nephews who had their own land in a different village.

- 2.5 The lower court erred in fact by holding that the land belonged to the deceased's clan instead of the deceased's immediate family (Appellant and her siblings).

### **3.0 The Facts**

- 3.1 The Appellant in this matter appeared before the Senior Magistrate court sitting at Thyolo under a Civil Cause No 211 of 2015 claiming that the Respondents herein had taken away her piece of land. She further claimed that the Respondents had cut down her trees.
- 3.2 The Appellant told the court below that her grandfather married a wife from Chikwawa and took her to Thyolo. The wife to the grandfather also acquired land which land was being used by her relatives. When her grandmother died in 2004. She continued using the land which she was allocated in 1995 by her grandmother.
- 3.3 When her father died in 2006 she became the sole occupier of the land. On 15 June 2015 the Respondents entered her land and started cultivating. When the matter was referred to the Group village Headman and the District Commissioner for Thyolo it is alleged the two ruled in her favor. No evidence to support this claim has been provided.
- 3.4 The story as narrated by the Appellant was confirmed by John Petulo the Appellant's uncle. Petulo stated that the land in issue belonged to government. Later government allocated the land to the chiefs who shared the land among their subjects. That when the Appellant's grandparents were allocated the land, it has always passed from one person to the other within the family.
- 3.5 In defence Davie Paul Kachikondo stated that the Appellant was not saying the truth as she was allocated land in Lilongwe. He farther alleged



that the Appellant wanted the land in dispute in order to sell it. That the Appellant and her uncle had land which they have rented out while their relations had no land. Kachikondo stated that the Appellant had taken advantage of the absence of the other relatives who were outside the country.

- 3.6 Evance Pemba and Rabecca Nice also confirmed what Kachikondo had said that the Appellant was not born on the land and that her piece of land was in Lilongwe.
- 3.7 The court ruled that the parties were under the sena and lomwe cultures. The court ruled that according to the custom in the area the Respondents were the rightful beneficiaries as nieces of the Appellant's father. That the land was given to the clan and not to an individual. The court then dismissed the action.

#### **4.0 The Law**

It is trite law that the burden of proof in civil matters lies on the party who alleges the existence of certain facts. He who alleges must prove. The standard required by the civil law is on a balance of probabilities.

- 4.1 Section 28(2) Republican constitutions No person shall be arbitrarily deprived of property.
- 4.2 Section 17(91) Deceased Estates wills, Inheritance and protection) Act 2010. Upon intestacy the person entitled to, inherit in the intestate property should be the members of the immediate family and the dependent of the intestate.
- 4.4 Section 3 (1) Deceased Estates wills, Inheritance and protection) Act 2010. immediate family has been defined as spouse and children.  
Dependents: A person other than a member of the immediate family who was maintained by that deceased person immediately prior to his death.

- 4.5 Section 4 Deceased Estates wills, Inheritance and protection) Act 2010. 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 for which a deceased person was entitled at the date of his or her death.

**5.0 The Finding**

- 5.1 I have gone through the evidence and the law that was applied. I'm of the considered view that the learned magistrate misdirected himself on several points of law. The court below invoked the provisions of customary law prevalent in the area without regard to the existing statute which deals with intestate deceased estates.
- 5.2 Customary law cannot override an Act of Parliament especially where the Act in question specifically state that customary law cannot override it. I therefore find that the court below misapplied the law by determining that the land in question belonged to the nephews and nieces of the deceased. This is not correct and this land does not belong to the clan.
- 5.3 This land belongs to the members of the deceased's immediate family or dependents who were being looked after by the deceased prior to his death. I therefore reverse the decision of the court below and order that the land belongs to the Appellant and her siblings. This appeal must succeed with costs. I so order

**Pronounced** in Open Court at Blantyre in the Republic on 25<sup>th</sup> October, 2018.



Dingiswayo Madise  
**JUDGE**