



**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL APPEAL CAUSE NO. 102 OF 2017**  
**BETWEEN**

**MYSON KAPIYE.....APPELLANT**

**-AND-**

**DELUNDE LAPKEN .....1<sup>st</sup> RESPONDENT**

**JOHN MAMISON.....2<sup>nd</sup> RESPONDENT**

**CORAM: THE HON. MR. JUSTICE D. MADISE**

, Appellant present, unrepresented

, Respondent absent, unrepresented

, Mr. Mbwkeani Official Interpreter

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**Madise, J**

**JUDGEMENT**

## **1.0 Introduction**

- 1.1** The Appellant first appeared in the First Grade Magistrate court sitting at Chikwawa under Civil Cause No 41/2017. The Appellant sought relief over a piece of customary land which he claimed was unlawfully in the possession of the 2<sup>nd</sup> Respondent. He stated that the 2<sup>nd</sup> Respondent was his son.
- 1.2** The Appellant had left the village and settled at his wife's village. When he returned he found that the 1<sup>st</sup> Respondent had constructed a home on his land. The Appellant instructed the 1<sup>st</sup> Respondent to vacate land but he refused. The 1<sup>st</sup> Respondent then sold the land to the 2<sup>nd</sup> Respondent. The Appellant told the court below that he inherited the piece of land from his father. The lower court found that the Appellant had failed to adduce enough evidence to show that the land belonged to him. His claim was dismissed with costs.
- 1.3** Being unhappy with that determination he now appeals to this court against the whole judgment. It is trite law that appeals in this court are by way of rehearing on the papers of all the evidence that was presented, the law applied, the reasons for the decision and basically all that which took place in the court below. The purpose of an appeal is to ensure that the court below was within the ambit of law and jurisdiction when it made that decision.

## **2.0 The Facts**

- 2.1** The facts of the case are as outlined in the introduction. Additionally though, it appears the Respondents took advantage of the Appellants absence and took over possession of the piece of land
- 2.2** When the Appellant and the 1<sup>st</sup> Respondent were summoned to Village Headman Muchuwa's court the 1<sup>st</sup> Respondent assured the chief that he

was going to vacate the land. To the surprise of all parties involved in the case, he sold the land to the 2<sup>nd</sup> Respondent.

- 2.3** The 1<sup>st</sup> Respondent stated that the Appellant's father had a different piece of land and not the one in dispute. The 2<sup>nd</sup> Respondent stated he bought the piece of land from the 1<sup>st</sup> Respondent who had inherited it from his father. Richard Muyaya a Village headman confirmed this statement and further stated that as village headman he had given the land in dispute to the 1<sup>st</sup> Respondent's father.

### **3.0 The issues**

- 3.1** There are three main issues for determination before me.

1. Whether the Appellant or the 1<sup>st</sup> Respondent had the right of usage and occupation of the land.
2. Whether the land was lawfully transferred to the 2<sup>nd</sup> Respondent under customary law.
3. Whether a permanent injunction should be granted restraining the Appellant or the Respondents from interfering with the land in question.

### **4.0 The Law**

- 4.1** Burden and standard of the proof in civil matters.

The law is settled that he who alleges must prove. The burden of proof is fixed and settled at the beginning of the trial by the state of pleadings and as a matter of law remains unchanged throughout the duration of the trial. The standard required by the civil law is on a balance/preponderance of probabilities. It is evidence which is more convincing to the mind and accords with reason and credibility. Where at the end of the trial the probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty.

#### **4.2** Title and ownership of customary land

Section 25 of the Land Act is the starting point.

*All customary land is hereby declared to be the lawful and undoubted property of the people of Malawi and is vested in perpetuity in the President for purpose of this ACT.*

#### **4.3** Section 26 of the same Act provides that.

*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.*

#### **4.4** Customary land has been defined in Section 2 of the Land Act as all land which is held, occupied or used under customary law but does not include public land. Customary law is also defined as customary law in the area concerned. It is therefore trite from the reading of the above that chiefs have been given the general mandate to authorize the use of customary land within their area.

#### **4.5** It is important to state right at the outset that there is nothing like ownership of customary land in this Republic. 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 to our Constitution and all laws currently under it. In more specific terms my senior brother Mzikamanda, J as he was then called in VH



Takeyo Chunga vs. Nowell Jere, Civil Cause No 176 of 2000, Mzuzu High Court, (unreported) held that:

*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.*

**4.6** However in administering the use and occupation of customary land chiefs must be guided by the law most importantly the Constitution. It is therefore against the law to deprive any person the right to use and occupy customary land without any justification at law. Any chief who purports to re-locate customary law must do so within the parameters of the law. Anything outside the ambit of the law will be annulled by the court. Indefinite individual usage and occupation of customary land is therefore permissible under the laws of Malawi.

**4.7** Section 25 Land Act. All customary land is hereby declared to be the lawful and undoubted property of the people of Malawi and is vested in perpetuity in the president for the purpose of this act.

## **5.0 The Determination**

**5.1** The court below made a finding after receiving evidence from both parties that the said piece of land originally belonged to the 1<sup>st</sup> Respondent's father. Thereafter it was inherited by the 1<sup>st</sup> Respondent who in turn "sold" it to the 2<sup>nd</sup> Respondent. The court below found no evidence that the land belonged to the Appellant. In its judgment of 28<sup>th</sup> April 2017 the court below dismissed the Appellant's claim with costs.

**5.2** I have gone through the evidence as recorded by the trial court and the reasons given for the decision. I have looked at the relevant law and I find no evidence to substantiate the Appellant's claim. On a balance of

probabilities I do not find the story as told by the Appellant to be more convincing. I therefore find no error whatsoever in the judgment of the First Grade Magistrate sitting at Chikwawa. This appeal was a mere tactic to deny the Respondents the fruits of litigation. This appeal was not supposed to see the light of day in our Court.

- 5.3** We need to find ways and means to allow the Registrar to dismiss these appeals at preliminary stage so that the High Court is not inundated with such frivolous appeals. It is high time the law and procedure on appeals was changed. This was an abuse of the Court's process.

I therefore confirm the judgment of the court below. This appeal is dismissed with costs.

I so order

**Pronounced** in Open Court on 23<sup>rd</sup> July, 2018 at Blantyre in the Republic.

A large, stylized handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the left.

Dingiswayo Madise  
**Judge**