



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
LAND CAUSE NO. 6 OF 2017**

BETWEEN:

MATHEWS MKACHALI MHANGO PLAINTIFF

-AND-

ROBERT KATAWA MSOWOYA 1ST DEFENDANT

LENARD MWANGAIRO 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Gondwe, of Counsel, for the Plaintiff
Mr. Ghambi, of Counsel, for the Defendants
Mrs. Doreen Mkangala, Court Clerk

ORDER

Kenyatta Nyirenda, J.

I became seised of this case on 21st March 2018.

The background to the present proceedings is of the simplest. The Plaintiff commenced the case on 8th February 2017 by way of Originating Summons. The Plaintiff seeks several declarations, orders and other reliefs in respect of a block of land being 0.3 hectares of public land situate at or near Simama Filling Station along Karonga/Chilumba road within Karonga Boma (land in dispute).

The Defendants contest the action by the Plaintiff and they both filed affidavits in opposition to the Originating Summons. This was done on 8th March 2017. The Plaintiff proceeded to file affidavits in response on 8th March 2017.

Hearing of the Originating Summons was set for 7th November 2017 but the Defendants did not show up. The Court allowed the Plaintiff to present his case. By its judgement dated 19th February 2018, the Court found in favour of the Plaintiff and granted him all the reliefs sought in the Originating Summons and costs.

On 22nd February 2017, the Defendants filed with the Court an ex-parte summons for an order setting aside the judgment. The Court ordered the application to come by way of inter-partes hearing and the same was eventually set for 21st March 2018.

On the set hearing date of 21st March 2018, the Court heard the parties through their respective Counsel and proceeded to make the following ruling:

“The matter is set aside to allow the Defendants to present their case. Judgement is set aside. Case transferred to Justice K. Nyirenda.”

To my mind, the effect of the Court’s ruling is that parties are back to square one: the proceedings have to be heard afresh. In this regard, the proceedings have to be governed by the Court (High Court) (Civil Procedure) Rules [Hereinafter referred to as “CPR”].

Order 1, r.5, of CPR as read with section 7D of the Courts Act are relevant. Order 1, r.5, of CPR provides, in part, as follows:

“5. — (1) The overriding objective of these Rules is to deal with proceedings justly and this includes—

- (a) ensuring that the parties are on an equal footing;*
- (b) saving expenses;*
- (c) dealing with a case in ways which are proportionate—*
 - (i) to the amount of money involved;*
 - (ii) to the importance of the case; and*
 - (iii) to the complexity of the issues;*
- (d) ensuring that a case is dealt with expeditiously and fairly; and*
- (e) allocating to a case an appropriate share of the Court’s resources, while taking into account the need to allocate resources to other cases.*

- (2) *The Court shall seek to give effect to the overriding objective whenever it—*
- (a) *exercises any power conferred on it by these Rules; or*
 - (b) *interprets any written law, rules and regulations.*

(3) *The parties shall assist the Court to further the overriding objective.* –
Emphasis by underlining supplied

Section 7D of the Courts Act is couched as follows:

- (1) *Any party to any proceedings commenced in a District Registry may, at any time, apply to a Judge to transfer the proceedings from the District Registry to the Principal Registry of the High Court or to another District Registry, and the Judge shall have discretion whether or not to order that the proceedings be so transferred.*
- (2) *Proceedings ordered to be transferred by virtue of subsection (1) and such original documents, if any, as have been filed therein shall, upon receipt of such order by the District Registrar concerned, be transmitted to the Principal Registry of the High Court or to such other District Registry accordingly, and the proceedings shall thenceforth continue in the same manner as if they had been originally commenced in the Principal Registry or such other District Registry, as the case may be.*
- (3) *A Judge may order the transfer of any proceedings from the Principal Registry of the High Court to a District Registry and, in that event, the provisions of subsection (2) shall, mutatis mutandis.* - Emphasis by underlining supplied

Venue is concerned with locality of an action – the place where judicial authority may be exercised: see Foster, “Place of Trial in Civil Actions”, 43 Harv. L. Rev. 1217(1930). In more practical terms and for purpose of this case, venue involves a decision of which registry of the High Court is appropriate, based typically on where (a) the matter occurred, (b) the subject matter is situated or (c) the parties reside.

It is important to bear in mind the distinction between venue and jurisdiction. Venue is concerned with the geographical location of the court where an action is commenced. Jurisdiction, on the other hand, may be defined as the power to hear and determine a matter. In other words, jurisdiction focuses primarily on the authority of a court to hear a particular case.

It is clear from a reading of section 7D of the Courts Act that it lies within the discretion of the Judge to transfer proceedings from the Principal Registry to a District Registry or to transfer proceedings from a District Registry to the Principal Registry or another District Registry. However, neither section 7D nor any other section in the Courts Act prescribes the factors or considerations that have to be

taken into by the Court in the exercise of its discretion. In the premises, resort has to be to caselaw and the leading authority appears to be that of **Raphael Joseph Mhone v. Electoral Commission and Symon Vuwa Kaunda**.

The dispute in **Raphael Joseph Mhone v. Electoral Commission and Symon Vuwa Kaunda** related to parliamentary elections which took place in Nkhata Bay Central Constituency. An application was made to transfer the proceedings from this Registry to Mzuzu District Registry. In allowing the application, Kalembera J had this to say:

*“The main consideration in determining this application is the appropriateness and convenience of having the case heard in one court as opposed to another. The convenience here does not in my considered view refer to the convenience of the main parties in the action only but all other participants in the proceedings such as witnesses. Of course the consideration of the convenience of the main parties in the proceedings is paramount but cannot be taken in isolation of the convenience of the other parties in the proceedings ... The main petition concerns or arises from Nkhatabay Central Constituency ... All the witnesses ... will at most come from the said constituency ... The petitioner contends that he has no problem bringing his witnesses to Blantyre and accommodating them, whereas the 2nd respondent contends that he will not be able to do so... There are District Registries established in this country to cater for specific regions in which they have been established. In the northern region there is the Mzuzu District Registry under which the said Nkhatabay constituency lies. These district registries were established among other reasons to avoid inconvenience of parties travelling long distances to the Principal Registry in Blantyre ... and also to save litigants the costs of travelling to the said Principal Registry.” –
Emphasis by underlining supplied*

On appeal, being **MSCA Civil Appeal No. 48 of 2009**, the Supreme Court of Appeal upheld the decision by Kalembera J. and Justice Tembo S.C. summarized the applicable law as follows:

“... we are in complete agreement with the submission by counsel on this point that a Judge, in exercising his discretion under section 7D ought to consider what, in the circumstances is the most suitable forum in which the particular proceedings should be conducted. Besides in considering the most suitable forum, the Judge should take into account the balance of convenience between the parties having regard to all the circumstances of the case. These are factors or considerations prescribed to be taken into account on transfer between district registries in proceedings commenced by Writ of Summons in England as evidenced by Order 4 Rule 5 of the Rules of the Supreme Court ...”

The Supreme Court of Appeal concluded in the following terms:

“Applying all the principles of law considered above and regard being had to the reasoning of the Judge, we are of the view that the Learned Judge in exercising his discretion to transfer proceedings from the Principal Registry in Blantyre to Mzuzu District

Registry had not committed any error in law and had, in fact, exercised his discretion on the facts of the case”

In the present proceedings, a perusal of the Originating Summons and other Court documents shows that:

- (a) all the three parties reside in Karonga as follows:
- Plaintiff: Mwakisulu Village, P. O. Box 52 Kaporo
1st Defendant: Bonje Village, T/A Wasambo, Karonga
2nd Defendant: Kashata Village, T/A Kilipula, Karonga;
- (b) the other deponents/witnesses are resident in Karonga as follows:
- Henderson Kapira: Mwambuli Village, T/A Kyungu, Karonga
Yasin Majawa: *“I moved to Karonga District and I have lived there ever since ...”* see paragraph 2 of his Affidavit in Response
Shadreck Mwenitete: mwandingule Village, T/A Kilipula, Karonga;
- (c) the Plaintiff’s legal practitioners, M/s Ritz Attorneys-at-Law, are based in Blantyre;
- (d) the Defendant’s legal practitioners, M/s Chram Associates, are located in Mzuzu; and
- (e) the subject matter of the proceedings, that is, the land in dispute, is situate in Karonga.

To my mind, the reasoning in **Raphael Joseph Mhone v. Electoral Commission and Symon Vuwa Kaunda** applies to the present case with equal force, particularly when regard is had to the fact that the land in dispute is much closer to Mzuzu District Registry than it is to this Registry, which is 825.2 kilometres from Karonga: see also **Kawalazi Estate Co. Ltd v. Village Headman Likungwi and 7 Others, HC/PR Civil Cause No. 518 of 2010 (unreported)**.

The above-mentioned matters clearly point towards having these proceedings dealt with by a registry nearest to Karonga. Mzuzu High Court Registry is the Registry that happens to be closest to Karonga. To my mind, holding the trial of these

proceedings in Blantyre would be harshly "unfair" to all the three parties and all the witnesses.

In view of the foregoing and by reason thereof, and having regard to the fact that the Originating Summons has to be re-heard de novo, these proceedings have to be transferred to the Mzuzu High Court Registry. It is so ordered.

Before resting, I wish to stress that it is very important that rules governing choice of venue should be strictly enforced otherwise failure to do so might not only defeat the overriding objective set out in Order 1, r.5, of CPR but could also easily lead to accusations, founded or otherwise, of forum shopping.

Pronounced in Chambers this 18th day of April 2018 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE