

**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
LAND CAUSE NO. 32 OF 2018**

BETWEEN:

GERALD JINAZALI 1ST CLAIMANT

MARY JINAZALI 2ND CLAIMANT

-AND-

AGNES JOHN MATOLA 1ST DEFENDANT

GROUP VILLAGE HEADMAN MUTU 2ND DEFENDANT

3 OTHER PERSONS UNKNOWN 3RD DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Phokoso, of Counsel, for the Claimants

Mrs. Doreen Nkangala, Court Clerk

ORDER

Kenyatta Nyirenda, J.

The Claimants seek several declarations, orders and other reliefs in respect of a piece of land situate at Mutu Village, Area 51B, Traditional Authority Mtema in Lilongwe District (land in dispute).

Order 1, r.5, of the Court (High Court) (Civil Procedure) Rules [Hereinafter referred to as “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 process shows that:

- (a) both Claimants reside in Nkhotakota;
- (b) all the Defendants are resident in Lilongwe District;
- (c) the Claimants’ legal practitioners, M/s Chagwamnjira and Company, are based in Blantyre; and
- (d) the subject matter of the proceedings, that is, the land in dispute, is situate in Lilongwe.

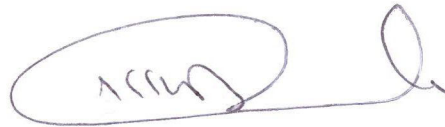
To my mind, the reasoning in **Raphael Joseph Mhone v. Electoral Commission and Symon Vuwa Kaunda** applies to the present case with equal force, particularly when regard is had to the fact that the land in dispute is much closer to Lilongwe District Registry than it is to this Registry: see also **Kawalazi 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 Lilongwe and Nkhota-kota. Lilongwe District Registry is the Registry that happens to be closest to both places. To my mind, holding the trial of these proceedings in Blantyre would be harshly "unfair" to the parties and, most likely, all the witnesses.

In view of the foregoing and by reason thereof, these proceedings have to be transferred to the Lilongwe District 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 30th day of July 2018 at Blantyre in the Republic of Malawi.

A handwritten signature in blue ink, consisting of a large, stylized loop on the left and a smaller loop on the right, connected by a horizontal line.

Kenyatta Nyirenda
JUDGE