

MZUZU DISTRICT REGISTRY
HIGH COURT OF MALAWI
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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY
CIVIL CAUSE NO. 117 OF 2017

BETWEEN:

HLAZU KAUNDA.....PLAINTIFF

-And-

GANJE MHANGO.....1ST DEFENDANT
MRS. CHIMWEMWE MHANGO MAWAYA2ND DEFENDANT
DR. ANTHONY MAWAYA.....3RD DEFENDANT

RULING ON APPLICATION TO DISMISS ACTION FOR BEING
STATUTE BARRED

Introduction

The Plaintiff commenced this action against the Defendants by way of originating summons seeking reliefs from this court as follows:-

- 1 A declaration that the Respondents are entitled to occupy and use only 12 acres of customary land at Chauluma Village, T/A Kampingo Sibande in Mzimba District.
- 2 A declaration that the Respondents' lease application should be in respect of 12.0 acres only and not 12.963 Hectares of

customary land at Chauluma village, T/A Kampingo Sibande in Mzimba District.

- 3 A declaration that all customary land in excess of the said 12.0 acres belong to the applicant.
 - 4 A declaration that the respondents had committed an act of encroachment by extending the boundaries of their land into the applicant's reserved land without the consent of the applicant herein.
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- 5 A declaration that the applicant is the only lawful and proper person to have interest in the said piece of reserved custody land for occupation and usage.
 - 6 A permanent order of injunction restraining the respondents, by themselves, their agents or servants from interfering in anyway with the applicant's customary land lawfully allocated to him at Chauluma Village, T/A Kampingo Sibande in Mzimba District.
 - 7 Order for costs.
 - 8 Any other order or directions as the court shall deem just and proper.

Now, the Defendants filed this application; to dismiss this action for being statute barred because the Applicant commenced the action herein on 6th June, 2017, following a lease application made by the Respondents in 2004. That the Respondents occupied the said 12.396 hectares of land in 2003 having made consultations with chiefs, and that the application was completed and approved on 6th October, 2004. The Respondents cited section 6 of the Limitation Act which provides that no action shall be brought by any person to recover any land after the

expiry of twelve years from the date on which the right of action accrued to him or, if the action first accrued to some person through whom he claims, to that person. According to the Respondents, the Applicant can only claim to recover land from 6th June, 2005 to 6th June, 2017.

Counsel for the Applicant, Mr. Chunga vehemently opposed the application to dismiss the action on the basis that it was statute barred. He submitted that the cause of action arose earlier than counsel for the Respondents, ~~Mr. Evans Mbotwa wanted the court to believe. He said~~ that the cause of action arose on 01/03/06 when an offer of the lease in question was made, and that the action was commenced on 06/06/17 which, according to him, was within the limitation period. Mr. Chunga further submitted that, in the event that the court would agree with Counsel Mbotwa that the cause of action arose in 2004, then the court also ought to put on record that the lease application process was dubiously made by the Respondents in that, while they pretty knew that the land in issue was within the jurisdiction and powers of Mbelwa District Assembly, the Respondents made the same application to NkhataBay District Assembly in order to keep the Applicant in obscurity no wonder the lease came to the notice of the Applicant after it was already approved on 01/03/06.

Counsel Chunga went on to submit that had it been that the Respondents made their application for lease before Mbelwa District Assembly, the same would not have been granted because the Assembly would have known that the Applicant owned the land in question. Counsel drew the attention of the court to section 25 of the Limitation Act which provides that, where there is fraud manifestation, the limitation period could be extended. Mr. Chunga also submitted that the Respondents had also misrepresented the facts before the court by intimating that the magnitude of the land in issue was 12.396 hectares instead of 12 acres. He said all these worked in favour of the Applicant that the action be

redeemed, and the application by the Respondents be dismissed with costs.

ISSUES TO BE DETERMINED

I have carefully considered the skeletal arguments submitted along for this application. I want to thank both counsels for the guidance given me on the law and the authorities cited in support of their submissions. Where appropriate, I will take into account these submissions in my ruling.

There could be a number of issues, but what is clear is that I need to provide answers as to whether;

1. The cause of action arose in 2004 when the Respondents began taking steps to apply for lease or in 2006 when an offer of lease was made to the Respondents by the responsible minister
2. the Applicant acquiesced or if there was delay to commence the matter, such delay could be attributed to the conduct by the Respondents
3. The lease so offered is concealed by fraud or mistake.

i. **Whether the cause of action arose in 2004 or in 2006**

The law is straight-forward on this question. Computation of time, for purposes of the Limitation Act, time commences from the moment an action arises and not when one comes to the knowledge of the act. See **Cartledge v Joplings and Sons Ltd** [1963] 1 All ER 341. At this point, I would agree with Counsel for the Respondents that the cause of action arose in 2004, and not in 2006 when the Applicant came to the knowledge that the land in question had been put on lease to the Respondents. Admittedly, by commencing the matter on 6th June, 2017, the Applicant was well beyond the limitation period of 12 years assigned by the Act under section 6.

ii. **Whether the Applicant acquiesced or if there was any delay in commencing the action, the same could be attributed to the conduct by the Respondents**

I have already alluded to the fact that there was delay in commencing the action on the part of the Applicant. The cause of action arose in 2004. However, the manner in which the Respondents had applied for the instant lease raises a lot of questions. While conceding that I have not come across any law forbidding people to apply for lease anywhere within Malawi, custom and good practice demands that the same should be done through the Assembly/council in whose jurisdiction the land is situated. The purpose for taking such a step is to efficiently and effectively ascertain possible interests in the land from the people and chiefs of the area. See section 27(e) and (f) of the Registered Land Act. The opposite happened in this matter; while the land in question is situated in Mzimba, the Respondents went to NkhataBay and made the application for lease there. According to the submissions made by Counsel for the Applicant, it was difficult for the Applicant to know from the beginning what were the Respondents up to, until a grant of lease was made in 2006. In these circumstances it cannot be said that the Applicant acquiesced. What is clear is that the delay occasioned by the Applicant in commencing this action is attributable to the conduct by the Respondents. With what had happened, one would be tempted to think that the Respondents had deliberately by-passed Mbelwa District Assembly and went to NkhataBay in order to keep the Applicant in darkness. In **Masiku v ADMARC** [1995] 2 MLR 387 (HC), the plaintiff's claims were for an order condemning the second defendant, the State, for inducing a breach of contract of employment between himself and the first defendant, an order for the payment of pension of benefits, an order for the payment of a sum of money had and received by the defendant without consideration, an order that hospital bills being demanded by the State be waived and finally exemplary and aggravated

damages for false imprisonment. The defendant denied liability and challenged the action on the ground that it was statute-barred in terms of section 4 of the Limitation Act. The High Court held, allowing the action in part and dismissing the action for inducement of breach of contract and waiver of hospital bills: (1) It would be wholly inequitable to allow the defendants to take advantage of a situation of their own making. By constantly depriving the plaintiff of his liberty, the defendants effectively prevented him from conducting any normal business, including the right to sue. The defendants cannot be allowed to plead the Limitation Act. (The underlined is emphasized).

The situation herein is strikingly similar to that in the case cited above. Therefore the Respondents, in these circumstances, cannot be allowed to plead the Limitation Act.

iii. Whether the lease so offered is concealed by fraud or mistake.

In the circumstances outlined above, it would be a bit difficult to conclude that there was fraud in this lease deal. However, *prema facie*, it is also easier to suspect fraud looking at the manner the lease offer was acquired. The avoiding of the Applicant by the Respondents manifested through the application for lease at NkhataBay District Assembly for a parcel of land situated in Mzimba district raises eyebrows. Why did the Respondents by-pass Mbelwa District Assembly in whose jurisdiction the land is situated? Where someone grapples with these questions, the suspicion which tends to be akin is one of a dirty dealing. Section 25 of the Limitation Act states as follows regarding the issue of fraud or mistake:

25. Where, in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as is mentioned in paragraph (a); or

(c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

The way I understand this provision is that where there is fraud or mistake, the limitation period could be extended. The Act does not go ahead to define fraud or mistake but the sense one gets from the provision is that the fraud or mistake could be actual or constructive. In my view, the mere appearance or manifestation of fraud or mistake is sufficient for purposes of the application herein. See **Waka v Attorney General**. For the limitation period to be extended the action must either be based on the defendant's fraud or the right of action must be concealed by the fraud of the defendant. See **Waka v Attorney General**.

Section 25(2) of the Limitation Act states that where, in the case of any action for which a period of limitation is prescribed by this Act, either the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent or the right of action is concealed by the fraud of any such person as is mentioned above or the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake or with reasonable diligence could have discovered it.

There is a clear manifestation of fraud and mistake concealing the lease process on the part of the Respondents which now works in concert with other shortfalls already outlined above to defeat this application.

In sum, in these circumstances, I would be unjustified to allow the application, *to wit*, that the action be dismissed for being statute barred. I therefore dismiss this application with costs.

Made in chambers today Friday the 19th day of January, 2018.



Brian Sambo
Ag Assistant Registrar