



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL CASE NO. 27 OF 2011

BETWEEN:

UNYOLO NAMAHALA.....APPELLANT

AND

FANNY BISIWECK.....RESPONDENT

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA

Appellant, present and unrepresented

Respondent, present and unrepresented

Mr Ng'ambi, Official Interpreter

JUDGMENT

Kalembera J

This is the Appellant's appeal against the decision of the Third Grade Magistrate Court sitting at Chiradzulu. The parties had been married and their marriage was eventually dissolved. After the dissolution of the marriage, the Respondent claimed from the Appellant a piece of land and a tree which she said belonged to her. The lower court decided the matter in favour of the Respondent. The Appellant being dissatisfied with the lower court's decision has appealed to this court against the whole decision of the lower court.

The Appellant has filed the following grounds of appeal:

1. That he acquired the disputed land before he even married the Respondent and that Mr Pahuwa built for him the house on this land;
2. That upon dissolution of the marriage he built the Respondent a house at her village;
3. That whatever properties the Respondent wanted upon dissolution of the marriage she took;
4. That previously a Chiradzulu court had decided that the said land did not concern the Respondent;
5. That owners of the disputed land are his children whose mother is from Namulenga;
6. That Village Headman Gunda, Group Village Headman Masauli and the Traditional Authority agreed that the said land did not concern the Respondent.

I must state that the Appellant being unrepresented, the grounds of appeal were not properly crafted. However the lower court record has been helpful in determining this appeal.

The brief facts of this matter as emanating from the evidence on record is that the parties were once married. The Respondent was a second wife. The marriage ended some years back. Both parties are claiming ownership of a disputed piece of land. The Respondent and her witness testified that the said piece of land belonged to the Respondent's father who then gave it to her to develop with her husband, the Appellant, since it was a business place. And that the Appellant had been conducting his business opposite the disputed land. The Appellant lived in another house with his first wife whereas the Respondent lived in another house on the disputed land. After the divorce is when the Appellant started chasing the Respondent claiming that the disputed land was his.

On the other hand the Appellant contended that he came to the disputed piece of land in 1965 with a wife from Zaone. He later divorced her and married a woman from Namulenga with whom he lived on the disputed land and had four children with her. He later built a house there. After marrying the Respondent he took her to his home where he built a house for her at Mwinjiro Village. They stayed there for three years. The Respondent then said she was no longer interested in the marriage. They parted ways. After two years she sued him at the Boma Court in Chiradzulu

claiming that he was not supporting her. Later she started claiming the piece of land as hers but it was the District Commissioner who gave him the land. DW II testified that the disputed land belonged to the Respondent's father and that the Appellant shifted to the disputed piece of land after being removed from his original land by Government Officials as his land was earmarked for the construction of a hospital. And that the house constructed on the land was constructed together with the Respondent.

The main issue for the court's determination is whether to uphold the lower court's decision that the disputed land belongs to the Respondent or not.

Did the lower court have jurisdiction to determine ownership of land? Section 39 (2) (a) of the Courts Act provides as follows:

"s.39 -(2) Notwithstanding subsection (1), no subordinate court shall have jurisdiction to deal with, try or determine any civil matter –

*(a) where the title to or ownership of land **which is not customary land** is in question save as is provided in section 156 of the Registered Land Act."* (emphasis supplied)

It is therefore clear from this provision that where the title or ownership of customary land is in question a subordinate court has jurisdiction. In the matter at hand it is not in dispute that the disputed land is customary land. The Respondent claims to have inherited it or gotten it from her father, whereas the Appellant claims to have obtained it from the District Commissioner and that some traditional chiefs were witnesses. The lower therefore had jurisdiction to determine this matter.

I have gone through the lower court's record as well as the lower court's judgment, and it is clear that there were some inconsistencies in the Appellant's versions of how he got ownership of the said land. In one vein he claims that the District Commissioner gave him the said land, and in another vein he claims that it was the village headman who gave him the land. It was clear though from DW II, the Appellant's own witness, that the said land belonged to the Respondent's father and that the house on the said land was built jointly by the Appellant and the Respondent.

I am therefore at pains to fault the findings and decision of the learned magistrate. The Appellant has failed to prove and support the grounds of appeal filed herein. According to the evidence it is not true that he acquired the disputed land before he even married the Respondent. He has not even substantiated his claim that a court at Chiradzulu Boma had already ruled that the Respondent had nothing to do with the disputed land. He who asserts must prove.

All in all, the lower court's decision cannot be faulted, This appeal must therefore fail in its entirety and is hereby dismissed. I make no order as to costs.

PRONOUNCED this 3rd day of July 2019, at the Principal Registry, Blantyre.



S.A. Kalembera

JUDGE