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**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL APPEAL CAUSE NUMBER 127 OF 2017**

**BETWEEN:**

**JAMES LEMU**

**APPELLANT**

**AND**

**ODIODI TAPALA**

**RESPONDENT**

**CORAM: JUSTICE M.A. TEMBO,**

Supedi, Counsel for the Appellant  
Mickeus, Counsel for the Respondent  
Mankhambela, Official Court Interpreter

**JUDGMENT**

This is this court's judgment following a hearing of the appeal in this matter.

The appellant appeals against the decision of the lower court by which the lower court found that the respondent was lawfully possessed of pieces of customary land and that the appellant's claim to recover the said land from the respondent was made out of time and amounted to an attempt at property grabbing.

The respondent had commenced civil proceedings before the lower court claiming that he was entitled to recover possession of the pieces of land in issue, namely, three

gardens and a plot of blue gum tree which he was dispossessed of by the respondent's relative, now deceased, Mr Lewis Liviel.

The facts of the matter are that the appellant's brother had died and there was distribution of the deceased estate peacefully after the *Nsudzulo* ceremony.

By *Nsudzuro* ceremony, under Mangánja custom, a widow is released from the home of the deceased husband and to return to her original home with the children of the marriage, if any. See *Vekeni v Malibwana* Land appeal case number 40 of 2010 (High Court) (unreported).

Thereafter the appellant and his clansmen decided to get the pieces of customary land in dispute herein. That was in 1993. They worked on the said land for three years.

Then Mr Lewis Liviel, a relation of the respondent, came in and dispossessed the appellant and his clansmen of the pieces of land in issue by force including by having the appellant and his clansmen arrested.

Mr Lewis Liviel died and it is a few years after his death, in 2017, that the appellants sought recovery of the pieces of land in question because they were taken by the said Liviel by force and contrary to the customary law and are in the possession of the respondent.

The respondent contended that his parents used this land since 1990s and he resisted the claim.

The matter was taken before the traditional authorities who ruled in favour of the respondent reasoning that the land was for the use of the children related to Mr Lewis Liviel.

The lower court heard the evidence and determined the matter in favour of the respondent and reasoned that the claim was very old dating back to the 1990s and that the appellant was attempting to engage in property grabbing from the respondent and other children that are related to Lewis Liviel.

There was no discussion of applicable customary law principles at all.

Being dissatisfied with the lower court's decision, the appellant filed three grounds of appeal in this matter.

This Court will only consider the first ground of appeal for reasons that will become clear later on. That is, namely, that the lower court erred in law by deciding for the respondent without reminding itself of the applicable customary law regarding devolution of title to property, in matrilineal systems of marriage, especially after conducting of the *Nsudzuro* ceremony.

The parties correctly submitted that, on hearing of civil appeals, this Court has the following powers as provided in section 22 of the Courts Act

In a civil appeal the High Court shall have power—

- (a) to dismiss the appeal;
- (b) to reverse a judgment upon a preliminary point and, on such reversal, to remit the case to the subordinate court against whose judgment the appeal is made, with directions to proceed to determine the case on its merits;
- (c) to resettle issues and finally to determine a case, notwithstanding that the judgment of the subordinate court against which the appeal is made has proceeded wholly on some ground other than that on which the High Court proceeds;
- (d) to call additional evidence or to direct the subordinate court against whose judgment the appeal is made, or any other subordinate court, to take additional evidence;
- (e) to make any amendment or any consequential or incidental order that may be just and proper;
- (f) to confirm, reverse or vary the judgment against which the appeal is made;
- (g) to order that a judgment shall be set aside and a new trial be had;
- (h) to make such order as to costs in the High Court and in the subordinate court as may be just.

The appeal is by way of rehearing. That means this Court will subject the evidence before the lower court to a fresh scrutiny. Of course, this Court is always mindful that when sitting as an appellate Court it should never lose sight of the fact that the lower court had the advantage of determining the credibility of the witnesses first hand.

During arguments on the appeal the respondent contended that there was no evidence before the lower court that the pieces of land in issue were in the use or possession of the respondent so that he could be properly sued. And that therefore issues of customary never arose that could properly be considered by the lower court in its determination.

This Court wondered whether that contention by the respondent addresses the first ground of appeal sufficiently and put it to the respondent whether the issue of who is a correct party to proceedings herein is a question of customary law considering that the land in issue is customary and is usually communal.

The respondent insisted on his argument that he should not have been sued as he was not the one in possession of the land in question.

The appellant contended that during trial it was clear that the land was sought to be recovered by the appellant from the respondent clansmen and that the suit was issued in a representative capacity.

This Court after careful consideration of the first ground of appeal agrees with the appellant that the lower court reached its decision in this customary law dispute without any reference to customary law whatsoever. In fact, no law was discussed in the lower court decision in this matter.

Yet the customary law dispute raises important customary law issues, among them whether the appellant indeed properly sued the respondent for recovery of the pieces of customary land, an issue raised by the respondent as part of resisting the present appeal.

When one considers the bases for the lower court decision, namely lapse of time in bringing the claim and that the appellant wanted to engage in property grabbing, it was imperative that the lower court justify those decisions on the basis of prevailing customary law or some other law where necessary.

No customary law was considered by the lower court. The lower court decision did great violence to the prevailing customary law.

The lower court is aware that under section 64 of the Courts Act, an issue of customary law must be proved in evidence unless the same is already decided by the High Court and is held to be precedent and binding on the lower trial court.

There would actually be situations where customary law has evolved like any other good law should. Such matters need to be investigated and probed through evidence.

The lower court had a duty to ensure that it gets evidence on the customary law applicable in the area or locality in dispute and to the dispute and then to decide on the same.

To that end, the lower court should have directed the parties accordingly as to what they ought to prove and how they could prove the same, for instance by calling in witnesses knowledgeable on the issues so that the Court is properly advised on the prevailing customary law and be properly informed in its decision. That was not done by the lower court in the present matter.

The decision of the lower court is accordingly set aside and this appeal succeeds on the first ground of appeal. This court will consequently not consider the other two grounds of appeal.

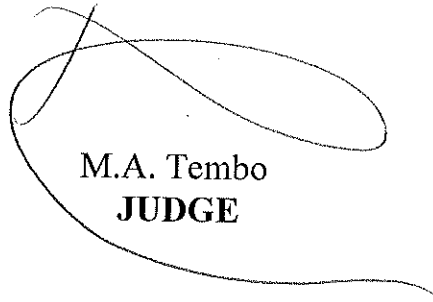
This Court is of the view that in the foregoing circumstances it should exercise its powers under section 22 (d) and (g) of the Courts Act to order a re-trial of the matter by a Resident Magistrate to be assigned by the Chief Resident Magistrate at Blantyre and that the lower court should during e-trial direct the parties to bring evidence or binding precedent on the prevailing customary law to be taken into account in determining the issues on re-trial.

It is therefore ordered that the re-trial shall be done by a Resident Magistrate to be assigned by the Chief Resident Magistrate Court at Blantyre as soon as is reasonably practicable

It is further ordered that to preserve the peace, as this matter has been very emotive, the parties that were possessed of and using the land in dispute before the lower court decision, being the respondent and any of his relatives, shall continue in such possession and use of the land until this matter is re-tried and a decision is made.

Considering the circumstances of the appeal, especially the error of the lower court, each party shall bear its own costs on this appeal.

Made in open court at Blantyre this 8<sup>th</sup> April 2019.



M.A. Tembo  
**JUDGE**