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JUDICIARY

IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

MISC CIVIL APPEAL No. 86 OF 2018

BETWEEN:

MARY MANYENJE..... APPELLANT

-AND-

MANUEL MPINGO.....FIRST RESPONDENT

-AND-

MELENIA PONDANI.....SECOND RESPONDENT

CORAM: THE HONOURABLE JUSTICE JACK N'RIVA

Mr. Phokoso, of Counsel for the Appellant

Mr. Panyanja, of Counsel for the Respondent

Mrs. D Mtegha, Court Clerk and Official Court Interpreter

JUDGMENT

The appellant commenced a case at Namitambo Magistrate Court. His claim was that the respondents grabbed a piece of customary land that she had used the land for twenty years after her late mother and grandmother used for forty years.

In the court below, the respondents claimed that land originally belonged to the patrilineal lineage of the appellant and is located in the patrilineal village of her parents. Thus, they argued, the appellant had to leave the land and go back to her mother's village.

The court made a decision in favour of the respondents on the ground that the land was in the appellant's paternal village. The court decided that the appellant could not continue using the land.

The appellant appealed against the decision. She raised the following grounds:

1. The lower court erred in failing to recognise that the appellant could not be disposes of a piece of customary land that she had been tiling over twenty years thereby disturbing her use and occupancy and her reliant interest in the land guaranteed under Section 28 of the Constitution.
2. The lower court erred in holding that the appellant could not have ownership, use and occupancy over the land because it was located in her paternal village.
3. The lower court erred in holding that the appellant be dispossessed of the land after 20years of "ownership", use and occupancy and in entertaining the claims of the respondents after that period.
4. The lower court erred in holding that under the law the use and occupancy of customary land is tied to the customs of the marriage of the Appellant's grandfather.
5. The lower court erred in extinguishing the appellant's use and occupancy and reliance interest in the piece of customary land in contravention of section 28 of the constitution.

In arguing in support of the appeal, counsel for the appellant quoted *Kampaundi v. Sisco* [2002-2003] MLR 117 where the Supreme Court upheld the appellant's claim to the land on the ground that she had used the land for several years. He also quoted the High Court in *Langton Sikalioti v. Benson Chimkasa* Civil Appeal No. 65 of 2011 where the Court was of the opinion that chiefs may grant use of customary land regardless of customs prevailing in the particular area.

The other argument the appellant raised was that once use and occupancy of customary land is in perpetuity once allocated, and passes through generations of the family– *Msiska v. Traditional Authority Bibi Kuluunda* Civil case No. 187 of 2012, *Lufani v. Crown Agro Limited* Civil Case No. 42 of 2013.

Furthermore, the appellant argued that once a person uses a land for over ten years, claims against the use of land must not be entertained- *Langton Sikalioti v. Benson Chimkasa.* Counsel argued that such claims are repugnant to the right to property that section 28 of the constitution protects the appellant's grandfather as a native in the village where the land is.

Counsel argued that after the death of the appellant's grandfather's death, his wife, the appellant's grandmother, continued using the land. She passed on the land to her daughter (the appellant's mother) who used it until 1998 when the appellant started using the land.

On the other side, the respondent argued that the court did not err in making the decision. Counsel argued that the court did not find as a fact that the appellant used the land for over twenty years. Counsel argued that during the evidence it was unclear as to when the appellant started using the land.

Secondly, counsel argued that in *Langtoni Sikalioti v. Benson Chamkasa*, nowhere does the court hold that chiefs may grant use and occupancy right in customary land to anyone irrespective of customs prevailing in the area.

Counsel argued that such an approach would be contrary to section 25 of Land Act. Section 25 of the Land Act provides that a chief may subject to the general or special direction of the Minister, authorize the case and occupation of any customary land in accordance with customary law on land; that inheritance of customary land follows customary land law norms. Counsel argued that the distinction between maternal and paternal land is affected by the distinction between matrilineal and patrilineal systems of marriage. Counsel argued that the suggestion by the appellant may defy section 25 of the Land Act that the Chief may allocate land based on the customary norms of a given area.

The issue for determination is whether or not to allow the appeal. Thus, the question is whether the trial court made its decision on error of law.

It is unnecessary to deal with the grounds of appeal one by one. I believe all the grounds of appeal can be dealt with together except where it is exceptionally necessary to do so.

The respondent's argument was basically that land allocation and subsequent entitlement depends on whether one is lives in a society where the marriage system is matrilocal or patrilocal. Counsel quoted published articles about land use and acquisition in relation to the two customary marriage systems. He quoted G Matchaya (2009), quoting Kishindo (2009).[1] Basically, according to the parts counsel has quoted, the article takes the view that inheritance of customary land follows the type of the marriage be it patrilineal or matrilineal. However, in my appreciation of the law, applying constitutional principles, it is not necessary to tie the system of marriage to ownership of land where the facts and circumstances of the of the case dictate otherwise. Land acquisition and use has to depend on justice and circumstances of each case. The question of constitutionality of a particular law in the circumstances would

[1] G Matchaya (2009) "Land ownership security in Malawi" in 4 *African Journal of Agricultural Research* 1-13 ; P Kishindo "Customary land tenure and the new land policy in Malawi" 2004 *Journal of Contemporary African Studies* 213-225

obviously arise. Remember that customary law is a recognised source of law so long as it is inconsistent with, and not repugnant to, the Constitution.

Unrelenting adherence to cultural and customary norms might end up in unfair and constitutional results especially in relation to vulnerable and marginalized persons.

A person who has known place X as her home, or enjoyed entitlement to land in such an area, may be dispossessed of the place or property on it on such grounds as death of a spouse or a parent. That would not only be unfair but also unconstitutional. It may be said to be discriminatory and section 20 of the Constitution proscribes discrimination of any persons on the grounds of among others, birth or other status and condition.

Therefore, courts should not be in a habit of enforcing customary norms that run contrary to the Constitution as the supreme law of the land. In *Langton Sikalioti v. Benson Chimkasa* Dr. Kachale J said:

> "...courts are adopting an approach that makes it impossible to attack rights in customary land over a certain period of time for lack of any reliable documentary evidence to assert such claims. In the case of the customary land my view would be that beyond ten years of uninterrupted usage it should not be possible to simply repossess the land (even if one is cultivating in a field away from his village of residence or origin)."

Counsel for the respondent argued that the first ground of appeal was a factual question and it was not put as evidence that the appellant used the law since 1998. Counsel for the appellant though, argued that that point was not in dispute. In my perusal of the court record the claimant stated, when the defendant cross-examined her, that she was given the land in 1998.

Therefore, I find it as a fact that the appellant used the piece of land since 1998 after her mother used the land for equally a considerable period. Therefore, all in all, the only issue is that the appellant was dispossessed of the land based on the lineage of the marriage system. It is not in dispute that the court ruled against the appellant merely based on the fact that the land was under the paternal parents holding (in a matrimonial

setup). The custom was that the appellant had to own land through the maternal lineage. Such an approach to customary law might, once again, end up with unfair and unconstitutional consequences.

In this matter, the appellant has enjoyed the use and occupancy of the land for a long period of time. Her grandfather used it. Then it was her grandmother, her mother and herself. Using the law to her disadvantage would be unfair. That would breach her constitutional right to ownership of property.

My finding is that the finding of the trial court was in error. The appellant having used the land for such a long time, after taking over the use from her parents, she had a right to occupancy and use over the land. Dispossessing her over the land based on the type of marriage system would, in my view, be repugnant to the constitutional right to own property (Section 28 of the constitution)

In the *Administrator of the Estate of Dr. H. Kamuza Banda v. Attorney General* [sic] 2002 – 2003 MLR 272, the High Court emphasized the protection to the right to property in customary land. The court said:

> "section 28 of the constitution provides that every person shall be able to acquire property alone or in association with others and further that [no] person shall be arbitrarily deprived of property. It is clear that this provision does not aim to protect only those who hold legal and equitable titles to property. It is therefore, equally protective of any kind of title to property...
>
> It should be noted further that the provision does not dictate where the property should be acquired and so a holder of customary land is within the ambit of its application and protection."

In other words, customary land practices and principles might fail some constitutional tests and prescriptions, in this case, on the right to own property. We have to regard customary using the lens of constitutional principles and prescriptions.

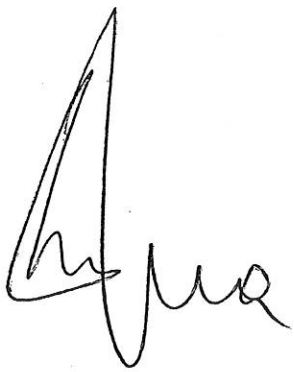
All in all, I allow the appeal. The appellant prayed for costs of this appeal hearing. I exercise my discretion to order that each party should meet the costs on their own.

Finally, I wish to regret that this Judgment has taken long to be released. It was due to inadvertence on our part. Instead of me having the record to work on the Judgment, the record together with other unheard case records. It was only when I was doing inspection on the progress of the cases, when I discovered this.

Coincidentally, during the same period one of the parties inquired through the Registry as to the status of their awaited Judgment.

Once again this is regrettable.

Made the 19th day of March, 2020



J N'RIVA

JUDGE