



IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL APPEAL CAUSE NO 40 OF 2018

MADISI MASJID KADRIA ASUM.....APPELLANT
AND
MWACHIBE FAMILY.....RESPONDENT

CORAM: HONOURABLE JUSTICE CHINANGWA

Mataka Counsel for the Claimant
Pearson Counsel for Respondent
Chitao Court Clerk

JUDGEMENT

1. Introduction

This is an appeal against the decision of the First Grade Magistrate Court sitting at Dowa as pronounced on 23 February 2018. In the lower court, the respondent (being the plaintiff in the lower court) claimed that the appellants (being the defendants in the lower court) were grabbing their clan land. In the lower court ruling the appellant was not successful. The court ordered that the land belonged to the respondents being plaintiffs in the lower court. The appellant thus appeals against that decision on grounds outlined below.

2. Grounds of Appeal

The appellant filed three grounds of appeal as follows:

- a) The lower court erred in law and practice by presiding over a matter in which it had no jurisdiction as the issue involved property grabbing that is ownership of land and not encroachment.
- b) The lower court erred in law and practice by admitting evidence which was contradictory and full of lies.
- c) Whether the lower court erred in law and practice by ignoring the overwhelming uncontroverted evidence in favour of the appellant herein.

On the day of hearing, the appellant through Counsel withdrew the first ground of appeal on jurisdiction. This court will thus make its determination on the two remaining grounds. However, it is pertinent to note that the grounds of appeal, simply put, are a request for this court to scrutinize the claim against the evidence before the court. Below is a reprint of evidence that was recorded in the lower court.

3. Summary of Evidence

a. Respondents (Being Plaintiff in the Lower Court) Evidence

The first witness was Kazembe Mwachibe. He stated as follows: 'I am years 45, from Dembo Village, T/A Bibi Kuluunda in Salima. I am in this court as a representative of Mwachibe Family. My parents are Salima Mwachibe Kachipula. He was given the land by Village Head Chinomwe in 1973 and after being given the land, at first, we were using it for farming in the year 1973 and 1974 we built a house on the land and we have been staying there. In 1976 my parents found another land near the same area and he bought the land from Mrs. Mmanga and then we moved and settled on the newly bought land. My parents and all our family are Muslim by religion and at that time the mosque was at Kachigamba village and looking at the distance from where my father was to Kachigamba, my late parents thought of building a mosque on his land. After building the mosque we found the Mwalimu. This mosque was a family mosque and it was built there based on the reason of distance. Then people started using the mosque as it was the first mosque at Madisi Trading Centre. Then after sometime they were many people who started using the mosque and they constructed a big mosque and people have been using the mosque as it was the first mosque there. In 1987 my father thought of going back home and in 1989 there was a plan to build a big mosque. Then people went to ASUM to ask assistance to build a big mosque and they were showed where there was the old mosque that they should build a big mosque. This time the

land was in the hands of our brother Suman M'dala. When my father was leaving the area, he advised all people of the ownership of the land and who will take care of the mosque. We have been leaving at peace and we were doing every development together. The Mosque cannot do any development without consulting the family as they were aware that the land belongs to Mwachibe family. Then the mosque employed a Madrassa teacher who was staying at a rented house and that madras teacher was being assisted by my brother Suman M'dala and after my brother got tired of paying house rent for the Madrassa teacher, he thought of building a house and that house was given to Madrassa teacher in order for my brother to reduce expenses for paying house rent. Then we were approached by ASUM that they wanted to build a modern mosque and they were advised to demolish the old mosque to build a modern mosque with the blessing of my brother Suman M'dala and in 2010 I came to see my brother who was very sick and then my brother passed away. There was no problem after the death of my brother till last year in 2017 when people started cutting down trees which belong to Mwachibe family. They cut down mango trees without our permission and they cut down acacia tree which was in the face of our houses. After that it is when we were surprised with their behavior. Then we thought of having a round table discussion with executive members of the mosque but they were not coming. Then we thought of constructing a brick fence to demarcate the land which was given to the mosque by our parents and our own land. After that it is when all the problems started as the executive member of the mosque were claiming that the land belongs to them. Then we were summoned by village head Master and after hearing the evidence at the village tribunal, the verdict was that the land belongs to Mwachibe family. They were told to appeal within 7 days and they did not appeal. Then after that we asked the executive body of the mosque through the village head that the house which the madrassa teacher is using, he should vacate the house. The Mwalimu is still using the house since the verdict of the village head in November 2017. Then after that we thought of approaching the Madrassa teacher (Mwalimu) to move out of the house and we locked the house as the Mwalimu (Madrassa teacher) was not willing to move out of the house. Then the matter was taken to Madisi Police by the executive body of the Madisi Mosque. After hearing at police, we were advised to open the house and that the matter should be taken to court. That is why we are before this court; the mosque members were advised to move the Mwalimu to another house as there was disagreement between our family and the mosque members. There is bad blood relationship between the mosque and our family as they have been insulting our family even mentioning our private parts without valid

reasons. We are the first to settle on the land. This land was given to our parents by village head Chinomwe. My father was the first person to construct the mosque considering the distance as the next mosque was some kilometers away.

Nothing was said in cross examination.

The second witness was Master Nkhoma. He stated that, 'I am Master Nkhoma, 41 from Madisi, T/A Chakhaza in Dowa district. I am the village head Kasangadzi 4. This matter before this court was held in my tribunal after hearing the matter the verdict was that the land should be demarcated, one side for Mwachibe family and other side for the Mosque. It was on the 19th October, 2017 when I got the complaint from the mosque and we summoned all elders in the village who had information of the land in order for my tribunal to come with a fair judgement and the issue was of the boundary not ownership of the land. After hearing the mosque and Mwachibe family and elders in the village who had history of the land, it was held that the land belongs to Mwachibe family and the Mwachibe family are the ones who built the first mosque as their parents were finding it difficult to walk a long distance to find another mosque which was some kilometers away and after getting full information of the land from the elders in the village we came to conclusion that the land belongs to Mwachibe family but we decided to divide the land considering that the mosque will be affected. Then the land was divided and the mosque was given a chance to call anyone who had a history of the land but they told my tribunal that they don't have any. We gave them 7 days to appeal but they did not appeal and after 7 days, we were approached by the mosque representative that they want a round table discussion with the Mwachibe family. They did not give me feedback. Later we were approached by the Mwachibe family to advise the mosque to move out their Mwalimu (Madrassa teacher) from the house and I contacted the mosque. After that the matter went to police and this court.

In cross examination he added that, 'The time the mosque was constructed I was not there but after receiving information from the elders of the village, there was evidence that the land belongs to Mwachibe family and that is why I decided to demarcate the land'.

Nothing was said in reexamination.

The third witness was Abel Mafikoni Katema. He stated that, 'I am Abel Mafikoni Katema, 77, from Kayembe village, T/A Kayembe, Dowa district. At present I am based at Madisi Trading Centre. This land belongs to the applicant family. This land was given to Mwachibe family by

Village Head Chinomwe. Then the late Mwachibe was a Muslim and considering the distance where there was a mosque, he decided to build a temporary mosque on his own land and this was due to distance factor that he was not able to move a long distance to access the mosque. As time went by, he decided to build a big mosque and this land was not given to mosque by a village head but by the owner of the land who is the late Mwachibe as he was doing that for his own benefits. It was last year when the mosque started claiming the ownership of the land and this matter was heard by the village head and there was no evidence that the land was given to the mosque. After hearing the case, it was heard that the land belongs to Mwachibe family but we asked the Mwachibe family to share part of the land to the mosque which the family admitted. The Mosque was given 7 days to appeal if not satisfied but they did not appeal and then the matter was taken to police and this court'.

In cross examination he stated that, 'The family of Mwachibe settled in the 1970s and Madisi trading center. It was Mr. Mwachibe who built the first mosque. This land was given to Mr. Mwachibe as his own land not mosque land. After hearing the case there were all representative of the mosque. The owner of the land is Mwachibe family not the mosque'.

Nothing was said in cross examination.

The fourth witness was Jailosi Emmanuel. He stated that, 'I am Jailos Emmanuel, born in 1959 from Madisi trading centre, T/A Chakhaza in Dowa district. I know the history of the land from the owner who settled on the land after being given the land by Village Head Chinomwe. He was a Muslim by faith and he was praying at Kachigamba and because of distance he thought of building his own mosque and he has been using the mosque from then. Then this matter was heard by the village head and after hearing the evidence at the village to know the rightful owner of the land. The representative of the mosque was given a chance to parade any witness who will prove to the tribunal that the land belongs to them. They failed to bring any witness or documentary evidence and the verdict was that the land was divided and both parties were given 7 days to appeal if not satisfied with the village head verdict. Then the matter was taken to police and later referred to this court'.

In cross examination he added that, 'I know the genesis of how the mosque come to be the applicants land. After the verdict, all parties were given chance to appeal. The land was demarcated

after hearing the evidence from the applicant's family and respondent representatives. This land was given by the village head to the applicant family'.

Nothing was said in reexamination.

The fifth witness was M'dala Suman. He stated that, 'I am M'dala Suman, 41, from Madisi, T/A Chakhaza in Dowa district. I was born in 1977 at the same place which we are fighting in this court. My grandparent was a tailor at Mjemu shop, he settled on the land after being given by a village head Chinomwe. He is the one who gave the land to our grandparents. That time in the 1970s there was no mosque at Madisi and the mosque was at Kachigamba and as a practical Muslim we pray 5 times a day and it was not possible for my grandparent to be going to Kachigamba five times a day and he thought of constructing a mosque at his own land for easy access of the mosque. The mosque was built and after sometime as the mosque had many members, we decided to ask assistance to build a new mosque from ASUM and they admitted to provide support. I am the one who authorized the ASUM with my father that they should build a modern mosque and my father was responsible for paying a Mwalimu (Madrassa teacher) he was staying at rented house and my father was responsible to pay the Mwalimu (Madrassa teacher) paying rent for the teacher till we built the house to accommodate the teacher. After building a new mosque, we asked ASUM to maintain the house which was built to accommodate the Madrassa teacher. After the death of our father, the problem started. They threaten my mother that she doesn't have land. The disagreement became worse when the executive member of the mosque started cutting down trees. They cut down 3 mango trees and they came and cut the 'sindilira' tree which was near the house without my knowledge and authority. Then I took the matter to executive members to know who cut down the tree. They promised to come back and after 4 days I was surprised to see the mosque still using the trees which was cut without my authority. Then I went back to the elders of the mosque in order to resolve the matter amicably. Then I started building the fence and I was surprised to be stopped by members of the mosque that the land belongs to them and my father was there as a mosque worker and the land belongs to the mosque. After that I got the summon from the village head. After hearing the evidence from both sides, the verdict was that the land belongs to our family but we were asked if we can be merciful to the mosque by demarcating the land on the side for the mosque and the other side for our own. After demarcating the mosque, we were given 7 days to appeal if not satisfied with the judgement of the tribunal to appeal but they did not appeal. After sometime it was discovered that the Mwalimu (Madrassa

teacher) who was ordered to vacate the house was not leaving the house. Then the matter was taken back to the village head for enforcement. After 2 months we went back to village head to seek clarification, then we asked permission from the village head to remove the Mwalimu from the house and we were given a written permission to remove the Madrassa teacher. Letter dated 04/01/2018 marked as App-ex 1. Then the house was locked by our family, then the matter was taken to Madisi Police and we went to police and after hearing the matter at Madisi police, we agreed to open the house and allow the Madrassa teacher to move out all his properties. We were surprised that the Madrassa teacher was refusing to vacate the house. We were insulted by a group of people as they were singing all insulting songs. Then after another hearing at police, there was no agreement as the mosque members were refusing to remove their Madrassa teacher from the house. Then we were referred to this court and we want this court to decide whether this land belongs to our family or not. We are ready to take the court judgement. Unfortunate thing, we have been insulted by the mosque members. What we want is justice before this court, we are ready to move out if the judgement will go against us'.

In cross examination, the witness added that, 'I have all history of the land and how the mosque was built on the land. We asked assistance from the ASUM, ASUM is an Islamic Organization that provides support of building in different areas. They provide every support to build the mosque. We were the first to settle at Madisi. We are the ones who built the first mosque in the area considering that there was no mosque at Madisi'.

Nothing was added in reexamination.

b) The Appellant (Being Defendant in Lower Court) Evidence

The first witness was Inuru Jailosi Mwalabu. He stated that, 'I am Inuru Jailosi Mwalabu, 43, from Chimsapo Village, T/A Malili in Lilongwe. I am in this court as chairman of ASUM (Association of Sun Madrassa) this is a Muslim organization and our duty includes building mosques and schools. We came to know about Madisi in 1996 and in 1997. On 1st October we received a letter from Madisi Mosque asking assistance. After getting the letter we asked them all necessary questions and we gave them a form to sign and the form was given to the people at Madisi to sign. After signing the form on 3rd November, 1997 and with me is the form which the people signed. Application form RP-Ex 1. Then we built the mosque and house and we have a list of the first students to attend the Madrassa marked as RP-Ex 2. RP-Ex 1 is a document indicating that the

mosque will belong to ASUM. The first Mwalimu in 1998 was sent in January. It is true that the first mosque was a bad one that is why they asked for assistance for the new mosque. In 2020 we managed to build a new mosque at Madisi. Then after that we agreed the procedure to bring development at Madisi mosque. There was a committee which was set to oversee the project. Before building the mosque, we asked the people to identify the owner of the land and were told that the land belongs to Madisi area. There is no documentary evidence that this land was given for constructing the mosque. We did not visit or seek permission from T/A Chakhaza as we were assured that the land belongs to the mosque. In 2020 we asked people of Madisi to give ownership of the land to ASUM. This land was bought at K50,000 from Madisi Quadria Jamaat on 6th February, 2012, marked RP-Ex 3. This land was sourced through village head. All the people who sold the land did not sign any document and the buyer did not sign any document even the village head GVH or T/A Chakhaza. This court should take notice that we were doing this business based on trust. This land belongs to ASUM as the rightful owner of the land. The same document which I have brought is the change of ownership from community to ASUM. The building of the Mosque started in 2011 and all property which we were using to build the mosque were being kept by AP-W4 who was a treasurer of the project. The reason those people signed the document was the fear of what has happened today. This land was given to build the mosque by Village Head Chinomwe. We inspected all the boundaries of the land with the seller but without the presence of the village head. There is a house which the applicants claim that the house which is accommodating the Madrassa teacher was built by the applicant family. This house was built by people of Madisi not applicant family. This house at first was a grass thatched house till it was roofed with iron sheet by ASUM. We were doing maintenance of the building in the presence of applicant family. So, for ASUM this is how we came to settle on the land. It was last when we got information that there was a disagreement between the applicant and the mosque'.

In cross examination the witness added that, 'There were people who witnessed when the land was being given to Madisi mosque. When ASUM was coming we found a mosque there. Mr. Kachipula was the first to come on the land. As ASUM we don't know the exact date when we settled on the land'.

Nothing was said in reexamination.

The second witness was Idrisah Asedi. He stated that, 'I am Idrisah Asedi, Makanjira village, T/A Makanjira in Mangochi district. I just heard that there was a problem between the applicant and the respondent. This land was given to us in 1975 and this land was given by T/A Chakhaza who was the traditional leader in 1974 and I left in 1975 and I am the one who built the first mosque at Madisi and I left Madisi in 1975 and since 1975 I have never come back to Madisi and I don't know what took the place in 1975 up to 2018 as I was not there. I don't know that land was sold and I don't know that this land is in another peoples hand'.

In cross examination he added that, 'I know you as the son of late Mwachibe. The time the mosque was built at Madisi I was not there. I was not there when this land was given to the mosque. I don't know the boundaries of the land'.

Nothing was added in reexamination.

The third witness was Ibrahim J Chikopa. He stated that, 'I am Ibrahim J. Chikopa, 63 from Mwenye village, T/A Khumba, Phalombe district. My evidence is from 2010, we have been seeking for assistance to help us to build the mosque and we were lucky to find ASUM as the donors. But before building the mosque we were asked by the donor to know whether the land belongs to an individual or the mosque. Then after that the land was sold to ASUM and I am the one who signed the document. I came to Madisi in 1980 and I don't know the background of this land, my history is from 2010 up to this time. I signed on the document which we signed on 6th January, 2012 to sell this land to ASUM'.

In cross examination he added that, 'The time you were given this land, I was a C.C.A.P church member. The time I was joining Islamic I found an already constructed mosque at Madisi. I don't know where were at the time I was joining Islam. The time ASUM was coming, there was already a mosque'.

Nothing was added in reexamination.

The fourth witness was Douglas Maulana. He stated that, 'I am Douglas Maulana, 48, from Madisi trading centre, T/A Chakhaza in Dowa district. This land which has a mosque belongs to the people of Islam at Madisi. As a group we have been looking for assistance from well-wishers to assist people at Madisi to build the mosque. Then ASUM came in as donors and before building the mosque, ASUM asked who is the owner of the land and it was discovered that the land belongs

to the mosque. Then ASUM provided support to build the mosque and in order for ASUM to have this land they paid K50,000 to own this land. Applicant was the one taking care of every property for constructing this mosque. I came to Madisi in 1998 and this was not bought by ASUM as claimed before this court. I know the history from the elders but I was not told the year the land was given. The first Mosque to be constructed and the Mwachibe family found the mosque at the area. This is a mosque land not the Mwachibe family. There is a house which belongs to the mosque and this house was built in sometime back as I cannot remember the year'.

In cross examination he added that, 'I was not told when the pioneer of this land came. The land history I have on this land is from 2010. The time this mosque was built you were not there'.

Nothing was added in reexamination.

The fifth witness was Daniyele Namwaka. He stated that, 'I am Daniyale Namwaka, 70, from Madisi trading centre, T/A Chakhaza in Dowa district. My evidence is that the land belongs to people from Muslim faith. I am sheikh on the mosque and I am the one who built the house which is used and that house was built by people of Muslim faith in 1996 and before building the house, we were renting house for Madrassa teacher. In 1996 I was contracted to build the house and I charged them K12,000 for building a house. This land was given to Masjid sometime back and I was not there when this land was being given to Madisi Masjid and I was not there when the first mosque was being built and I know the first person to build the mosque is RP-W1. The new mosque was built by ASUM. Then this land was sold to ASUM at K50,000 and I signed for the document, but the document which has been tendered to this court is not the one I signed at that time'.

In cross examination he stated that, 'You are the first to come to Madisi. When your father was given this land, I was not there. I don't have firsthand evidence on the land but I was only told by other people. The time your father was being given this land RW-W1 was there'.

Nothing was added in reexamination.

4. Issue for Determination

This court has to determine who is the rightful owner of the land in question?

5. Analysis of Law and Evidence

It should be noted on hearing an appeal the court subjects all the evidence to fresh consideration and may where appropriate depart from the decision appealed from: see section 22 of Courts Act and **Namtiti Mtsuko v Isaac Jere** [2013] MLR 272. The purpose is to ensure that the trial court was within the ambit of the law when arriving at its decision: **Mbughi v Ghambi** (Civil Appeal Cause No 34 of 2014) [2017] MWHC 143 (24 October 2017). Being a civil matter, the party making an assertion has to prove their claim on a balance of probabilities. It is not in dispute that the land in dispute is customary land. **Section 25 of the Land Act** is the starting point. It states that, '*All customary land is hereby declared to be the lawful and undoubted property of the people of Malawi and is vested in perpetuity in the President for purpose of this Act*'. In addition, **Section 26** of the same Act provides that, '*The Minister shall subject to this Act and to any other law for the time being in force administer and control all customary land and all minerals in, under or upon any customary land for the use or common benefit direct or indirect of the inhabitants of Malawi. Provided that a chief may subject to the general or special direction of the Minister authorize the use and occupation of any customary land within his area in accordance with customary law*'. Following these provisions, it is noted that customary land is administered by chiefs and those allocated rights of usage cannot be arbitrarily removed from such land without reason as custom would dictate: **The Administrator of The Estate of Dr. Kamuzu Banda v Attorney General** (2002-2003) MLR 272. Upon considering the evidence, this court notes that the respondents state they were given the land by Village Headman Chinomwe. On the other the respondents state they were given the land by people of Madisi Area and by Traditional Authority Chakhaza and that they subsequently bought the land as their rules regulated them to do so. What can be noted again from the evidence is that the appellants have not disputed that the respondents were the first occupants of the land as argued by the appellants. They have also disputed the fact that they came in to refurbish a mosque that was already existent. This court finds the story of the respondents more credible as the appellants story has a lot of contradictions.

From the first appellant witness: '*We did not visit or seek permission from T/A Chakhaza as we were assured that the land belongs to the mosque*' '*Before building the mosque we asked the people to identify the owner of the land and were told that the land belongs to Madisi area*'. '*This land was sourced through village head all the people who sold the land did not sign any document and the buyer did not sign any document even the village head GVH or T/A Chakhaza.*' '*When ASUM was coming we found a mosque there. Mr. Kachipula was the first to come on the land. As ASUM*

we don't know the exact date when we settled on the land'. From the second appellant witness: 'This land was given to us in 1975 and this land was given by T/A Chakhaza and who was the traditional in 1974 and I left in 1975 and I am the one who build the first mosque at Madisi' 'The time the mosque was built at Madisi I was not there. I was not there when this land was given to the mosque. I don't know the boundaries of the land'. From the third appellant witness, 'The time you were given this land, I was a C.C.A.P church member. The time I was joining Islamic I found already constructed mosque at Madisi' From the fourth appellant witness, 'I was not told when was the pioneer of this land come. The land history I have on this land is from 2010' and from the fifth appellant witness, 'You are the first to come to Madisi. When your father was given this land, I was not there. I don't have firsthand evidence on the land but I was only told by other people'. From the foregoing it is the courts view that the appellants were misled as to who is the true owner of the land or considering that the villagers were using the mosque, they mistakenly thought it was a communal property. There is however no evidence that the family gave the land over to the appellants. If anything, they asked for assistance to build a better mosque after the first mosque built by the family could not serve its purpose. It should be noted that there is a process which ought to be followed when customary land is changing hands. Much as the appellants argue that the respondents have given hearsay evidence, the court finds that the appellants have done the same. The only appellant witness who said he was around in the year 1975 when the mosque was built contradicted himself in cross examination as such his evidence is not credible. All in all, this court finds that the appellants bought or were given land from people who could not give them land as the same is administered by chiefs. If a chief is giving land which is already occupied there ought to be valid reasons for doing so under custom. These reasons were not brought to the court. Lastly the court finds that there was no clear arrangement regarding the mosque as to who would own the same after the appellants and people came in to rehabilitate the first mosque that was built.

6. Finding

The appeal fails. Costs are awarded to the respondents.

Pronounced this 14th day of October 2021 at LILONGWE



R.M CHINANGWA

JUDGE