IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
CIVIL APPEAL NUMBER 36 OF 2019
(Before Justice Rachel Sophie Sikwese)

BETWEEN:

MAGODO.....APPELLANT

AND

CHIKOPA.....RESPONDENT

CORAM

HON. JUSTICE RACHEL SOPHIE SIKWESE

Appellant; Unrepresented
Respondent; Unrepresented
Mithi; Official interpreter

JUDGMENT

SIKWESE J

Preamble

1. This is an appeal against the judgment of the Thyolo Second Grade Magistrate Court finding that a disputed piece of customary land belonged to the Respondent. For reasons given below the appeal is allowed and the lower court's decision is reversed.

Procedural Background

1. On 29 September 2019, the Appellant filed an Appeal with this Court appealing the whole judgment of the lower court sitting at Thyolo Second Grade Magistrate Court (the lower court).

2. The judgment appealed from was delivered on 4 July 2017.

3. The notice of appeal and grounds of appeal were filed with the lower court on 19 July 2017, exhibit "JM1" being the sworn statement of Johannes Magodo, as proof of payment of requisite fees for appeal.

4. Due to technical challenges regarding preparation of the record of appeal, the Appellant was advised to refile the notice and grounds of appeal which he did on 26 September 2019, exhibit "JM2" is proof of payment for this second filing.

5. On 26 September 2019, one Andrew Makolija, a Court Marshall, then stationed at the High Court, Blantyre, personally served the notice of appeal on the Respondent, Mr Cidrick Chikopa, at his place of business at Bvumbwe and filed a sworn statement of service marked "JM1".

6. As at the date of this Judgment the Respondent had not filed any submission in response to the appeal.

Facts and Evidence

7. The facts of the case as deduced from the lower court record are that the Appellant and Respondent had neighbouring plots. In between the plots was a stretch of land which both parties claimed to have owned. The matter was brought before the lower court to resolve the boundary issue. Five witnesses including the Appellant testified for the Appellant while the Respondent paraded four witnesses. The lower court found for the Respondent.

Appellant's evidence

8. The evidence can be summarised as follows; the Appellant bought land from one Mr. Saibati, the seller, through an Estate Agent, Mr. Geofrey Matiki (Estate Agent).

9. The Estate Agent, confirmed that the Appellant bought the disputed piece of land on 28 December, 2014, and that at the time of the sell, the Estate Agent had shown the Appellant the boundaries of the property as instructed to him by the seller. This boundary stretched beyond

the disputed land such that the land in dispute was part of the parcel of land bought by the Appellant from Saibati.

10. The testimonies of the Appellant and that of the Estate Agent regarding the boundary was corroborated by the evidence of one Loveness Wonga, a neighbour to both the Appellant and the Respondent. She asserted that the piece of land belonged to the Appellant because before he left for Lilongwe, Mr Saibati had informed this witness that he had sold that piece of land to the Appellant.

11. The testimony of the Appellant to the effect that he owned the disputed land was further corroborated by that of the Village Headman Adam Matiki, of White Village, Traditional Authority Bvumbwe, Thyolo. He testified that the disputed piece of land belonged to the Appellant and that the Respondent had "crossed the boundary" into the Appellant's property.

Respondent's Evidence

12. The Respondent asserted that his previous neighbour was Mr. Saibati, who upon relocating to Lilongwe sold his property to the Appellant. He alleged that the boundary between their two properties was marked by some blue gum trees which the Respondent had planted after buying the land in 1998. In 2002 he bought a stretch of land comprising some four metres beyond the blue gum boundary towards Saibati's property for his car park (the disputed land). Mr Saibati built his toilet in the disputed land.

13. The Respondent was not present when Saibati sold his property to the Appellant and hence he didn't know until 2015 the exact piece of land that the Appellant bought from Saibati.

14. In 2015 the Appellant was invited to a land dispute resolution session over the disputed land called by Village Headman Matiki. He did not attend the session.

15. On 21 September 2015 he was visited by Village Headman Mr Matiki, Mr. Saiti and the Appellant to be informed that Mr. Saibati had sold his property to the Appellant and that the blue gum trees constituted the boundary between the Respondent's and Appellant's property.

16. The Respondent did not agree with the boundary and he took the matter before Group Village Headman Masi who advised him to build a fence. He did not build the fence because the Traditional Authority advised him that although the land was his, he should not build a fence.

17. In 2017, he alleges that the Appellant crossed into his land by digging waterways. The Respondent lodged a complaint before Village Headman Zungu but got no assistance. He therefore decided to dig a foundation for his fence in the disputed piece of land.

18. The Respondent called one Nellie Masuku to confirm that he had bought the disputed piece of land in 2002 from her and her mother who got a little something for the land. She did not disclose the amount of money that the Respondent paid for the land. She said Mr Saibati had his toilet in the disputed land.

19. Also, in support of the Respondent's case, one Absent Mateyu, testified that he was a Chief's Counsellor who assisted Village Headman Zungu to resolve the dispute. Overall, this witness's evidence carries no weight. The hearing at Village Headman Zungu did not take place and therefore whatever this witness said in the lower court about the case constitutes what he himself was told by other people and not from his direct knowledge of the case. It was hearsay evidence and inadmissible.

20. The third witness for the Respondent was one Davie Lickston Slaim. He averred that the disputed land belonged to the Respondent. The record does not show how he came to know about the exact boundary between the neighbours. He confirmed that Mr. Saibati had his toilet on the disputed land. This witness' testimony was irrelevant to the issues before the lower court.

21. The fourth and last witness for the Respondent was Mr Limited Chikopa who indicated that he was related to the Respondent. He confirmed that the Respondent owned the disputed land because he witnessed the sale of land agreement between the Respondent and the seller. The witness' signature does not appear on the said agreement.

Lower court judgment

22. The lower court found that the four-metre piece of land in dispute belonged to the Respondent. This is an excerpt of his reasoning:

> In accordance with the totally of evidence the court is of the view that the defendant's boundary went beyond his blue gum trees and this 4-meter space belongs to him because of the following reasons: firstly, the evidence of Ms Nellie Masuku is clear that she sold the defendant land first and he planted blue gum trees as his boundary; and the defendant later bought a space for a road and a ground for easy reverse of the cars. She told the court that he paid something to her grandmother. She told the court that the space in question belongs to the defendant. The document of sale agreement signed by village headman was tendered in court.

Secondly, the court visited the land and saw the old stone foundation built by Mr Saibati as his boundary and the four meters space is clearly seen. Had it been that the bluegum trees marked the boundary Mr Saibati's foundation could have been built close to the blue gum trees maybe leaving the space of half metre, but the whole four meter space is there. Why did Mr Saibati leave that whole space?

Thirdly, the Plaintiff was supposed to bring in court Mr Saibati who sold him land. Mr Saibati is alive and is within Malawi. Mr Saibati was the right person to come to court to defeat the defendant's claim over this space.

It must be mentioned that the Plaintiff failed to bring Mr Saibati to support him in court and the court itself phoned Mr Saibati, he refused to come. The court further called Mr Saibati to come and the wife of the Plaintiff talked with Mr Saibati through phone in the presence of the court, she pleaded with him to come to assist them but Mr Saibati denied to come. This is a clear indication that this piece of land belongs to the defendant.

Ground of Appeal

23. The Appellant was unrepresented in this Court. His grounds of appeal can be summarised as one ground of appeal attacking the whole judgment as being against the weight of the evidence. In particular the lower court failed to properly assess and evaluate the evidence before him as a result he arrived at a wrong decision.

Considerations

Functions and Powers of this Court on Appeal

24. Section 20(1)(a) of the Courts Act provides that an appeal shall lie to the High Court from a subordinate court from a final judgment. On appeal this court;

> "...conducts the appeal by way of rehearing i.e. reviewing the evidence and the court's decision with the aim to determine whether the lower court arrived at a correct decision... The Courts deal with issues that were in the trial court", see *Luciano v Tasera*[1].

25. The term "rehearing" has developed in the High Court through case law. It does not appear in the statutes governing appeals from the subordinate courts to the High Court.

[1] [Civil Appeal No. 110 of 2018, Judgment date 7 March 2019 (unreported)][1].

26. This phrase is expressed in Order III (2)(1) of the Supreme Court of Appeal Rules providing that; 'all appeals [to the Supreme Court from the High Court] shall be **by way of rehearing'.** (this Court's emphasis)

27. The Supreme Court of Appeal clarified in *National Bank of Malawi v Cane Products Ltd*[2], that;

> "...The words "by way of rehearing" do not mean that witnesses are heard afresh. They indicate that the Court considers, so far as may be relevant, the whole of the evidence given in the Court below and the whole of the course of the trial". Page 306.
>
> "As the process of rehearing an appeal entails subjecting the issues before the Court to a fresh scrutiny it allows the Court to render a decision that is most appropriate in the case; that which ought to have been made. In doing so however it could not mean that the Court can venture on a fluoric of its own in order to find the most appropriate determination of the dispute. Neither can the Court allow the parties new matters in order for them to perfect their respective cases. That would be a fresh fight. The power is about the Court being able to render the most appropriate judgment in a matter; but on the basis of the issues which called for decision in the Court below. A judgment or order that ought to have been made presupposes an already existing set of issues which would have resulted in the judgment or order had the lower Court properly addressed its mind on the issues". Page 308.

28. Accordingly, the function of this Court in this appeal is to restrict itself to scrutinising carefully, the material on record of the lower court in order to determine whether the lower court properly analysed the evidence before him and applied the relevant law in arriving to his decision.

29. Section 22 of the Courts Act provides the powers of the Court on appeal and in relation to the present appeal, subsection (f) states that;

> In civil appeal the High Court shall have power to- confirm, reverse or vary the judgment against which the appeal is made.

Customary land holding (ownership)

30. The dispute in this matter is about ownership of a piece of customary land. This Court has reviewed earlier decisions of this Court which proposed that customary land cannot be owned by an individual by virtue of section 25 of the Land Act[3].

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[2] [2012] MLR 301 (SCA)

[3] For example Mbughi v Ghambi [Civil Appeal No. 34 of 2014, judgment delivered on 24 October 2017 (unreported), citing Chunga v Jere [Civil Cause No. 176 of 2000(unreported); Chataika v Bugayo [Civil Appeal No. 8 of 2014 judgment delivered on 8 June 2017 (unreported) citing Chunga v Jere [Civil Cause No. 176 of

31. The position that an individual cannot hold title to customary land was settled by the Supreme Court of Appeal which essentially reversed all decisions that proposed that an individual cannot hold title to customary land, or own customary land[4].

32. On 8 February 2017, the Supreme Court of Appeal in *Chirwa v Karim and another*[5], agreed with scholastic materials on the proposition that, "customary land was [therefore], salable and sold".

33. In relation to the procedures for the sale of customary land, the SCA held that;

> The statutory recognition that customary land was land held, occupied or used under customary law suggests that the disposal or allocation of land within the people of Malawi who own property commonly or singly is governed by the sale rules- customary law rules. These rules are internal to customary law and not easily amenable to the external point of view.
>
> When an opportune time and event arose, chiefs did sell otherwise sacrosanct customary land. The trend of customary law, evidenced by expert witnesses and conveyance practice is that, at customary law now, customary land can be and is sold. A family can sell part of their land as long as they agree. Moreover, an individual allotted the land may, with the consent of the family, sell part or excess land.

34. The Supreme Court of Appeal emphasised in the aforesaid jurisprudence that, "the Land Act does not restrict individual ownership or acquisition of customary land".

Role of Chiefs on customary land Use and Occupation

35. In relation to the role of chiefs in disposal of customary land, the SCA in Chirwa cited above held that;

> In pursuing to sell customary land, because of collective, individual and common ownership in customary land, sale, like any other disposal, has to conform to customary law. Where, therefore, under customary law consents are necessary, they should be obtained. At customary

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2000(unreported); Kuwali v Kanyashu [Cuvil Cause No. 109 of 2010, judgment delivered on 2 November 2011 (unreported) citing Chunga v Jere [Civil Cause No. 176 of 2000(unreported), Botha v Kumwenda [Civil Cauise No. 28 of 2009 (unreported), Mkandawire v Village Headman Zulu [Civil Cause No. 154 of 2008 (unreported)

[4] The Supreme Court of Appeal lamented the erratic nature of our law reporting system describing it as "delayed and not exhaustive" thereby posing "a real risk that views expressed [in the judgment] disagree or cohere with [the] court's earlier decisions", Chirwa v Karima and another [MSCA Civil Appeal N0. 1 of 2016 (judgment delivered on 8 February 2017) (unreported)] SCA

[5] [MSCA Civil Appeal No. 1 of 2016. Judgment dated 8 February 2017 (unreported)] SCA

> law consents for sale of customary land occur at different levels. In certain respects, the consent of a chief is necessary... For individuals, a chief's authorisation is necessary both at customary law and under section 25 of the Lands Act".

36. It follows from this authority that in order to prove ownership of land the party alleging to be the owner must show on a balance of probabilities, being a civil matter, that he did own the land through acquisition processes recognised under customary law prevailing in the area.

37. In *Chipwayila v Gondwe*[6], this court in answering the question as to who was the rightful user or occupier of [customary] land noted that;

> "The only answer can come from the village chiefs who are mandated under the law to administer customary land on behalf of the Minister of the Malawi Government responsible for the land matters"[7]

38. Such is the position because section 26 of the Land Act gives the chiefs power to authorise the use and occupation of customary land. The chief in exercising these powers, is assisted by group village headmen and village headmen.

39. The court below heard evidence from the Appellant that he was the owner of the land and that the Chief of the area was his witness. The Chief was called to testify and he confirmed that this piece of land belonged to the Appellant. He stated that the Respondent had encroached on the Appellant's land. This was a material witness.

40. On the contrary, the Respondent did not produce the chiefs that he mentioned in his testimony to have resolved the matter at local level. These were material witnesses under the law of sale of customary land as noted above. The lower court should have questioned the Respondent's failure to call any one of the chiefs that he referred to. It has been held that;

> Failure to call a material witness to testify on a material point may damage the case of the party who fails to do so as that failure may be construed that the story is fictitious".[8]

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[6] [Civil Cause No. 3 of 2016, judgment delivered on 25 October 2017 (unreported) HC

[7] Paragraph 5.1

[8] Quoted from Leyland Motor Corporation Limited v Mahomed [Civil Cause No. 240 of 1983 in BP Malawi Limited v NBS Bank limited [2009] MLR 39 (SCA) at page 46, also citing Maonga and others v Blantyre Print and Publishing Company Limited [1991] 14 MLR 240;

41. The lower court therefore, misdirected himself when he insisted and based his decision on the absence of one Saibati as a material witness in the matter before him.

Valid written sale agreement

42. The lower court forgot his law of contract by admitting in evidence a document purported to be a sale agreement produced for the Respondent in the court below. This document did not bear the parties' signatures. It is therefore not a valid sale agreement.

Proof of contract of sale- Consideration

43. The lower court committed a further error of law of contract when in his judgment he relied on the evidence of one Nellie Masuku who said she and her grandmother sold the piece of land to the Respondent. She did not disclose the price of the land paid by the Respondent as consideration for the land. A valid contract of sale must have consideration. Failure to show consideration must weigh against the party alleging to have bought the property, see *Winga v Malawi Housing Corporation*[9], holding that; "the price is the cardinal consideration from the buyer to the seller on which a contract of sale premises".

Conclusion

44. The lower court failed to properly analyse the evidence and apply the relevant law to the facts before him.

Judgment

45. The appeal should, therefore, be allowed. The Appellant is entitled to the four-metre piece of land stretching from his property to the blue gum trees. The blue gum trees that the Respondent planted are his boundary and he is not entitled to any piece of land beyond the blue gum trees.

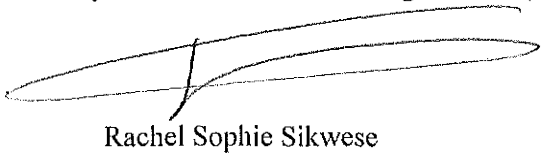
Costs

46. Each party to bear own costs.

Right of Appeal

47. The Respondent is at liberty to appeal this judgment to the Supreme Court of Appeal.

Pronounced in open court this 9th day of November 2021 at **High Court (Civil Division) Blantyre.**



Rachel Sophie Sikwese

JUDGE

[9] [MSCA Civil Appeal No. 7 of 2014, judgment delivered on 26 April 2016 (unreported)] SCA