

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL APPEAL CAUSE NO 15 OF 2018

ENELESI HUSSEIN.....APPELLANT
AND
MARTHA CHIWAULA.....RESPONDENT

CORAM: HONOURABLE JUSTICE CHINANGWA

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

JUDGEMENT

1. Introduction

This is an appeal against the decision of the Second Grade Magistrate Court sitting at Nkukula as pronounced on 26 October 2016. In the lower court, the appellant (being the defendant in the lower court) claimed that the respondent (being the plaintiff in the lower court) was encroaching on her land. In the lower court ruling the appellant was not successful. The court ordered that the land belonged to the respondent being plaintiff 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 failed to give weight to the evidence that the land belongs to the applicant and her family.
- b. The lower court failed to give weight to the evidence of the then Village Headman Nsamu that the land belongs to the applicant.
- c. The lower court did not give weight to the duration that I have worked on the land.

Below is a summary of the evidence that was before the lower court.

3. Summary of Evidence

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

The first witness was Martha Chiwaula. She stated as follows, ‘ I am a cleaner at Chiwaula Primary School. I asked for a dimba garden from the late Village Headman Samu in 2013 and I started using the dimba garden in June, 2013 and I have been using the dimba garden since then till today. In June 2016, I got surprised that someone has encroached my dimba garden and when I approached the defendant over the same, she said that she has allocated the dimba land to someone. Upon hearing that, I took the matter before Village Head Samu and while waiting for the matter to be heard, the defendant took part of my dimba garden and gave it to her son. I also went before the village head again for the second time. The village head and myself, went to the dimba garden where I showed him the part that was encroached who advised to take my concerns before this court’.

In cross examination she added that, ‘I said that nobody marked the boundary of the dimba garden we all asked for the dimba garden. I did not hear that one should use land temporarily for three years. It is me who asked for this land from the Village Headman.

Nothing was added in reexamination.

The second plaintiff witness was Thomas Alyula of Chiwaula Village, T/A Chimwala, Mangochi. He stated that, ‘I am a farmer. It was in 2013, thus on 3rd September, I went to Village Head man Nsamu and asked for a piece of dimba garden. He told me to come the following day and when I visited him the following day together with my two relations, he took me to the dimba garden and

allocated me a dimba garden. While I was about to leave, I saw Martha Chiwaula coming with her husband, she was also allocated a dimba garden close to me and on 05/09/13 we all started clearing our land towards the lake. Both of us have used our land for three years. My dimba garden is to the north of the dimba garden while Mr. Mangame's dimba garden is to the south of the land in dispute'.

In cross examination he added that, 'When the Village Headman gave us land, he fell sick, you summoned us as village Headman's Counselor. Nobody bought the land but we were just given the land freely. The Village Headman gave us the land but said that once we were tired of the land we should give back the land to him. The village Head Man's Secretary said that we should use the land for 3 years and then renew the agreement after every three years. You got me at my dimba garden and said that the Complainant has produced insulting language to you'.

In reexamination he added that, 'I have seen the Defendant's son with his wife using the dimba garden which was allocated to you. Many people were allocated land there by the late Village Headman Nsamu. After the death of the Village Headman, the newly installed village Headman said we should continue using the land. When we were being allocated this land, the Defendant was not there. Nobody has been stopped to use this land. The land that was allocated to us was idle and bushy. The owner of the land is Village Headman Nsamu. When we were allocated this land, nobody came to claim this land to be his or hers until the village Headman died'.

The third plaintiff's witness was Annie Chiwaula of Chiwaula Village, T/A Chimwala, Mangochi. She stated that, 'I am a farmer. The Defendant approached me one day and told me to inform the Complainant that she was taking part of the Complainant's dimba garden so that she should allocate this part to her son. When I got home, I informed the complainant the same'.

In cross-examination she added that, 'I do not know why you decided to take part of the Complainant's dimba garden. There are misunderstandings that are between you. When you were being allocated this land by late Village Headman Nsamu, the land was idle and bushy'.

b) Appellants (Being Defendant in Lower Court) Evidence

The first defendant witness was Enelesi Hussein of Nsamu Village, T/A Chimwala, Mangochi. She stated that, 'I am a farmer. In 2012 Mr. Mangame and Mr. Emmanuel approached Village Headman Nsamu and asked for land and by then the land belonged to the family of the then Village Headman Nsamu not land for the Village. After allocating land to these two, my mother and I myself went before Village Headman Nsamu and blamed him for allocating land to these two. The Village Headman assured us that we should not worry because he had agreed with these people to use the land for three years only. After that Mr. Mangame and Mr. Emmanuel were allocated their land. In 2014 Mr. Emmanuel also came with Mr. Tambala, Mr. Mwamvani and asked land for these two people from V/Head Nsamu, then the V/Head called me and informed me about this but I refused. Village Head Nsamu convinced me that these people will only use the land for three years only and the goodness was that these were public servants and could leave at any time, so Mr. Tambala was allocated land. Later the Village Head wanted to meet Mr. Emmanuel so that he should summon Mr. Tambala. The Complainant was allocated the dimba garden by the late, village head Nsamu, but the land which was allocated to her belongs to me. So, I have taken over my land, as there was an agreement that those using the dimba garden should only use it for three years only. When she saw that I have allocated the land to someone, the complainant insulted me. So, I decided to take over the garden because she insulted me.

In cross examination she added that, 'It is the then Village Head Nsamu who gave you this land and it was idle. And bushy. When you started clearing the land, I was there, I was doing casual work in your garden because I knew that after three years you will stop using the garden'.

In reexamination she added that, 'It is the late Village Headman Nsamu who said that each and every person should use the land for three years.

The second defendant witness was Stambuli Lyson of Chiwaula village, T/A Chimwala, Mangochi. He stated that, 'I am a farmer. While my late father Village Headman was sick, the Complainant's husband approached my father and asked for land, my father allocated him and he used the land for two years. Later my father fell sick then rumors got rife that my father had sold the land, so my father send me to his counselors namely Abiti Adini, Abiti Hussein so that they

should call for a meeting and ask those people whom my father had allocated and find out from them if there was someone among them who had bought the land, he was using from the Village Headman. When a meeting was held it was found that nobody bought the land and the village headman said that those people using the land, should use the land for three years only but they were free to continue using the land if they wanted to do so. After that we dispersed and reported back to my father.

In cross examination he added that, 'The land belonged to the people of the Village (Villagers) not to the royal family'.

Nothing was added in reexamination.

The third defendants witness was Benesi Ajiba of Nsamu Village, T/A Chimwala, Mangochi. He stated that, 'I am a fisherman. My mother's uncle was Village Head Nsamu, he then got sick and there were some people who were allocated land by the Village Headman and while these people were using this land, there were rumors that the Village Headman had sold Village land to those people. Upon receipt of this information, the Village Headman sent his Counselors to hold a meeting over this issue but nobody admitted to have bought the land so we dispersed'.

In cross examination he added that, 'People were complaining that the Village Headman had sold land belonging to Villagers not land belonging to the royal family. The Defendant is not an ordinary Villager, she is from the Royal family'.

Nothing was said in reexamination.

4. Analysis of Law and Evidence

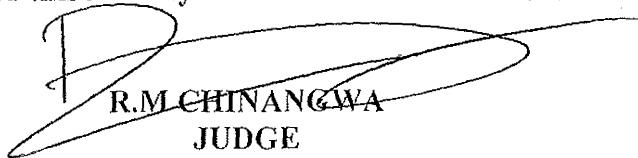
It should be noted on hearing an appeal the court subjects all the evidence to fresh consideration and may where appropriate depart from the decision appealed from: see section 22 of Courts Act and **Namtiti Mtsuko v Isaac Jere** [2013] MLR 272. The purpose is to ensure that the trial court was within 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 Being a

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. In brief the evidence is that the respondent was allocated the land in dispute in the year 2013. The appellants argue that the allocation was only for three years. The question that arises is who has the rights of usage to the land? It is not in dispute that the land was allocated to the respondent by the Chief. This is in line with the law which gives Chiefs the power to allocate land. The question is how would one who is allocated land be removed at custom? In this case there was no evidence regarding the custom in the area as to how a person who has been allocated land can be removed from the land as at the custom obtaining at the material time in that area. The appellants argue that the respondent was given three years to use the land. This court observes that nothing was put in writing to that effect. The evidence pertaining to the land being allocated for three years only to the respondent has not been proved on a balance of probabilities. This court finds that the appellant did not substantiate their claim on a balance of probabilities.

5. Finding

The appeal is dismissed.

Pronounced this 25th day of October 2021 at LILONGWE


R.M. CHINANGWA
JUDGE