

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL APPEAL CAUSE NO 56 OF 2017

(Being Civil Cause Number 362 of 2016)

KAIPA MPHANDULA (GVH MPHANDULA).....APPELLANT

AND

MAGRET DZINGWA.....RESPONDENT

CORAM: JUSTICE CHINANGWA

Dala	Counsel for the Appellant
Unrepresented	Counsel for Respondent
Chitao	Court Clerk

### JUDGEMENT

#### Introduction

1. This is an appeal against the decision of the Senior Resident Magistrate sitting in Lilongwe. In the lower court the respondent herein was the complainant and the appellant herein was the defendant. In the lower court, the dispute presented to the court was on land encroachment. The lower court's decision date 19<sup>th</sup> January 2017, the court found that, '*... the complainant has managed to prove on a balance of probabilities that the disputed piece of land belongs to her and her family and not to school. However, it has to be mentioned at this stage that the disputed land which this court has held to be for the complainant, has several houses for teachers of the school. There are both old and new house built to house the staff of the school hence it is my view that it will be counter-productive and a bad move to order of the destruction of the houses for the teachers so that the complainant enjoys the use of the land. Due to this development, this court orders the respondent, as a Group Village Headman, to allocate another piece of land equivalent to the land in question to*

*the complainant. This should be done as soon as possible and not beyond four months from the day of delivery of the present judgement'.*

2. Following the decision of the lower court, the appellant lodged an appeal on the following grounds:
  - a) The court erred in law and finding by failing to consider limitation of time when adjudicating the matter.
  - b) The court below erred in law by failing to take into account that the land in question was an institutional one.
  - c) The court erred in law by failing to take into account the interest of public policy.
3. This being an appeal, this court proceeds by way of rehearing witnesses but puts the evidence recorded in the lower court under fresh scrutiny. Under section 22 of the Courts Act, this Court can make the appropriate orders.
4. The evidence recorded in the lower court was as below.

#### **The Evidence**

5. The first complainant witness was the complainant herself. She stated as follows: 'I am Margret Dzingwa, Angelo Village, T/A Malolo in Lilongwe. My father gave a place for building of school. As there was a boundary cut between the school place and my place. This place I owned I work there. Last year I saw a summon from GVH Mphandula and they said I was working on a school plot. I said the plot is not for the school and that there was a boundary on the plot. We went to the plot to have a talk. Teachers were part of the talks. I asked why the teachers were involved. We went to see the plot and I was surprised chief went on my plot. I told them to go into the beacons but the chief did not permit me. The headmaster went and told the students to destroy bricks on the plot. They destroyed all the bricks. There were wrangles and quarrels. Called the police and explained urgently. The police told us that the chief should give us another place in exchange. But it took them this for them to give us a place and the group said that they had no place to give us. The police told us to go to court. But we went to the T/A first who resolved that we should not go to the place as it is for school. They told us to sue here. In cross examination she added that, 'The plot my father gave for the school. It was first given to Mrs. Liu so that she should teach children. The school was named Mphandula. 1963 because is it in village headman Mphandula. He was installed a chief when the late Mphandula died. After the plot was given to school, we were still farming there. We did not complain it was given to the school'. Nothing was said in re-examination.

6. The second complainants witness was Fatima Zigwa. She stated as follows, 'I am Fatima Zigwa, Ngolo Village, T/A Kalolo in Lilongwe. The Plaintiff is my elder sister. I want for full claim because the defendant took on plot. As a GVH he is taking on plot. One day, the plaintiff wanted to get to the plot to work, when she started to work, we received summons from the defendant as a chief. We went to hear the summons; he told us that we are farming on the school plot. We told him that what we were taking was not a plot for school because there was a boundary. We continued to work on the place and the headmaster of the school ordered the students to destroy all the bricks on the place. The police told him to give us another place. He obtained summons from T/A Kalolo who judged that the plot was for school. We were not happy with the ruling because the plot is outside the beacons of the school. The school has beacons. We went to the T/A to help us with leave to go to other forums. The T/A called the defendant whether he should give us leave to go to other forums. The T/A gave us leave to come here. The place was given us by our father. We have been working on the plot for some years but he could not stop us. There are beacons to indicate the boundary. In cross examination she added that, 'The place is for our parents. It was given to us by the chief. The owner of the place should know the boundary of the place. We know the boundary of the place. We got ...last year'. Nothing was added in re- examination.
7. The third complainants witness was Harold Chimbalanga. He stated that, 'I am Harold Chimbalanga from Angelo Village T/A Kalolo, Lilongwe. I stay at the Village. The Plaintiff is my sister. My sister has a plot which she has been farming since ever. But last year, she decided to build on the place as she stated to mould bricks. I got a summon in the process from the defendant which said that the plot was not ours. He said we should stop working on the plot. The chief ordered the students to destroy the bricks. They were ordered by the Headmaster. We notified the police and the police told us to discuss. And he said the plot is not on the school premises. He told the chief to give us another place if he wanted the plot close to school. But later we resolved from the T/A who said the plot should be for the school. The plaintiff requested a referral to the court. He gave us a go ahead that is why we are here'. In cross examination he added that, 'We did not quarrel previously because there was no encroachment on the plot'. Nothing was said in re-examination.
8. The first defence witness was Kaipa Mphandula. He stated that, 'I am Kaipa Mphandula from Mphandula Village T/A Kalolo in Lilongwe. I started as a chief in 1990 from my predecessor. In 1991, I was taken to see the boundaries of the school. There were S4 chiefs around the plot. By then, there were trees on the school. In 2014, a school committee,

approached me that the place was being worked upon. I asked the fellow chiefs that behind the school, the people were working on the plot. He said he had talked to them but could not listen. We agreed to call them if we went the place to see the boundaries. Then an example to show the boundaries of the school. Then I heard that there were quarrels between school and the plaintiff. The police came and told us that the issue was not within their mandate. We went to the T/A and he judged that the place was for the school. They were told to appeal if they wanted in 30 days. In this year, it's when I was called and told that they wanted to appeal. We were waiting for the DC to make his talking but its when I heard that there is this summons. We went to the DC and he said the summons is indicated from court. The DC is about to make a ruling as we speak. There is a survey development of the school of their maps and the map is now out'. In cross examination, he added that, 'I accepted at T/A that they can appeal. I just said they can appeal. There was no need for me to call the surveyor. The school has no beacons. The surveyor is just new. The tress of'. Nothing was added in re-examination.

9. The second defence witness was Joseph Kapakayenda. He stated that, 'I am Joseph Kapakayenda from Mphandula Village T/A Kalolo, Lilongwe. I am a farmer and also an advocate. The plaintiff is insisting on plot of school which is at Lilongwe West, Namitete. There are two schools on the place. Mphandula Primary School which has many pupils. There is also Chibambo Community Day Secondary School. There is a road on the north part, the village is part of the trading centre. The matter was discussed at village Head and it was adjudged that the place was not hers and even at T/A Kalolo who said the place is for the school. From the Ministry of Education who wanted to build a laboratory and who showed them that place. The place is for the school'. In cross examination he added that, 'The school came in 1962. The group was there when your father was giving that place. I am a witness because I am an advocate at the village. I judge cases at the village. I have no evidence that the place was already measured. The court will see'. Nothing was added in re-examination.
10. The third defence witness was Simeon Njakayolo. He stated that, 'I am Simeon Njakayolo from Mphandula Village. I am a Chief at the Village, Njakayolo Village. I was born in 1947. From 1966, there is a school which has taken plots of 6 people. It was started by a woman then in 1970 who started to plant tree. Since then we did not hear any issue about this plot. The trees surrounded this school. The school is inside. The place is inside the school and the plot is inside the trees. In 2013, is when we heard about this case. The school committee complained then we resolved that the place was for school. It was taken to T/A Kalolo and that he resolved that it was for the school. The place is inside the school.

The place is outside the school. The place is not outside school. In April, 2016, we were called that there was a survey because they wanted to put beacons. as said, we were there all and gave the survey people the map of the place. Since 1976 up to now there is no beacon'. In cross examination he added that, 'There are no beacons on the school. There are other beacons for the town not school. There was form was one by a Germany. He was following instructions from T/A. we could not call you because we, ourselves were called'. Nothing was said in re-examination.

11. The fourth defence witness was Tambala Wailesi. He stated that, 'I am Tambala Wailesi, from Mtopola, T/A Kalolo, Lilongwe. I am just a citizen. The School of Mphandula was started in 1966. The place was to given to by several people including the father of the plaintiff. We have been living in peace but the plaintiff started to work on the place. They were called at the chief and could not convince us. She shouted at the chief and caused confusion at school. Pupils at school tried to defend their own place and started to destroy the bricks. We went to see the place but the plaintiff failed to show the proper boundaries as she was showing a place of somebody who was there and she was stopped. The place has been measured when she saw this, she rushed to get a statement from the T/A for an appeal'. In cross examination he added that, 'You cause confusion at the school when you started to mould at the school. You showed the place of Chamdidi. The place was given by your parents'.

### **Issue for Determination**

12. This court has to determine whether the appellants encroached on the respondent's land.

### **Analysis of Law and Evidence**

13. From the facts it is not in dispute that the respondents father gave up some land for the community to build a school. The issue in dispute is the boundaries. From the evidence it is not clear how much land the school was given. However, during a scene visit the lower court found beacons showing the boundaries which the respondent showed the court. However, outside the area demarcated by the beacons in the respondent's land are also teachers houses. From the facts it is interesting to note, where was the respondent when the teachers' houses were being built?
14. In determining this matter the court finds that the land in dispute is customary land despite a school being built on the land. The appellants have argued that the land became public land when the school was built. This argument falls short of the appellant explaining and abiding by the legal process which would make customary land become public land. The

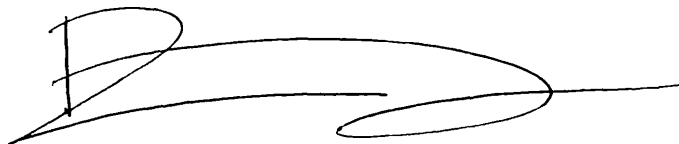
**Land Acquisition Act** Chapter 58:04 of the Laws of Malawi clearly spells out the process which should have been followed but was not followed. That being the case the land is customary land and not public land.

15. Now proceeding on the understanding that the land is customary land, in **Kampaundi v Rev Sisco** [2002–2003] MLR 117 (SCA) it was held that title to property on customary land moves with property. The court further held that it was evident that the appellant was requested for a piece of land on which the respondent wanted to build her own house; that the house was built entirely with resources provided by the respondent and that since the appellant had been in occupation for several years and the house was constructed on customary land it was only proper that the appellant remained in occupation.
16. In this regard, the facts reveal that there are beacons which show the boundaries between the appellants being school land and respondent's land. The facts also reveal that teachers' houses were built outside this demarcated area into the respondent's space. It is this courts finding that title to the land on which the school houses were built will belong to the school being represented herein by the appellants as title moves with property. It is strange to note as earlier questioned where was the respondent when the houses were being built and used by the respondents. This would mean she acquiesced to the surrender of her piece of land.
17. This court will not make a determination on the ground of appeal regarding limitation of time as the evidence does not clearly show when the dispute arose regarding the boundaries. The determination made above suffices.

### **Finding**

18. The appeal succeeds.

**Pronounced this 3<sup>rd</sup> day of November 2021 at LILONGWE**

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a horizontal line that curves upwards at the end.

**R.M CHINANGWA**

**JUDGE**