

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NUMBER 169 OF 2016**

**BETWEEN:**

**TEXTEN KAMFOLOMA**

**1<sup>st</sup> CLAIMANT**

**ANNE LIZEYO**

**2<sup>nd</sup> CLAIMANT**

**RICHARD LIKANDI (on his own and Representing  
the Likandi Family)**

**3<sup>rd</sup> CLAIMANT**

**AND**

**THE REGISTERED TRUSTEES OF THE CHURCH OF  
CENTRAL AFRICA PRESBYTERIAN, BLANTYRE  
SYNOD**

**DEFENDANT**

**BLANTYRE CITY ASSEMBLY**

**1<sup>st</sup> THIRD PARTY**

**MALAWI HOUSING CORPORATION (MHC)**

**2<sup>nd</sup> THIRD PARTY**

**CORAM: JUSTICE M.A. TEMBO,**

C. Kalua, Counsel for the Claimants  
Z. Chipembere, Counsel for the Defendant  
B. Matumbi, Counsel for the 1<sup>st</sup> Third Party  
C. Gondwe, Counsel for the 2<sup>nd</sup> Third Party  
Mankhambera, Official Court Interpreter

## JUDGMENT

1. This is this Court's judgment following a trial of this matter. The claimants commenced this action seeking an order of injunction restraining the defendant from trespassing, clearing and building on their land situate at Machinjiri, South Lunzu in Blantyre, which is near or adjacent to South Lunzu CCAP Church Building. They also claimed damages for trespass to the said land.
2. The defendant resists the action and claims ownership of the disputed land in freehold. The defendant also contends that it entered the disputed land on the authority of the 2<sup>nd</sup> Third Party. The defendant joined the 1<sup>st</sup> and 2<sup>nd</sup> Third Party so that this Court determines the question of ownership of the disputed land as between the claimants, the defendant and the 1<sup>st</sup> and 2<sup>nd</sup> Third Party.
3. It is worth noting that this matter was consolidated with another action in which by originating summons the defendant had sued the 1<sup>st</sup> Third Party over the land in issue in this matter in civil cause number 86 of 2015.
4. It would be ideal to set out the statements of the cases of each of the parties at this point.
5. The claimants' claim is as follows:
  - '1. The claimants are members of the Likandi Family.
  2. At all material times the Likandi Family were and remain owners of customary land situate at Machinjiri in South Lunzu in Blantyre.
  3. The defendant owns land situate near or adjacent to the claimant's said customary land and have built a church building where members of South Lunzu CCAP Church congregate.
  4. Since the 1990s the defendant has encroached on the claimants said customary land and there have been several quarrels between the claimants and the defendant over the land.
  5. On or about the 19<sup>th</sup> April, 2016 the defendant without the consent of the Likandi Family or of the claimants commenced clearing part of the claimants' land and in the process cut down fruit and bamboo trees thereat.

6.The conduct of the defendant constitutes a trespass to the claimants' property.

And the claimants claim-

- a. An order of permanent [injunction] restraining the defendant from trespassing on their land.
- b. Damages for trespass
- c. Costs of this action.'

6. The defendant filed a defence and a counter claim which was as follows:

'1. Paragraph 2, 3 and 4 of the statement of case are denied. The defendant denies that the claimants own, possess or have a right to possess the land occupied by South Lunzu CCAP Church surrounding the Church and school buildings.

2.The defendant refers to paragraph 5 of the statement of case and states that the land it was clearing was not the claimants' land.

3.The defendant denies that by clearing the said land it committed trespass against the claimants.

#### Particulars

- a. The claimants were not and are not owners of the said land.
- b. The defendant owns the said land in freehold or alternatively;
- c. The defendant entered upon the said land by command and authority of Malawi Housing Corporation who own the said land.

4.The defendant denies that the claimants are entitled to any damages for trespass, an order of injunction and costs of this action.

5.Save as hereinbefore specifically admitted, the defendant denies each and every allegation of fact contained in the statement of case as if the same were therein set out and traversed seriatim.

### Counter Claim

6. The defendant will contend that it is and was at all material times owner or licensee and thus entitled to the possession of the land and premises situate at and known as South Lunzu CCAP in Machinjiri.

7. The claimants or their agents have wrongfully entered the said land and premises and have wrongfully taken possession of the same, and have thereby trespassed and are still trespassing thereon.

8. By reason of the matters aforesaid, the defendant has been deprived of the use and enjoyment of the said land and premises and has thereby suffered loss and damage.

9. And the defendant claims:

i. A declaration that the said land is possessed by the defendant.

ii. An order that the land be registered in its name.

iii. A permanent injunction restraining the claimants and their agents from entering the said land and premises and from in any way dealing with the said land contrary to the defendant's ownership rights.

iv. Damages or mesne profits to be assessed from time of occupation until possession is delivered.

v. Further or other relief.

vi. Costs of this action.'

7. The claimants then filed a reply to the defence as well as a defence to the counter claim as follows:

'1. The claimants refer to paragraph 3 of the defence and deny that the land in dispute is owned by Malawi Housing Corporation.

2. The claimants contend that even if the land in issue initially belonged to Malawi Housing Corporation, they are entitled to exclusive possession and use of it by adverse and uninterrupted possession for a period exceeding 12 years.

### Defence to Counter Claim

3. The claimants deny paragraph 6 of the counterclaim and the defendant is put to strict proof thereof.
4. The claimants contend that they are entitled to exclusive use and possession of the land in issue having acquired it under customary law.
5. The claimants refer to paragraph 6 of the counter claim and contend, alternatively, that they are entitled to exclusive use and possession of the land in issue having acquired it by adverse and uninterrupted possession and use for a period exceeding 12 years.
6. The claimants deny paragraph 8 of the counter claim and the defendant is put to strict [proof] thereof.
7. The claimants contend that the defendant is not entitled to remedies sought in paragraph 9 of the counter claim.'
8. The case of the defendant against the 1<sup>st</sup> Third Party as contained in the sworn statement of Reverend Alex Benson Maulana in support of the originating summons, in Land cause number 86 of 2015, is as follows:
  - '1. That I am the General Secretary of the CCAP Blantyre Synod and therefore authorized to swear this affidavit.
  2. That matters of fact deponed herein have come to my knowledge while so acting and from my own personal knowledge.
  3. That in 1903 the predecessors of Blantyre Synod, the missionaries of the Church of Scotland, established a church at South Lunzu in Machinjiri when they built a prayer house at the premises where the South Lunzu CCAP church is now standing.
  4. That at that time the missionaries of the Church of Scotland acquired and delineated land around the church building for future developments like schools, a church hall and a health centre.

5. That since the acquisition of the said land in 1903, the Church has continuously been in occupation thereon up to date and has never conveyed or disposed any part thereof either for consideration or otherwise.
6. That in or around 1975, nearby land was acquired by the Malawi Housing Corporation which then drew up a map of their said land recognizing the land belonging to the church. The said map has been attached thereto and exhibited and marked as CT1. It can be clearly seen from the map that the land belonging to the church (highlighted) was not demarcated by Malawi Housing Corporation.
7. That in or around 2013 people started encroaching the said church land by erecting structures and conveying the land without any authority and without any regard for the rights of the church as owners.
8. That the church, in trying to secure their interest in the said land, then mistakenly applied for a lease to the Blantyre City Council instead of applying for a land certificate to the Land Registrar.
9. That I am aware that as owners we were supposed to apply to the Land Registrar for a Land Certificate seeing as we have freehold interest in the land having acquired the land in 1903 and having been in continuous occupation and possession since then to this day.
10. That the Chief Executive Officer of the Blantyre City Assembly then called us to a meeting to his office and informed us that the Council held the freehold interest in the land and they had in fact allocated a part of the said land to the Anglican Church.
11. That I am aware that the Blantyre City Assembly can only legally acquire land under section 34 of the Local Government Act and that under the said section the Council can acquire land by way of purchase, lease, and exchange or gift.
12. That at no point has the Blantyre Synod sold, leased, exchanged or conveyed by way of gift the said land or part thereof to the Blantyre City Council.

13. That we are therefore surprised and shocked to learn that Blantyre City Council is claiming freehold ownership of the said land only imputing leasehold to the Synod.

14. That the claimant therefore seeks the indulgence of this court to declare that the claimant owns the whole of the said land in freehold for the following reasons:

i. That the claimant acquired the said land in 1903 and has enjoyed quite, peaceable and continuous and uninterrupted possession of the whole of the said land since then up to date.

ii. That the claimant has never sold, disposed of, exchanged, conveyed in any way or abandoned possession of the said land or part thereof to anyone or at any time.

iii. That the assertion that the Blantyre City Council owns the said land or part thereof in freehold is baseless and lacks merit as Blantyre City Council has never had proprietary rights over the said land, or alternatively;

iv. That if the said land was clandestinely registered purporting to give Blantyre City Council freehold ownership, such registration is illegal, unjustifiable, and without any legal basis or at all.

v. That the claimant owns the whole of the said land in freehold by prescription.'

9. The 1<sup>st</sup> Third Party opposes the claim by the defendant and asserted that it got the land herein from the 2<sup>nd</sup> Third Party. The 2<sup>nd</sup> Third Party expressed no interest in this matter.

10. The issue for determination is who owns and has control over the land in issue as between the claimants, the defendant and the 1<sup>st</sup> Third Party and the 2<sup>nd</sup> Third Party. And whether the defendant trespassed on the claimants' land.

11. This Court bears in mind that, as submitted by the parties, the standard of proof in these civil matters is on a balance of probabilities. And that, the burden of proof lies on he who asserts the affirmative. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.

12. Each of the parties brought evidence to substantiate its claim.
13. The claimants' first witness was Texten Kamfoloma. He stated that the 2<sup>nd</sup> claimant is his cousin and that the 3<sup>rd</sup> claimant is his uncle and eldest member of the Likandi Family to which they all belong.
14. He stated further that the Likandi Family owns customary land that is situated in South Lunzu, Machinjiri within Blantyre where they built their houses and also do cultivate diverse crops and trees.
15. He explained that near or adjacent to this family customary land is situated the defendant's South Lunzu CCAP Church building where the defendant's congregants meet.
16. He stated that he was born on the said customary land in 1953 and he has grown up and lived there throughout his life. He then claimed that since the 1990s the defendant has encroached on their customary land and there have been several quarrels between members of the defendant's Church in South Lunzu and his Likandi Family over the said land.
17. He then stated that on 19<sup>th</sup> April, 2016, the defendant without the consent of the Likandi Family or any of the claimants' commenced clearing part of the claimants' customary land that is adjacent to the Church building at South Lunzu CCAP and in the process damaging the claimants' land and cutting down their fruit trees and bamboos with the intention of constructing a church structure there. He added that prior to the just mentioned acts, the 2<sup>nd</sup> claimant and himself were called by Senior Chief Machinjiri who asked if they could consider selling part of their land to the defendant stating that he had been approached by members of the defendant's Lunzu CCAP Church with such a request but they declined their considering the several past quarrels and disagreements with the defendant.
18. He explained that during the meeting with the Senior Chief Machinjiri, it was agreed that the Senior Chief would call for another meeting between themselves and the defendant to discuss the defendant's request in person with them in person but the defendant proceeded to do the acts complained of before that intended meeting.
19. He added that the defendant continued its acts of clearing the claimants' land and cutting down trees and other plants despite that the family had subsequently lodged a complaint at the police against the actions of the



- defendant. He asked this Court to stop the defendant's acts of trespass and sought compensation.
20. He pointed out the boundary of the disputed land as being the tarmac road at the front and the grave yard at the back.
21. He was not cross-examined by the defendant and the 2<sup>nd</sup> Third Party.
22. During cross-examination by the 1<sup>st</sup> Third Party, he stated that the defendant did not attend their meeting with the Senior Chief saying that it had already bought the land. He added that the defendant encroached on the whole land and destroyed houses and that the church is actually built on encroached land.
23. He then said the church took long to build and that they tried to complain to authorities like the City Assembly who did not help and chiefs said they did not know anything. He added that when the matter was taken to the police they were told to go to the chiefs who should sit down with the parties.
24. The second witness for the claimants was Anne Lizeyo. She is the 2<sup>nd</sup> claimant in this matter. She stated that she was born in 1964 at Machinjiri village in Machinjiri. She stated that her late father was married to the Likandi Family and died at Machinjiri and was buried at the Likandi family graveyard.
25. She then stated that she still resides in the village where she was born and brought up on the land of the Likandi Family. She recalls that her parents and other relatives were staying on the family land and also cultivated on it.
26. She explained that she is aware that there have been issues with the defendant concerning their land in Machinjiri Village and that the dispute has led to this action. She indicated that the land in issue was inherited from grandparents as their customary land and is owned by the Likandi Family. She added that she was born on the disputed land, their houses have always been there, and that she has grown up on the land. She added that they have always done their farming on the land and there are trees on the land planted by themselves. She added further that some trees were cut down by the defendant.
27. She then stated that the dispute over the land, to her knowledge, surfaced around 1996 when members of the defendant came to their land, uprooted their cassava trees and plants and built the South Lunzu CCAP Church.
28. She explained that in 2016, the 1<sup>st</sup> and 2<sup>nd</sup> claimant went to meet Senior Chief Machinjiri where they were called to discuss the request of the CCAP Church to purchase part of their land but the request was declined. She explained further that after this meeting she saw members of the defendant coming to

- their land with a Grader and started cutting down their bamboo and fruit trees and clearing part of their land. She added that this was done without the consent of the Likandi Family.
29. She stated that part of the land in dispute which the defendant is claiming constitutes their grave where their parents and other relatives have been buried and this grave yard has been in the use of the claimants.
30. She asserted that the conduct of the defendant constitutes trespass to their land and the defendant has no right to occupy and/or use their land now under dispute.
31. She requested that this Court should stop the defendant from trespassing and claiming ownership of the land in dispute as this land is owned by the claimants.
32. She then took this Court around explaining about the boundaries of the disputed land. She indicated that the boundary run along the trees that are next to the wall of the adjacent school. She stated that the houses built on the land were built with the consent of the claimants. She also pointed out the boundary then runs along the trees planted by the defendant that are next to the school football ground. And further that the boundary runs all the way down to the Lunzu stream on the other side. She then stated that Lunzu stream forms a boundary on the far side. She pointed out that then the boundary next runs along the road going to the graveyard. And then that the boundary runs along the outside of the graveyard and goes beyond the graveyard up to somewhere just before some blue gum trees. And then that the boundary next runs along the road to Area 6. And that it then runs just beyond a hill where there are some houses on the claimants' land and the boundary runs along a brick wall.
33. She explained that she had planted mango and guava trees next to the church and the Grader came and removed them. She noted that the Church was already there then. She stated that they protested when the Church was built. She added that she also protested when she was told not to farm on the land next to the Church. She could not recall the year in which the Church was built but stated that it was during the time of Dr Kamuzu Banda. She asserted that the church is on their land.
34. She then pointed out the boundary then run along the path from the tarmac road to where she started explaining the said boundary. She then explained that their houses are within the land that she had shown this Court.

35. She was not cross-examined by the defendant and the 2<sup>nd</sup> Third Party.
36. During cross-examination by the 1<sup>st</sup> Third Party, she stated that people who built houses bought the land from the 1<sup>st</sup> Third Party. She then stated that when the defendant came on the land she went to see a lawyer in the company of her uncle. She then said it appears there is a document which they got from the 1<sup>st</sup> Third Party which says the village land belongs to the claimants but they are not to pay city rates. She reiterated that she was born and grew up on the land in dispute. She added that as she grew up they had houses at the village.
37. She then stated that she recalls that when she was growing up there was a CCAP Church beyond the boundaries of their land. And that at that time they were residing on the site of the current CCAP Church. She added that her uncle grew cassava on the current Church site which the defendant removed. She added that the defendant wanted to pay her uncle but he refused the payment. She indicated that the Church started with a foundation.
38. She stated that in 2016 the defendant brought a Grader on the same land. She added that they first met on the land with the defendant and the chiefs but could not agree about the land as they protested that the Church just came on the land without asking the claimants who are the dwellers on the land. She stated that the Church said that the land in dispute was theirs and they had bought it from the 2<sup>nd</sup> Third Party. She noted that however, the 2<sup>nd</sup> Third Party said it never sold the land to the defendant.
39. She explained that at a second meeting they were called by the Chief who said that the defendant wanted to buy the land and present was herself, Songamika, the 1<sup>st</sup> claimant and her brother but that the defendant was not present at that meeting.
40. During re-examination, she stated that she had a document saying that the land in dispute is their village land from the City and that they should not pay rent.
41. The third witness for the claimants was Enelesi Kamwana and she stated that she has resided in Machinjiri all her life and was born in 1935. She added that the claimants are her relatives. She pointed out that the 1<sup>st</sup> and 2<sup>nd</sup> claimant are children of her late sister and the 3<sup>rd</sup> claimant is the son of her late uncle.
42. She reiterated the evidence of the other witnesses of the complainants about how the land in dispute has always been owned by the Likandi Family, how the defendant came to build the Church in 1996 and about the 2016 meeting

- with the Chief Machinjiri. And she reiterated the relief sought. She added that her house was behind where this Court sat at the land in dispute.
43. She was not cross-examined by the defendant and the 2<sup>nd</sup> Third Party.
44. During cross-examination by the 1<sup>st</sup> Third Party she stated that she was born on the land herein. She added that the defendant sent letters to the claimants to leave the farming land in dispute.
45. The fourth witness for the claimants was Fanny Jonathan. She stated that she was born at Machinjiri village in 1952 and has lived there ever since. She added that her father, who dies in 1975, married into the Likandi Family.
46. She reiterated the evidence of the claimants that the Likandi Family owns the farming land in dispute on which the defendant cut some trees belonging to the claimants. She further reiterated the claimants' testimony that the dispute surfaced in 1996 when the defendant built the current Church. She repeated the evidence concerning the 2016 meeting and how the defendant then came to clear part of the disputed land and trespassed on the claimants' land. She asked for the same reliefs sought by the claimants.
47. During cross-examination by the defendant she stated that before the current church was built her uncle grew cassava there for a long time. And that she was young then.
48. She was not cross-examined by the Third Parties.
49. The fifth witness for the claimants was Jolly Songamika. He stated that he resides at Machinjiri. And that he was born in 1948 in Machinjiri Village where he has lived ever since. He indicated that he had a good knowledge of the area.
50. He then stated that he knows the claimants who are from his neighboring village. He added that he has known these people especially the 1<sup>st</sup> claimant from his youth.
51. He then stated that he is an Assistant to Chief Machinjiri on administration and was assigned responsibility over the area where the claimants reside. He explained that the claimants have always lived where they are now and have their land for cultivation there.
52. He recalled that in the past, next to the land of the claimants, there was a school belonging to the defendant known as Lunzu Primary School then, which he attended from 1956. He said that the school is now known as South Lunzu Primary School.

53. He also recalled that there was the defendant's church building at the premises where there are school buildings currently. And that he used to worship there. He explained that the defendant built a new church in the late 1990s. And that the defendant uprooted cassava, bamboos and mango trees belonging to the claimants at this site.
54. He then recalled that in 2016, the clergy and church elders of the defendant's South Lunzu Church invited Chief Machinjiri and his subordinates to a meeting at their church. He stated that he attended the meeting.
55. He explained that in that meeting the church elders wanted to know the history of the Machinjiri especially the area where the church is situated and who the early settlers were. He stated that he explained the history of the place as someone who knows the same very well and the meeting eventually dispersed.
56. He then stated that after the church meeting, the Chief called the complainants to a meeting over the issue of the land herein. He explained that the Chief communicated to the claimants that the defendant wanted to purchase part of the land of the claimants that is adjacent to South Lunzu Primary School. He observed that the claimants expressed unwillingness to sell the said land and it was agreed that there be a subsequent meeting with the defendant's South Lunzu members.
57. He pointed out that he later noticed that the church went ahead to clear the land of the claimants using a tractor before the subsequent meeting took place between the Chief, the claimants and the Church. He indicated that the land in dispute has always belonged to the claimants.
58. He was not cross-examined by the defendant.
59. During cross-examination by 1<sup>st</sup> Third Party, he reiterated what he said in his evidence-in-chief and stated that his uncle worked in the church. He reiterated that the Chief expected a meeting between the claimants and the defendant but suddenly the defendant brought in a grader to clear the land next to the church. He stated that at that point he notified the Chief who said they should leave the defendant alone as it did not listen to his advice.
60. He stated that in his explanation of the history of the land in dispute he indicated that the church took land belonging to the claimants. He explained that the same land was claimed by the defendant and the claimants and people wanted to know how the land moved to the defendant.

61. He then stated that the 1<sup>st</sup> Third party indicated that it would give new land to the claimants but prior to that the defendant started demolishing houses.
62. He added that people wonder how the land herein moved from the claimants to the 2<sup>nd</sup> Third Party. He indicated that the defendant claims the whole land from the tarmac to the graveyard.
63. During cross-examination by the 2<sup>nd</sup> Third party, he stated that they had issues on how land was taken from the claimants and given to the 2<sup>nd</sup> Third Party. He then stated that he was 70 years old and saw how people from Chinyonga moved from there after being paid compensation.
64. During re-examination, he stated that the claimants sought dialogue and lodged a complaint with the 1<sup>st</sup> and 2<sup>nd</sup> Third Party but none came to deal with the matter herein hence this action. This marked the end of the evidence of the claimants.
65. The defendant brought one witness Mrs. Roselyn Makwakwa who is the Synod Estates Manager for the defendant's Blantyre Synod. She stated that the defendant owns the land in dispute herein. She referred to documents marked as BM1 showing the location of the said land.
66. She then stated that in 1902, the Church of Scotland Trust, the defendant's predecessor, acquired land in South Lunzu in Machinjiri covering an area of about 13 hectares [about 32.1 acres] (referred to as the 1902 Conveyance). She then referred to documents marked as BM1 and BM2 a copy of the 1962 conveyance. But BM1 and BM2 are sketches of maps and not copies of any conveyance. She indicated that on this land, the Church of Scotland Trust built a prayer house and a primary school and had plans of constructing several other structures for instance a medical centre and university.
67. She explained that the Church of Scotland Trust subsequently conveyed the said land to the defendant and she referred to the copies of two indentures marked as BM3.
68. She then stated that on 3<sup>rd</sup> December, 1971, the Minister of Government Responsible for land matters, conveyed the land together with the buildings and structures thereon to the 2<sup>nd</sup> Third Party without notice to the defendant and with full knowledge of the defendant's interest in the land. She referred to this as the 1971 Conveyance, and exhibited a copy as BM4.
69. She then stated that the defendant has maintained possession of the land in issue herein since 1902 and has fought off encroachers.

70. She then explained that in 2010, when the problem of encroachers such as the claimants herein escalated, the defendant sought assistance from various avenues such as the police and the 2<sup>nd</sup> Third Party to help remove the encroachers but to no avail.
71. She indicated that, consequently, the defendant did a land search at the Deeds Registry on 12<sup>th</sup> June, 2012 and then discovered of the existence of the 1971 conveyance. She attached the official search result as BM5.
72. She then stated that upon this discovery, the defendant erroneously applied for a lease of the land instead of certifying its interest in the land.
73. She asserted that the claimants erroneously believe that the land in issue is customary land and that they have a right to it by reason of that. She asserted further that alternatively the claimants claim that the land in question belongs to the 2<sup>nd</sup> Third Party and they acquired it by adverse possession. She then explained that the defendant opposes the claim herein and state that the land is private unregistered land which belongs to the defendant in fee simple.
74. During cross-examination by the claimants, she stated that the document BM1 was not prepared by the defendant and she never prepared the same.
75. She then stated that in 1902 the land was acquired by the Church of Scotland Trust from chiefs. She however stated that she does not have documents on this acquisition as it happened long ago and due to changes in church personnel. She said she only heard about the 1902 acquisition and has no documentation on the same.
76. She then conceded that BM2 is not a 1962 conveyance but a map showing two plots, one for the defendant that is 1.18 hectares and one for the Anglican Church which is 1.08 hectares.
77. He was then referred to BM3 which she said is dated 1990 and is a transfer of land from the Church of Scotland Trust to the defendant. She was referred to page 6 of second indenture in BM3 and noted that the defendant's trustees were supposed to sign on the said page but never signed. She was then referred to a document signed by Mr. Gonthi for Controller for Lands and Valuation within BM3 certifying that the Church of Scotland Trust and the defendant had complied with section 24A of the repealed Land Act in respect of transfer of certain pieces of land and noted that there is a stamp bearing the date 26<sup>th</sup> July, 1990. She indicated that she is not familiar with section 24A of the

- repealed Land Act. She also noted that there is no Government stamp on the document.
78. She then observed that BM3 contained 1991 indentures. And she asserted that before 1991 the land in question in the conveyance belonged to the Church of Scotland Trust. She also noted that the land being transferred is listed in the conveyance.
79. She was referred to the First Schedule in the first indenture and stated that the land in dispute herein appears in the First Schedule as item number 9 called Pamanda Estate. She indicated that this land transferred by the Church of Scotland Trust was acquired by that Trust in 1902. She however conceded that item number 9 shows that the transfer date was 1899 which is different from 1902. She also conceded that the First Schedule does not show item number 9 land as acquired in 1902. She indicated land acquired in 1902 appears as item number 14 in the First Schedule.
80. She then stated that she had changed from item number 9 to item number 14 and that the land in item number 14 was  $\frac{3}{4}$  of an acre. She observed that in 1902 13 hectares of land was transferred and that this should be the same  $\frac{3}{4}$  of an acre. She conceded that 13 hectares is about 32.1 acres and that this is not the same as  $\frac{3}{4}$  of an acre. She then agreed that the land transferred in 1902 in item 14 of the First Schedule to the first 1991 indenture is not the same as the land which she stated was in dispute herein as item number 9. She then conceded that she could not point to the land in dispute herein the Schedules to the 1991 indentures.
81. During cross-examination by the 1<sup>st</sup> Third Party she reiterated that in the 1991 Conveyances the Church of Scotland Trust transferred land to the defendant. And that the Trust handed over the land to the defendant.
82. She was referred to the letter signed by Mr. Gonhi of Department of Lands and Valuations and stated that the land in dispute herein appears under First Schedule in that letter as SL37/31 and SL 37/103 and that this land is held under one Deed number 33589. She however said she has never seen that Deed. She added that when the Church of Scotland was leaving they took documents. But she said she thought this Deed can be found in the Deeds Registry. She indicated that she has been Estates Manager for the defendant since 2012. She added that in 2016, the defendant's Administrator went to Lilongwe to check for the Deed herein.



83. She then stated that she would show the Deed in question to stop trespassers like the claimants who are claiming the land. She wondered why the Blantyre City Presbytery at Kanjedza who are responsible for the documents did not come back to her at HHI offices after promising to see her again about the documentation for the land in dispute herein.
84. She then stated that the land in dispute herein appears in the second indenture in BM3 at page 5 at entry number 4 as Lunzu Church Site under an undated lease registered as Deed number 2502 with a size of 3 acres. She conceded that this is not 13 acres. She however asserted that the defendant holds this land in fee simple. She stated that she has never seen this lease document and doubted the defendant has this lease document but she said she could check with the Deeds Registrar as she has never checked.
85. During cross-examination by the 2<sup>nd</sup> Third Party, she stated that the defendant has no document showing ownership of the land in dispute herein. She added that she had never gone through the boundaries of the land in dispute since her Assistant came in during the time of the disputes. She also indicated that she cannot identify the land on the documents she presented in evidence.
86. During re-examination, she reiterated the contents of the letter from Mr. Gonhi. That marked the end of the defendant's evidence.
87. The 1<sup>st</sup> Third Party brought one witness. He is Mr. Precious Tembo, its Chief Estates Management Officer. He stated that in 1971, Parliament, through the Town and Country Planning Act made the Blantyre Planning Area Order by which South Lunzu Traditional Housing Area was declared a Planning Area. He produced a copy of the Town Planning Act Order as PT1. The planning Order reads as follows:

G.N. 251/1971    Blantyre Planning Area Order

*Under s. 3*

1. This Order may be cited as the Blantyre Planning Area Order.
2. The area, the boundaries whereof are described in the Schedule hereto, is hereby declared a Planning Area.

**SCHEDULE**

The area of the Municipality of Blantyre and Limbe (now the City of Blantyre) as defined in Government Notice no. 11 of 1964 (N) and in addition all that piece of or parcel of land situate at South Lunzu in the

Blantyre District known as the South Lunzu Traditional Housing Area  
And consisting of the area surveyed as Lunzu South Ntawira Block, Lot  
1 Ntawira Estate, Lot 2 Ntawira Estate, Lot 3 Ntawira Estate, Lot 4  
Ntawira Estate, remainder of Ntawira Estate and Sandford Estate which  
are shown upon Surveys Department Plans numbered SD/1956 and  
SD5124.

88. He then stated that in 1971 under Deed number 38947 dated 3<sup>rd</sup> December, 1971, the Government Minister responsible for land matters preformed a conveyance of the land under the said Blantyre Planning Area Order to the 2<sup>nd</sup> Third Party. He produced a certificate of official search dated 12<sup>th</sup> June, 2012 as PT2. He indicated that the search shows that the freehold title over the land herein belongs to the 2<sup>nd</sup> Third Party and not the claimants. The certificate of official search reads as follows:

Date: 12/06/12

Deed number and Date	Parties	Nature of Transaction	Rent Amount of Mortgage Consideration
38947 03/12/71	The Minister of Malawi Government responsible for land matters -to- Malawi Housing Corporation	Conveyance of 3123.00 acres of land situate at and known as Lunzu South Ntawira Block together with the buildings and other structures thereon, in the Blantyre District.  Consideration: Nil.	Survey Dept Deed Plan number 246/70 annexed.

89. He then stated that in 1992, the 2<sup>nd</sup> Third Party transferred the freehold interest to the 1<sup>st</sup> Third Party. He then stated that the defendant was supposed to apply for a lease from the 1<sup>st</sup> Third Party and not abandon such application. He added that the defendant could not have freehold over public land since it never acquired the said land from any person.
90. He then asserted that the reliefs sought by the defendant are not sustainable and should be disregarded and that the matter should then be dismissed for want of merit.
91. During cross-examination by the claimants, he stated that a planning area in land managed by the 1<sup>st</sup> Third Party in terms of buildings regulations. And that it does not mean that the land belongs to the 1<sup>st</sup> Third Party. He then stated that with regard to the area in dispute, the 1<sup>st</sup> Third Party only had planning authority.
92. With regard to the certificate of official search marked as PT2, he stated that he had not seen the conveyance. He agreed that the conveyance would show the specific land that is being conveyed shown by a map. He conceded that he had not produced the map covered by the land in the PT2 certificate. He further conceded that this Court cannot tell whether the land in dispute is covered in PT2.
93. During cross-examination by the defendant, he stated that PT1 has a schedule. He then stated that the land in dispute stands on Ntawira Lot. He then stated that the Planning Schedule covers the area in the conveyance in the certificate of official search. And also that the land in dispute was affected by the conveyance in PT2. He then stated that at the time of the conveyance in PT2 in 1971 there were people occupying the land and then the 2<sup>nd</sup> Third Party managed the land. He indicated that he was not aware whether Government compensated people upon the 1971 conveyance.
94. He then stated that at the time of the conveyance in PT2, the land was freehold and was transferred to the 2<sup>nd</sup> Third Party as freehold. He added that he heard that the land was an Estate whose owners surrendered to the Government.
95. There was no cross-examination by the 2<sup>nd</sup> Third Party.
96. During re-examination, he stated that the 1<sup>st</sup> Third Party got the land herein from the Malawi Government by a 1992 Order but he forgot the particulars of that Order. He then said that the 2<sup>nd</sup> Third Party transferred the whole land in South Lunzu to the 1<sup>st</sup> Third Party with a layout. He stated that the disputed

- land was on Ntawira Estate and the stream was a boundary of the said Estate. That marked the end of the evidence in this matter.
97. The parties then made submissions on the issue as to who owns the land in dispute herein. It is convenient to quickly point out that the 2<sup>nd</sup> Third party expressed no interest in the matter.
98. The claimants submitted that in determining who amongst the parties owns the land this Court has to determine the following questions as between them and the defendant, namely, whether the land in dispute is customary land or freehold land; whether the land in dispute is owned by the claimants or the defendant; whether the defendant entered upon the land at the command or authority of the 2<sup>nd</sup> Third Party and who between the defendant and the themselves is a trespasser on the disputed land. They added that as between the defendant and the Third Parties this Court will have to consider whether the land in question is owned in freehold by the defendant; whether the land was acquired by the 2<sup>nd</sup> Third Party in 1971 and whether the land is owned by the 1<sup>st</sup> Third Party.
99. The claimants then submitted that land in Malawi is classified as freehold, leasehold or customary estate as per section 7 of the Land Act, 2016. This Court observes that it also includes public land being Government land or unallocated customary land. They however asserted that the current matter arose before the 2016 Land Act and that as such it ought to be determined with reference to the repealed Land Act, 1965.
100. The claimants then asserted that section 1 of the repealed Land Act recognized three categories of land, namely, public land, private land and customary land. And that it defined public land as all land occupied and used by Government and any other land, not customary or private land. And further that it defined private land as all land owned, held or occupied under freehold title or certificate of claim or which is registered as private land under the Registered Land Act. And that it defined customary land as land being held, occupied or used under customary law but excluding any public land.
101. The claimants then contended that it therefore followed that if the land was not public land or private land then it was automatically in the category of customary land.
102. The claimants then observed that according to section 25 of the repealed Land Act, all customary land was declared to be the lawful and undoubted

property of the people of Malawi and vested in perpetuity in the President for the purposes of the said Act.

103. The claimants further observed that section 27 of the repealed Land Act allowed the Minister to declare, by notice under his hand and published in the Gazette that any customary land had become public land. They observed further that a person affected by such a declaration was entitled to reasonable compensation in terms of section 28 of the same repealed Land Act. They referred to *Import and Export Company of Malawi (1984) Ltd v Mizere* [1996] MLR 237.

104. The claimants then observed that in *Mkoka v Banda and another* [1992] 15 MLR 278 at 281 Mbalame J stated that unlike freehold land, leasehold or registered land, an occupant of customary land cannot have title to the land as the same is vested in the President. And that at most, such occupant has a licence or permission from the chief of the area to use the land.

105. They then asserted that occupation and use of customary land, however, gave right of ownership of the land to the occupier and user thereof. And that this right of ownership could not be taken away except by following the customary law of the area. They referred to the case of *Administrator of the Estate of Dr H. Kamuzu Banda v Attorney General* [2002-2003] MLR 272 where the Court said that:

That the land is customary land is not in dispute; neither the fact that it was given to President Banda. Being customary land, no registration of title or grant of any interest in land is required. (Ibik, Restatement of Africa Law. Volume 4 at 82). The nature and extent of the interest conferred under an allocation depends on the express or implied intention of the chief or village headman allocating the land in question and for purposes of ascertaining the nature, duration and limitation of the interest conferred, regard is had, *inter alia*, to:

- i. The evidence of the witness present.
- ii. The original request of the applicant.
- iii. Other relevant facts and surrounding circumstances.

The largest possible right which a grantee may possess and enjoy over the land is the right of indefinite occupation and utilization. It is capable of assignment and is also inheritable.

106. The claimants then observed that in the case of *Chitakale Plantations Co. Ltd v Woodsworth and another (2)* [2010] MLR 62 the Supreme Court stated that:

The evidence shows that the dispute concerning the piece of land in issue pre-dates the acquisition of Chitakale Estate by the appellant. There is evidence that the dispute had been the subject of discussion at a number of fora involving the respondents and appellant's predecessor in possession. One such forum was the office of the District Commissioner, Mulanje. With the aid of surveyors, it was established and resolved at the forum that the land in question did not form part of the Estate. The evidence further shows that the office of the District Commissioner further advised the respondents to take steps to have the land leased to them, which they did; assuredly, it must at that stage have appeared to that office that the respondents were better entitled to the land than the appellant. All appears to have been well thereafter until the Estate was purchased by Mulli Brothers when the wrangle resurfaced. It seems quite clear to us that the possession of the disputed land was and must have been, in the respondents by this time, who grew thereon various agricultural produce, which included bananas. Besides, the Court's clear finding that the Estate did not include the land in dispute strengthens the conclusion that the appellant could not have been in possession of it, the dispute about the land with the appellant's predecessor having been settled earlier than the acquisition by it. That settles the question of possession.

107. The claimants then asserted that the position that an occupant and user of land could not willy-nilly be dispossessed of land also came out in the case of *Nkhoma v ESCOM MSCA* civil appeal number 39 of 2013 in which the Court stated that:

We are aware that the Court found, as a fact, that the land belonged to the appellant. However, it must be accepted that the finding was based on the fact that possession of the land by the appellant was not disputed. We are of this view because the court below was aware that the appellant failed to disclose from whom he derived title to the land. Since 'equity treats as done that which ought to be done', we are prepared to hold that the appellant's possession gave him a good title over the land against all others except the legal owner.

108. The claimants then submitted on the issue of adverse possession and stated that, in the case of private land, the owner can be dispossessed under the doctrine of adverse possession. They pointed out that this happened in the

case of *Mataka and others v Kadzuwa and others* civil cause number 1073 of 1992 (High Court) (unreported) whereby the claimants lived and farmed on the defendants' estate for about 20 years and the Court found that the claimants had obtained title to the land in issue by adverse possession having lived on the land for over 12 years peacefully and uninterrupted. They alluded to section 6 of the Limitation Act which limits claims related to interests in private land to 12 years.

109. The claimants indicated that adverse possession of land can be had by unlawful possession of land for 12 years or more and which is accompanied by acts that are inconsistent with the land owner's intended use of the land. See *Mbekeani v Nsewa* [1993] 16 (1) MLR 295.
110. The claimants then submitted on trespass and observed that in *Kachale v Ashani and others* civil cause number 2306 of 2004 it was indicated that every unlawful entry by a person on the land in the possession of another is a trespass for which an action lies, even though no actual damage results. They added that possession is a question of fact.
111. The claimants then alluded to the evidence of the parties in this matter and then submitted on whether the disputed land is owned by the defendant un freehold and whether the defendant entered upon the land on the authority of the 2<sup>nd</sup> Third Party. They submitted that the defendant has failed to prove the allegation that it owns the disputed land in freehold. They added that the defendant did not produce any evidence of title to the disputed land by way of conveyance or document of title. The claimants observed that exhibit BM3 produced Roselyn Makwakwa did not include the disputed land. They observed further that she admitted that the defendant has no document of title to the land.
112. The claimants then asserted that no evidence was adduced by the defendant that it entered on the disputed land on the authority of the 2<sup>nd</sup> Third Party. They asserted that Roselyn Makwakwa did not allude to this claim at all in her evidence and there was no evidence from the 2<sup>nd</sup> Third Party on that aspect.
113. The claimants submitted that the claims by the defendant are therefore unfounded and that its counter claim ought to be dismissed. They submitted further that they never trespassed on any known land of the defendant.

114. The claimants next addressed the question whether the land in dispute was acquired by the 2<sup>nd</sup> Third Party in 1971 and then subsequently transferred to the 1<sup>st</sup> Third Party. They submitted that the 2<sup>nd</sup> Third Party has not laid any claim to the land. And that there is no statement of case by the 2<sup>nd</sup> Third Party. They observed that the 2<sup>nd</sup> Third Party was brought into the proceedings by the defendant who was claiming ownership of the land. They reiterated that the defendant has no title to the disputed land and that its case against the 2<sup>nd</sup> Third Party cannot hold.
115. The claimants asserted that suffice to say that the 2<sup>nd</sup> Third Party has not adduced evidence on the land in dispute. They observed that there is no evidence before the Court that the alleged conveyance by the Government to the 2<sup>nd</sup> Third Party in 1971 as per exhibit PT2 produced by Precious Tembo included the land in dispute in the present matter. They observed further that, as admitted by Precious Tembo, the only way to ascertain if the land was conveyed under exhibit PT2 was from the relevant Deed itself and the map attached to the said Deed.
116. The claimants noted that the relevant Deed and map referred to in exhibit PT2 were not brought in evidence before this Court. They noted further that the Third Parties did not call witnesses from the Deeds Registry to testify on the Deed in issue. And they asserted that the legal presumption is that the evidence from the Deeds Registry would have been contrary to the interests of the Third Parties. They noted that in *Mpungulira Trading Limited v Marketing Services Division* [1993] 16 (1) MLR 346 it was stated that failure to call a crucial and material witness works against the party. And that the Court will assume that the only reason why such a witness is not called is that the evidence is adverse to the party who should have called the witness.
117. The claimants then contended that the 2<sup>nd</sup> Third Party has not ascertained by evidence that the land in dispute was conveyed to it in 1971. They further noted that during cross-examination Precious Tembo admitted that he had never seen the 1971 conveyance. And further, that he had not seen the land described as having been conveyed by the Deed number 38947 the exhibit PT2. And that he was therefore incapable of ascertaining that the land in dispute was transferred to the 2<sup>nd</sup> Third Party.
118. The claimants further asserted that it is important to bear in mind that the 1<sup>st</sup> Third Party was not a party to the 1971 conveyance. And that therefore,



without looking at the Deed in issue all that Precious Tembo said on the Deed is hearsay and should be disregarded by this Court.

119. The claimants contended that since there is no evidence that the disputed land ever belonged to the 2<sup>nd</sup> Third Party, there is no interest in that land that was transferred to the 1<sup>st</sup> Third Party. Further, that the 1<sup>st</sup> Third Party has not adduced any evidence of transfer to it by the 2<sup>nd</sup> Third Party of the land in dispute. They observed that such a transfer would be by a transfer document in a prescribed form and no such document has been presented in evidence. And that, consequently, that there is no evidence that the land in dispute belongs to the 1<sup>st</sup> Third Party. They also asserted that in any event it was not proved that the land in dispute is part of South Lunzu Ntawila Block mentioned in exhibit PT the Deed number 38947.
120. The claimants then submitted on whether the land in dispute is customary land occupied and used by them. They asserted that having found that the land in dispute is neither public land nor freehold land and not leasehold land it follows that it is customary in nature.
121. The claimants pointed out that their evidence has not been impeached. They pointed out that they have been in occupation and use of the land for a very long time. They asserted that their unchallenged evidence is that they built, lived and cultivated on the land for over 80 years. And that it can safely be assumed that the land is customary.
122. The claimants then submitted that on the evidence before this Court, the defendant uprooted the claimants' plants and trees, cleared the land and has been chasing the claimants from the land and has even built a church on the land, which acts constitute trespass.
123. The claimants asked this Court to find that the land is customary and for their occupation and use. Further, that they be granted the remedies sought in their statement of claim.
124. The defendant never filed written submissions. However, its skeleton arguments are on record. By those said arguments, the defendant observed that the material facts are as stated in the witness statement of Roselyn Makwakwa, its witness.
125. It then contended that the issues for determination in this matter are fourfold, namely, whether the disputed land is customary land or private unregistered land; whether the 1971 Conveyance was valid; or in the

alternative, if the answer is in the affirmative, whether the defendant has an equitable interest in the land and whether the claimants acquired the land by adverse possession.

126. The defendant addressed the question whether the land is customary or private unregistered land. It reiterated that land can be either public, private or customary. It noted that customary land is governed by customary law. And that private land is either registered or unregistered. It observed that the fundamental difference between private registered land and private unregistered land is that the former deals with registration of title or interest whereas the latter deals with registration of documents affecting title to the land. It referred to section 6 of the Deeds Registration Act and *Re Tayub* [1923-60] ALR Mal 79. It noted that private registered land is dealt with by the land registry under the Registered Land Act whereas the private unregistered land is dealt with under the deeds registry under the Deeds Registration Act.

127. The defendant then asserted that the land in dispute herein is not customary land because it is not subject to customary law hence it is clearly private land. And that, specifically, it is unregistered private land because the title to the land was not recorded on the land register. Rather, that the interests affecting the land are contained under conveyances registered in the deeds registry.

128. The defendant then submitted on the validity of the 1971 Conveyance. It submitted that when resolving which interest takes priority over the other when dealing with two conflicting interests in private unregistered land, the cardinal rule is that the earlier in time takes precedence. This is in accordance with section 8 of the Deeds Registration Act.

129. It then contended that, in the present case, the disputed land was originally conveyed to the Church of Scotland Trust in 1902, whereas the 2<sup>nd</sup> Third Party was conveyed the land in 1971. Further, that 1902 is much earlier than 1971 and that the claimants have no single disposition of the land registered in their favour hence that the defendant has better title or legal interest in the land than all the other parties in this matter.

130. The defendant submitted, in the alternative, that the 1971 Conveyance was not valid for several reasons. First, that the Minister responsible for land matters had no interest in the land allowing her/him to bequeath the land to

the 2<sup>nd</sup> Third Party in this matter. Further, that if the Minister intended to acquire the land under the Land Acquisition Act, did not follow the requisite procedures and hence the disposition cannot be said to be valid since the Government failed to acquire any interest in the land. Secondly, that the disposition was done in bad faith and with dirty hands. It asserted that the Minister and the 2<sup>nd</sup> Third Party knew or ought to have known of the defendant's pre-existing interest in the land yet they went ahead with their alleged conveyance without any consultation with the defendant. Finally, that no notice was given to the defendant by the 2<sup>nd</sup> Third Party or the Minister of the intended 1971 Conveyance, despite having knowledge of the defendant's pre-existing interest. And that the 2<sup>nd</sup> Third Party cannot be said to be a bona fides purchaser of land without notice and cannot have a claim over the land in dispute.

131. The defendant submitted further that, moreover, the 1971 Conveyance is invalid on the ground that it was obtained fraudulently. It referred to the case of *Battisdon v Hobson* (1896) 2 Ch 403 at 413 where fraud is defined in the ordinary proper acceptance of the term. And further, that fraud includes situations where a person who knows or ought to have known of a prior charge or pre-existing interest in land shall not get priority over that charge or land by registration or conveyance.
132. The defendant then contended that, in the present case, when the 2<sup>nd</sup> Third Party was conveyed land and the structures thereon by the Minister under the 1971 Conveyance, it knew or ought to have known of the pre-existing interest that the defendant had in the land yet did not inform or notify the defendant of the transfer. It added that the 1971 Conveyance was done behind its back and without its consent. It contended in the alternative that no compensation was paid to the defendant for the land and all improvements thereon by the Minister or Government. And that such acquisition cannot be valid for being fraudulent.
133. The defendant then submitted that it has an equitable interest in the land herein. It submitted that an equitable proprietary interest in land arises where X is under a duty to Y. For instance, where X owes Y an obligation to consult, notify or otherwise inform Y of any dealings in the land.
134. The defendant contended that in the present matter, the Minister knew or ought to have known of the defendant's interest in the land and the

improvements it had made on the land and could not compulsorily acquire the land without consulting, notifying or otherwise informing the defendant. It observed that the legal duty that the Minister had was pursuant to Part IV of the Land Acquisition Act was to do an investigation, give notice to the defendant of the compulsory acquisition and compensate the defendant accordingly after an assessment of compensation. It observed that the Minister did not fulfil these legal duties. And that consequently, the Minister created an equitable interest for the defendant.

135. The defendant then observed that equitable interests bind third parties. It noted that in the case of *Williams & Glyn's Bank v Boland* [1981] AC 813 an equitable interest was found to exist under the following circumstances and was held to be binding on the third party bank. Mr. Boland was registered owner of a freehold. The freehold had however been acquired with financial assistance from his wife and was held under a trust in which his wife and himself were beneficiaries. Mr. Boland later charged the land to William & Glyn's Bank. The House of Lords held that Mrs. Boland's equitable interest in the land was binding on the third party bank, it being a proprietary and not personal interest.
136. It then submitted that, in the instant matter, the equitable interest that arose between itself and the Minister was and is binding on all third parties including the 2<sup>nd</sup> Third Party and is entitled to take priority over any other interest including the 1971 Conveyance. It observed that the only defence that exists for third parties is that the third party is a bona fide purchase of the land without notice of the prior legal or equitable interest. It however observed that one can be a bona fide purchaser only where several requirements have been met.
137. It observed that, the person must be a purchaser for value. And it submitted that to be a purchaser for value, the person must acquire the estate or interest in the land by an act of the parties rather than by operation of law. It contended that in the present matter, the Minister most likely acquired the land herein by virtue of his powers under Part IV of the Land Acquisition Act and consequently conveyed it to the 2<sup>nd</sup> Third Party herein. It contended that such an acquisition does not qualify as a purchase. Alternatively, that even if there can be said to be a purchase, which it denied, the said purchase was not for value. And that this is because there was no consideration paid by the 2<sup>nd</sup>

Third Party to the Minister under the 1971 Conveyance. It added that the conveyance was a mere gift and does not place the 2<sup>nd</sup> Third Party in a better position than the defendant for 'equity will not assist a volunteer'.

138. It then submitted that the other consideration in applying the defence of bona fide purchaser is that one must have acquired the land without notice of the pre-existing interest in the land. It added that notice can be actual, constructive or imputed. And that where one knows or ought to know of the existence of pre-existing interest in land that person will be deemed to have had notice.
139. The defendant submitted that, in the present matter, the 2<sup>nd</sup> Third Party knew or ought to have known of the defendant's pre-existing interest in the land. And that, by the 1971 Conveyance, the 2<sup>nd</sup> Third Party knew that there were certain developments on the land yet it still went ahead with the conveyance and that it cannot be said to be a bona fide purchaser.
140. The defendant then submitted on adverse possession. It contended that the land in dispute being private unregistered land is subject to common law adverse possession and not statutory prescription under the Registered Land Act. It noted that the Supreme Court of Appeal in *Mbale v Maganga* Miscellaneous Civil Appeal number 21 of 2013, is authority on adverse possession. It added that it must be appreciated that one cannot sue or found a cause of action for adverse possession. But that it is a defence to oust the title holder.
141. The defendant submitted, alternatively, that according to *Mbale v Maganga*, a person acquires land by adverse possession where that person has had peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of twelve years. It submitted that the claimants did not have possession but mere occupation of the land in dispute without the defendant's consent and that the defendant had employed several means to remove them from the land for instance using the police or the 2<sup>nd</sup> Third Party. It added that the claimants' occupation cannot be said to be uninterrupted hence cannot be said to be adverse possession.
142. The defendant noted that for adverse possession to be validly raised, the possession must be against the person lawfully entitled to the land. It observed that the claimants erroneously believe that the land in dispute belongs to the 2<sup>nd</sup> Third Party, the Malawi Housing Corporation. And that,

they have ousted the 2<sup>nd</sup> Third Party from its title. It observed that there cannot be adverse possession here because the requisite mental element, *animus possidendi*, is not present. It asserted that this is because the claimants intended to dispossess the 2<sup>nd</sup> Third Party and not the defendant who is the legal owner of the land.

143. The defendant also asserted that the claimants have at no time had constant possession of the land without interference from the defendant for a period of twelve years and that therefore they cannot make out a claim of adverse possession.

144. The defendant seeks that this Court finds that the land in dispute is private unregistered land. That the legal interest in the land rests in the defendant and binds all third parties. That, alternatively, the equitable interest in the land rests in the defendant and binds all third parties. Further, that commencement of the present proceedings pleading adverse possession is ill-founded and without legal basis. And further, in the alternative, that the claimants have not satisfied the elements for adverse possession. And finally, that the action be dismissed with costs.

145. The 1<sup>st</sup> Third Party then made its submissions in three parts comprising seven heads. It isolated seven issues that it deems relevant to the disposition of this matter. Under part A it raised three issues, namely, whether the 1<sup>st</sup> Third Party is the right party to be sued in the circumstances, whether the conversion of customary land to public land extinguishes all other rights on the land and whether the defendants have a remedy in public law for the loss of the right to land. Under Part B, the 1<sup>st</sup> Third Party raised the issue whether public land or customary land can be acquired by prescription. Under Part C, the 1<sup>st</sup> Third Party raised three issues, namely, whether a lease is a contract *per se*, whether a party can be forced to grant a lease and whether the granting of a lease by the 1<sup>st</sup> Third Party falls under public law or private law.

146. The 1<sup>st</sup> Third Party then submitted as follows. On the first issue under part A, it submitted that it is not the right party to be sued in the circumstances. It asserted that it was a recipient of the land from another party, the 2<sup>nd</sup> Third Party, which was itself given the land by the Minister responsible for land matters. And that it did not wrest the land from the defendant.

147. It then observed that under the Blantyre Planning Order of 1971 (G.N. 251/1971), subsidiary legislation to the Act, the disputed land and surrounding

estates were declared a planning area. And that in 1992, a Supplemental Order transferred the land to the 1<sup>st</sup> Third Party. It asserted that this was done under the Local Government Urban Areas Property Transfer Order, G.N. number 124 of 1992. The said Order provides as follows:

Whereas I, ELIA CHINGUWO KATOLA PHIRI, Minister of Local Government, have approved the agreement reached between the Malawi Housing Corporation, of the one part, (hereafter referred to as the 'Corporation') and each of the local authorities named in the *First Column* of the Schedule to this Order, of the other part, (hereinafter referred to as the 'local authority') for the transfer from the Corporation to the local authority of all such pieces and parcels of land in the area of jurisdiction of the local authority as are commonly known as traditional housing areas and named, relative to the local authority, in the *Second Column* of the Schedule to this Order (the boundaries whereof are more particularly delineated on the surveys plans of the Department of Surveys correspondingly specified in the *Third Schedule* of the Schedule to this Order) for such traditional housing areas to be managed, maintained, controlled or otherwise regulated by the local authority for the benefit of the inhabitants of the area of the local authority:

NOW THEREFORE, in exercise of the powers conferred by section 77A of the Local Government (Urban Areas) Act, I do hereby make the following Order-

1. This Order may be cited as the Local Government (Urban Areas) (Property Transfers) Order, 1992, and shall come into operation on 1<sup>st</sup> April, 1992.
2. Subject to any exceptions provided for in the agreement recited in the preamble to this Order, upon commencement of this Order the title, of whatever interest, to the land comprising a traditional housing area in the area of jurisdiction of a local authority vested in the Corporation shall vest, instead, in the local authority and thereupon all property, assets, rights, liabilities, obligations and agreements in, on or over the traditional housing area vested in, or acquired, incurred or entered into by or on behalf of, the Corporation shall be deemed to have vested in, or acquired, incurred or entered into by or on behalf of, the local authority and further every such property, right, liability, obligation or agreement shall be enforceable by or against the local authority to the same extent as it would have been enforced by or against the Corporation.
3. Where under any written law the transfer of the land or other property affected by this Order requires to be registered, the registering authority shall forthwith and at no cost to the local authority or to any other person by way of registration fees or other charges-

- a) Make such entries in the appropriate register as shall give proper effect to the transfer;
- b) Where appropriate, issue to the local authority a certificate of title to, or other documentary evidence of ownership of, the land or other property or make such amendments to the appropriate register as may be necessary;
- c) Make any necessary endorsements on such deeds or other documents as may be presented to such registering authority relating to matters of title, rights, liabilities or obligations concerning such land or other property.

#### SCHEDULE

<i>First Column</i>	<i>Second Column</i>	<i>Third Column</i>
LOCAL AUTHORITIES	TRADITIONAL HOUSING AREAS	SURVEY PLANS
BLANTYRE CITY COUNCIL	Bangwe Estate	SD/4672
	Mpingwe Estate	SD/4435
	Chilomoni Estate	SD/4416
	Zingwangwa	SD/4552
	Namiyango	SD/6032
	Ndirande	SD/4696

148. It then contended that the power to designate and allocate public land posits with the Minister responsible for land matters who exercises it generally on behalf of Government. And that under the Town and Country Planning Act, the Minister responsible may designate a piece of land for town and country planning purposes as needed.

149. It then asserted that the defendants lost their alleged title to the disputed land on the strength of the exercise of such governmental authority and the 1<sup>st</sup> Third Party acquired the same rights at the back of that designation by Government. It further asserted that it was not at fault. It insisted that disputes regarding land, therefore, if any, should have been taken up against the Minister of Lands and not the 1<sup>st</sup> Third Party since it was merely exercising



its rights and privileges over the land as had been rightfully accorded to them under law.

150. It concluded that the defendant should not have sued it for alleged encroachment on its freehold rights since the 1<sup>st</sup> Third Party could not be the right party to any such suit being legal recipients, from the Minister, of the respective rights and privileges accruing on the land.
151. On the second issue under Part A of its submissions the 1<sup>st</sup> Third Party contended that the conversion of customary land to public land extinguishes all other rights on the land. It noted that the defendant argues that it has absolute title to the land in dispute and that the Registrar of Lands and the 1<sup>st</sup> Third Party are acting illegally in transferring formal title to other people and/or developing the land while the defendant still retains tenancy and freehold title acquired by prescription.
152. It observed that it is on record that the land in dispute was converted to public land in 1971 after Parliament formally declared the area in issue a planning area.
153. It then referred to section 5 (1) of the repealed Land Act which provides that the Minister may make and execute grants, leases or other dispositions of public or customary land for any such estates, interests or terms, and for such purposes and on such terms and conditions, as he may think fit. And submitted that the Act gives the Minister the power to dispose of any land, save private land, for such interests and on such terms, conditions or purposes as he may think necessary.
154. It then observed that from a reading of section 5 (1) of the repealed Land Act only persons to whom public land has been designated by the Minister can enjoy the relevant rights and privileges accruing on the land and any other rights that are not in tandem with the Minister's designation are extinguished. And further, that any party with prior rights is entitled to compensation or may have the remedy of judicial review against the Minister.
155. It then observed that the land in issue herein was converted to public land. And that any rights that the defendant or any other occupants of the land might have enjoyed prior to that conversion have since ceased to exist legally. Further, that any continued use of the land from the moment of the conversion is contingent on the land's rightful owner's goodwill and is not as of right on the part of the defendant.

156. It asserted that the defendant seems to mistake the absence of any considerable development or other activity on the disputed land by itself as an indication that the defendant still has rights over the said land. It concluded that the defendant is misguided in asserting that despite conversion of the land herein to public land its alleged rights over the land still subsist.
157. On the third issue under Part A of its submissions, the 1<sup>st</sup> Third Party contended that defendant has a remedy in public law for the loss of the right to the land.
158. It observed that the defendant has occupied the land in dispute for a long time spanning over 100 years. And that throughout this period the defendant has invested in the land and hence felt entitled to a remedy at law hence this action.
159. It submitted that, however, the land in question was converted to public land on 1971 and the defendant never complained within the limitation period for judicial review. And that the defendant never sought compensation.
160. It then referred to section 28 of the repealed Land Act which provides that:

Any person who, by reason of-

- a) grant, disposition, permit or licence of or in respect of customary land, made or given by the Minister under section 5;
- b) any declaration made under section 27(1) that any such land is public land; or
- c) the temporary use and occupation of customary land under section 27 (2),

suffers a disturbance of, or loss or damage to any interest which he may have at, or immediately prior to the happening of any of the events above mentioned in this section, may have had in such land, shall be paid such compensation for such disturbance, loss or damage as shall be reasonable.

161. It then observed that the law recognizes the need for compensation where public interest has tramped private interest. And that it is undeniable that the defendant enjoyed some rights over the land herein before it was converted to public land. It then submitted that the defendant should accordingly seek compensation from Government and not seek redress from the 1<sup>st</sup> Third Party.

162. Under Part B of its submissions, the 1<sup>st</sup> Third Party contended that public land or customary land cannot be acquired by prescription or adverse possession.

163. It noted that the defendant claims that since it has occupied the land for over 100 years without any disturbance and without ever conceding possession of the same to anyone then it has acquired absolute title to the land by way of prescription. It referred to section 134 (1) of the Land Act which provides that:

The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of twelve years:

Provided that no person shall so acquire the ownership of customary or public land.

164. The 1<sup>st</sup> Third Party asserted that the land in question has at all times been either public land or customary land and as such it could not be possible for the defendant to acquire it by prescription or adverse possession.

165. Under Part C of its submissions, the 1<sup>st</sup> Third Party firstly submitted that a lease is a contract *per se*. It observed that the defendant claims that it has acted illegally by not granting the defendant a lease over the disputed land herein. It submitted that however a lease is subject to principles of freedom of contract.

166. The second submission under Part C was that the 1<sup>st</sup> Third Party cannot be forced to grant a lease. It observed that the defendant claims that by not granting it a lease, the 1<sup>st</sup> Third Party acted illegally. It reiterated that a lease is a contract. And that a party has freedom of contract and that the 1<sup>st</sup> Third Party cannot therefore be compelled to grant the lease to the defendant unless it wishes to do so willfully. It therefore asserted that it is not at fault for not having granted a lease to the defendant.

167. Lastly, the 1<sup>st</sup> Third Party submitted in the alternative to the preceding argument that, if the granting of a lease to the defendant falls under public law then the defendant can only complain under judicial review of an administrative action.

168. It observed that title to the disputed land has devolved under public law with conversion and granting of a lease to itself on the strength of statutory provisions. It added that, as such, considerations of legality of administrative

action generally come into play to whatever extent they stand relevant in resolving the issue at hand.

169. The 1<sup>st</sup> Third Party then referred to Order 53 rule 1 of the Rules of the Supreme Court which was applicable then and which dealt with the nature of cases that could be brought by way of judicial review for orders of certiorari, among others. It then submitted that if this Court finds that there are public law considerations with regard to the granting of the lease herein by itself to the defendant given that title devolved by exercise of power under statutory provisions, then the appropriate manner of proceeding was by judicial review soon after the land herein was converted by the Minister to become public land.

170. In light of the foregoing arguments, the 1<sup>st</sup> Third Party contended that the action herein is misconceived in that the 1<sup>st</sup> Third Party is not the correct party to these proceedings. Further, that the remedy available to the claimants is twofold, namely, challenging the grant of the land by the Minister responsible for land matters to the Malawi Housing Corporation and eventually to the 1<sup>st</sup> Third Party and seeking compensation for the loss of development done on the land.

171. It contended further that the action by the defendant flouts the hallowed principle of freedom of contract in that the 1<sup>st</sup> Third Party cannot be forced to grant a lease and thereby enter a contract. In the premises, the 1<sup>st</sup> Third Party prays that the action be dismissed for being against a wrong party, it being a mere recipient of the land and that the Minister should have been sued for taking away the land and giving it to the 1<sup>st</sup> Third Party. It further prayed that the action be dismissed for being an abuse of the court process for frivolously asking this Court to order it to enter into a contract in breach of the principle of freedom of contract. It further prayed that the action be dismissed for being commenced under private law when it ought to have been commenced under public law seeking compensation for loss of the development done on the land or for the land itself. And finally, that the action be dismissed for being an abuse of the court process because the defendant clearly has not acquired and has no capacity to acquire the rights to land under the doctrine of prescription or adverse possession. The 1<sup>st</sup> Third Party sought costs of this action.

172. This Court considers it prudent to firstly deal with the issue of who is owns or controls the land in dispute as between the two third parties before it can decide the main issue between the claimants and the defendant.
173. This Court observes that, as correctly submitted by the parties herein, the third parties herein did not make any statement of their cases upon being added as third parties. They ought to have done so as per the rules. They simply filed their evidence. The 2<sup>nd</sup> Third Party did not pursue its case at the trial and simply said from the bar that it handed over the land in dispute to the 1<sup>st</sup> Third Party. It is the 1<sup>st</sup> Third Party that put up a case of control over the land, essentially submitting that it got the land by virtue of the Local Government (Urban Areas) (Property Transfers) Order, 1992, which came into operation on 1<sup>st</sup> April, 1992.
174. Regrettably, the said 1992 Order does not include South Lunzu as one of the areas to which it applied. The land to which the Order applied is specified in a Schedule to the said Order. The Order has been reproduced by this Court in the preceding part of this decision for ease of reference. This Court observes that the said Order was premised on an Agreement between the 1<sup>st</sup> and the 2<sup>nd</sup> Third Party to transfer certain land. The Agreement is not in evidence. The Order also stipulates that it is subject to any exceptions contained in the said agreement. Given that the agreement is not before this Court, it is impossible for this Court to know what exceptions applied.
175. As correctly submitted by the claimants, it is impossible to tell whether the Agreement mentioned in the 1992 Order do have an effect on the land in dispute or indeed whether the agreement applies to the land in dispute.
176. The evidence in total therefore shows that the 1<sup>st</sup> Third Party has not proved that it has land holding over the land in dispute herein. The cause of the 1<sup>st</sup> Third party is not ameliorated by its reference to a prior 1971 conveyance to the 2<sup>nd</sup> Third Party of a piece of land in South Lunzu by the Government. As admitted by the 1<sup>st</sup> Third Party's witness, he could not tell whether the land in dispute was covered by the said 1971 conveyance. Consequently, the 1<sup>st</sup> Third Party has not proved that the land in dispute is covered by the said 1971 conveyance from the Government to the 2<sup>nd</sup> Third Party.

177. Both the third parties in this matter have not shown by evidence that they have a stake in the land in dispute. The arguments by the 2<sup>nd</sup> Third Party that it transferred the land herein to the 1<sup>st</sup> Third Party is therefore untenable. Further, the contention by the 1<sup>st</sup> Third Party that it in fact got the land in dispute herein from the 2<sup>nd</sup> Third Party and that the matters herein involve matters of public law on acquisition of land is also untenable. This Court will therefore not belabor itself with the arguments made by the 1<sup>st</sup> Third Party which were not well premised factually.
178. In view of the foregoing findings on the evidence, this Court agrees that the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties were not proper parties to this matter but for the reasons stated by this Court and not those advanced by the 1<sup>st</sup> Third Party.
179. The view of this Court is therefore that the issue will have to be dealt with by the Minister responsible for land matters in terms of documentation of title over the land in dispute.
180. At this juncture, this Court will now deal with the issue of who owns the land in dispute between the claimants and the defendant and also the issue of the claim of trespass as made by the claimants.
181. This Court agrees with the submissions of the parties that land in Malawi is either public land, private land or customary land. This system has been maintained from the repealed Land Act to the current Land Act. What actually applies in this matter is the repealed Land Act during the subsistence of which the dispute herein arose. This is as submitted by the parties.
182. The parties sought to classify the land herein. The claimants contended that the land in dispute is customary land on account of the fact that there is no proof that it is either public land or private land. In fact, the claimants submitted that it can be safely assumed that the land in dispute is customary land. This Court is unable to agree to that assumption on the evidence.
183. The point is that customary land is land that is held, occupied or used under customary law but excluding any public land. See section 1 of the repealed Land Act.
184. There is no evidence that the land in dispute was held, occupied or used under customary law. None of the claimants' witnesses testified to that effect. It would therefore not be safe to assume that the land in dispute herein is customary land. As will be shown shortly, the defendant in fact has

documentation showing that this land is privately held unregistered private land.

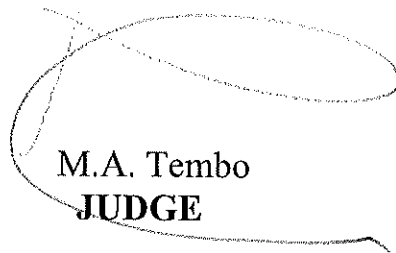
185. The 1<sup>st</sup> Third party argued that the land herein is public land given that it was under its control. However, as already found by this Court, the 1<sup>st</sup> Third Party had failed to prove that the land in dispute in particular is under its control and was received from the 2<sup>nd</sup> Third Party by Ministerial Order.
186. This Court is convinced on the evidence, and agrees with the defendant's contention, that the land in dispute is private land that the defendant in fact acquired from its predecessor in title, the Trustees of the Church of Scotland. The land is therefore private unregistered land to be dealt with under the Deeds Registration Act as submitted by the defendant.
187. There is evidence that the defendant and the claimants co-existed as neighbours on this land since before independence. The Chief's Assistant clearly testified to that fact. In the 1950s he went to the school run by the defendant's predecessor in title on this same land.
188. The defendant built the current church in the 1990s according to the evidence of the claimants. This period was a period that saw the country transition to the multiparty system of Government and entrenchment of human rights. It is surprising that the claimants assert that the defendant came to build its church on their land in the 1990s and uprooted their crops and without the claimants seeking redress before this Court or other authorities until they commenced this matter in 2016. This Court finds it hard to believe this version of events as asserted by the claimants.
189. This Court is rather persuaded by the defendant's evidence that the defendant in fact built the church where it stands now on account of the fact that it held the land in dispute after getting it as a gift from its predecessor in title, the Trustees of the Church of Scotland. While the defendant may have been sloppy in documenting its title to the land, this Court is convinced with the documentary evidence on record which shows that Trustees of the Church of Scotland, in 1991, transferred the land in dispute herein to the defendant. That evidence is borne out of the letter from Mr. Gonthe an officer in the Ministry of Lands who wrote concerning compliance with section 24A of the repealed Land Act in relation to transfer of land at South Lunzu under certain Deed numbers although the size of the land is not stated.

190. In view of the foregoing, this Court finds on the evidence that the defendant held the land privately by deed which needs to be verified and certified by Ministry of Lands and it cannot be said that the defendant trespassed onto the claimants' land. This Court is further persuaded that for many years the defendant actually fought off trespassers to its land which include the claimants herein.

191. In view of the foregoing findings, the claimants' claim for trespass therefore fails and so too the claim to a permanent injunction. On the contrary, the defendant succeeds on its counter-claim.

192. Costs shall be for the defendant as against the claimants. In the circumstances of this case, each of the Third Parties shall bear its own costs.

Made in open court at Blantyre this 5<sup>th</sup> February, 2021.



M.A. Tembo  
**JUDGE**