JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
LAND CAUSE NO. 213 OF 2022

BETWEEN

VERIJINA LOBI ………………………………………………..…… CLAIMANT

AND

VILLAGE HEADMAN KAGWERA ………..……........……… DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Ms. Dolozi, Counsel for the Claimant
Mr. Mando, Counsel for the Defendant
Mr. Gerald Kumwenda and Mrs. Mtenje, Court Clerks

RULING

Kenyatta Nyirenda, J.

1. On 25th April 2023, I delivered a Ruling in this case. It would be expedient that the Ruling be reproduced in full:

> *"There is before this Court an application by the Claimant for an order of interlocutory injunction restraining the Defendants either by themselves, their agents, relatives or whomsoever from from transacting, selling, building, developing, farming, cultivating, using or dealing with in any other way the land situated at Kagwere village, T/A Masumbankhuni in Lilongwe until the determination of the within matter or until a further order of the Court.*
>
> *The application is brought under Order 10, rule 27, of the Courts (High Court) (Civil Procedure) Rules, 2017 [Hereinafter referred to as the "CPR"] and it is accompanied by a statement sworn by the Claimant. The sworn statement is reproduced in full:*
>
> > *"3. **THAT** the piece of land in dispute belonged to my late father who died on 23rd November 2015.*

4. ***THAT*** *I was given the said Land by my late father in 1995 and the land is located at Kawar village T/A Masumbankhuni in Lilongwe district.*

5. ***THAT*** *I have used the land in dispute for over 25 years.*

6. ***THAT*** *the land was being used for agricultural purposes from 1995 up until in 2021 when the Defendant started cutting down trees and encroaching on the land.*

7. ***THAT*** *efforts to stop the Defendant from encroachment have proven futile.*

8. ***THAT*** *unless restrained by this court, the Defendant will continue to encroach onto my land thereby depriving me of my property that I lawful own."*

The Defendant is opposed to the application and he relies on her sworn statement which reads as follows:

"3. ***THAT*** *I have read the sworn statement of the Claimant in support of an application for an order of interlocutory injunction in the herein matter and I would like to respond thereto as I do in the paragraphs hereunder.*

4. ***THAT*** *I was born on the 3rd of March 1952 in Kagwera Village, Traditional Authority Masumbankhunda in Lilongwe District. I attach hereto a copy of my National Identity Card marked and exhibited hereto as "**DN1**".*

5. ***THAT*** *I was installed as the Village Headman Kagwera on the 12th of November 1976.*

6. ***THAT*** *I do know and recognize the Claimant in the within proceedings as a daughter to my uncle.*

7. ***THAT*** *the land the subject of the dispute culminating into the proceedings herein is situated in Kagwera Village, Traditional Authority Masumbankhunda in Lilongwe District and within the area of my jurisdiction.*

8. ***THAT*** *the said land is exclusively customary land used for communal purposes and it is further part of the land within the village that is allocated to the inhabitants to build their homes as opposed to cultivation.*

9. ***THAT*** *it is therefore not correct as deponed by the Claimant under paragraph 6 of the sworn statement in support of the application that the said land was used for agricultural purposes.*

10. ***THAT*** *there is no customary estate that has been created over the said land and the Claimant does not, therefore, have any private individual ownership of the land as it entirely remains customary land for communal purposes.*

11. ***THAT*** *it is within the jurisdiction of the chief to allocate and reallocate the said land within the village according to customary law and in accordance with principles of the constitution.*

12. ***THAT*** *I am the one in my capacity as the chief who allocated the land to the Claimant's father after a Mr Chiotha who was previously in occupation of it decided to relocate permanently from the village.*

13. ***THAT*** *I occupied part of the land under dispute in around 2020 when I relocated back to the village after I had been away for some time and I further constructed a five-bedroom house on the land.*

14. ***THAT*** *I have since been staying on the land in the house that was constructed thereon with my wife and children and hence I am already in occupation or possession of the land in question.*

15. ***THAT*** *at the time I was taking occupation of the land, the land was just lying idle as the Claimant relocated outside Kagwera Village a long time ago and is staying at Phirilanjuzi Trading Centre.*

16. ***THAT*** *prior to occupying the land with my family as aforementioned, I was staying and residing outside the village for a period of about three years.*

17. ***THAT*** *before taking possession of the land in dispute, I informed the Claimant when I relocated back to the village that I was looking for a place to stay and hence I would like to construct a house on part of the land as it was just lying idle at that time.*

18. ***THAT*** *I also further informed the Claimant that if she intends to come back and stay in the village whenever she desires, land would be made allocated to her within the village that she can use to build a house to stay in or for cultivation.*

19. ***THAT*** *notwithstanding paragraph 18 hereof, the Claimant already has plenty of land situated within the village for cultivation and also where she can construct a house if she wants to be staying within the village.*

20. ***THAT*** *the dispute herein has been to adjudication before the Senior Chief Masumbankhunda at the instance of the Claimant who lodged a complaint against me that I was trespassing on her land and it was thereat determined in my favour. I attach hereto a copy of the ruling delivered by the Senior Chief Masumbankhunda marked and exhibited hereto as "**DN 2**".*

21. ***THAT*** *under the decision of Senior Chief Masumbankhunda, it was held that the said land is not for agricultural purposes as contended by the Claimant but part of the land within the village that can be allocated and re-allocated under customary law to people for purposes of building homes.*

22. ***THAT*** *in the circumstances, this is not a matter that an order of interlocutory injunction should be granted to the Claimant."*

One of the key issues for determination is whether or not this case should first have been commenced in a customary land tribunal. The issue arises within the context of the Customary Land Act, 2016 (the Act) which provides, among other matters, a dispute settlement system for the adjudication of disputes pertaining to customary land in Malawi.

Part VII of the Act makes provision regarding settlement of disputes relating to customary land. Section 44 of the Act establishes in every Traditional Land Management Area a customary land tribunal to adjudicate on any dispute concerning customary land in the area.

In terms of section 45 of the Act, appeals from a customary land tribunal lie to a district land tribunal. A person who is aggrieved by a decision of a district land tribunal may appeal to a Central Land Board: see section 47 of the Customary Land Act. Finally, section 49(5) of the Act provides a party that is dissatisfied with a decision of the Central Land Board a right to appeal against the decision to the High Court.

Counsel Mando, appearing on behalf of the Defendant, has strongly argued that in terms of the scheme of things under the Act, this matter could only have come to this Court by way of appeal in the event that the Claimant was dissatisfied with a decision of the Central Land Board. It is his contention that in so far as there is no evidence that the present matter went through a district land tribunal and the Central Land Board, the matter has been prematurely brought to this Court and it should be dismissed on that ground:

> *"3.25 It must be appreciated however that the Customary Land Act, 2016 came into force on the 1st day of March 2018 through Government Notice No.17 published under the Malawi Government Supplement, dated the 13th of April 2018. It is further important to highlight that the Customary Land Act, 2016 came into operation on the said appointed date without any suspension of operation at all of some of its relevant provisions to a later date like provisions relating to the establishment of structures such as tribunals intended by the legislature to be responsible for the adjudication of customary land disputes. In the premises, when the Customary Land Act, 2016 came into operation as of the 1st of March 2016, all the structures provided for under the Act for the administration and management of customary land were therefore supposed to be established immediately or within a reasonable time after the Act coming into operation.*
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> *3.26 The proceedings herein were commenced in around 2022 and this was at the time when the new regime for the administration and management of customary land under the Customary Land Act, 2016 was in place. The Customary Land Act, 2016 is therefore the applicable law that the Court must have recourse to since the Act was in operation at the time that the proceedings were commenced. As earlier submitted, the Act clearly provides for the establishment of structures like tribunals for the adjudication of customary land disputes. It must be noted that these tribunals have been created in some districts after the Act came into*

operation i.e Chikwawa. Unless there is proper justification or alternatively sufficient reasons as to why the structures like tribunals which the legislature provided for the adjudication of customary land disputes under the Act have not been created in the district of Lilongwe, then the Court should not proceed to ignore the provisions of the Act in handling the matter specifically to decide as if the tribunals were not yet established.

*3.27 It would clearly be contrary to the intention of the legislature that customary land is not being administered and managed in accordance with the Act after it came into operation. In the case of **Seaford Estates v. Asher [1949] 2 K.B. 481**, Lord Denning said that the duty of an interpreter of a statute is to find and give effect to the intention of Parliament. He said at page 499:-*

> *"We do not sit here to pull the language of Parliament to pieces and make nonsense of it. That is an easy thing to do and is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gap and making sense of enactment than by opening it up to destructive analysis."*

3.28 We therefore respectfully submit that as there is no proper justification or sufficient reason that has been provided as to why the tribunals tasked with the adjudication of customary land disputes have not been established under the Customary Land Act, 2016, the intention of the legislature should prevail and the Court should not proceed to determine the matter herein as if the structures under the Act have not yet been established or the Act is yet to be operationalised."

Arguing on behalf of the Claimant, the learned Senior Legal Aid Advocate, Ms. Dolozi, has passionately pleaded with the Court not to dismiss the case for lapses on the part of authorities charged with the administration of the Act. The arguments were put thus:

> *"We do not dispute that as a customary land matter it is indeed supposed to be commenced before a land tribunal as stated in the Act however the tribunals have still not been set up to date and it would not be in the interest of justice for people who have land issues to have no remedy at all since 2016 just because the land tribunals have not been established.*
>
> *……*
>
> *It would not be in the interest of justice for the court not to hear customary land law matters where the tribunals are not existent since 2016 as this would not be in the interest of justice and people would take advantage of others since they would just take over somebody else customary land knowing that there are no tribunals and the complainant has no remedy if not to commence the matter before the High Court."*

Both parties proceed on the premise that customary land tribunal in respect of a Traditional Land Management Area covering the land located at Kagwere village T/A Masumbankhuni in Lilongwe district has not been established in the last five years since the Act came into operation.

It appears to me, in my not so fanciful thinking, that the prudent thing to do would be to get an official position from the office of the Attorney General regarding the issue whether or not it is indeed the case that a customary land tribunal has not been established to cover the area in question and, if the answer is in the positive, the reason (s) why the customary land tribunal to cover the area in question has not been established. To this end, the matter is adjourned to 15th of May 2023 at 9 o'clock in the forenoon. The Attorney General and any other interested party wishing to be heard on the issue in question have to file their respective sworn statements and skeleton arguments not later than 10th May 2023." – Emphasis by underlining supplied

2. Copies of the Ruling were given to the parties, the Attorney General's Chambers, and the Malawi Law Society. On the set hearing date, it is only the Claimant's legal practitioner that appeared before me. She adopted the legal arguments that had already been presented to the Court as captured in the Ruling dated 25th April 2023 whose text has been quoted at paragraph 1. The Court is dismayed that the other relevant offices opted not to appear before the Court to shed light on the issues raised by the Court in its Ruling dated 25th April 2023. The issues that the Court raised have far-reaching implications regarding access to justice and have a context, which is discussed at paragraphs 8, 9, 10, 11 and 33 below.

3. It is commonplace that an Act does not carry legal force until it has been published in the Gazette and it has come into operation: see section 74 of the Constitution. As was rightly observed by Counsel Mando in his submissions, the Customary Land Act, 2016 (Act) came into force on 1st March 2018: see Government Notice No.17 of 2018 published in the **Malawi Government Supplement,** dated 13th April 2018.

4. Part VII of the Act is headed "DISPUTE SETTLEMENT" and it makes provision relating to, among other things, customary land tribunals, district land tribunals, and Central Land Board: see sections 44, 46, and 48 of the Act.

5. It is not uninteresting to note that sections 44, 46 and 48 of the Act respectively use the phrase "*There shall be established ...*" as opposed to the phrase "*There is established...*". I understand the phrase "*There shall be established* …" to require establishment of the body being referred to at some point in the future. In contrast, the phrase "There is established …" means that the body being referred to is

established instantaneously (there and then): see G.C. Thornton, *Legislative Drafting*, 4th Edition, at page 320 where he gives the example of "*The Forestry Tribunal is established"*. See also section 107(1) of the Environmental Management Act, 2017 which states that "*There is hereby established an Environmental Tribunal*" and section 74 of the Patents Act [Cap.49:02 of the Laws of Malawi] which uses the words "*... there is hereby established a Patents Tribunal*".

6. In any case, the phrase "*There shall be established* ..." has inherent legal challenges of its own. The phrase is incomplete or ambiguous as it leaves unclear the identity of the authority which is vested with the power or duty to make the establishment. In legislative drafting, this is a serious weakness since the law requires that when a power or duty is conferred or imposed, the identity of the person on whom it is conferred or imposed should immediately be apparent.

7. It also goes without saying that where an Act calls for the establishment of a tribunal, the establishment has to be by a legal instrument which has to be published in the Gazette. The establishment of the tribunal in such circumstances cannot, legally speaking, be done administratively. While both parties stated that customary land tribunals have been established in some districts, for example, Chikwawa, neither party could point to an instrument in support of such establishment. Needless to say, this is a matter that needs urgent attention by the line Ministry and all interested parties.

8. Neither sections 44, 46 and 48 of the Act nor any other section in the Act states the time within which the customary land tribunals, district land tribunal and the Central Land Board respectively should be established. Section 46 of the General Interpretation Act comes into play in such circumstances and it states that where no time is prescribed within which anything shall be done, such thing shall be done without undue delay.

9. "Without undue delay" is a legal term which means without delay, except so far as the delay is justified by valid considerations or cannot be avoided. In short, the time taken to perform the required action should not be excessive or unwarranted and any such excessive or unwarranted delay has to be accounted for and explained: see https://lawinsider.com/dictionary

10. Section 46 of the General Interpretation Act was applied in **NBS Bank Plc v. Dean Lungu,** MSCA Civil Appeal No. 83 of 2019 and paragraph 5.6.2 of the judgment is pertinent:

> *"It is pertinent to observe that, although neither the Supreme Court of Appeal Act nor the Supreme Court of Appeal Rules provide for the time within which a notice of appeal must be served, section 46 of the General Interpretation Act provides that "…". To the extent*

*that it in effect requires that a notice of appeal must be served on a respondent "without undue delay", section 46 of the General Interpretation Act, although not identical to, is very much consistent with the requirements of Part 52.12 (3) (b) of Civil Procedure Rules, which provides an appellant's notice must be served on each respondent **as soon as practicable,** and in any event not later than 7 days after it is filed. Accordingly, in this matter the Registrar was required to serve the notice of appeal on the Respondent **without undue delay or, in other words, as soon as practical**"* - Emphasis by underlining supplied

11. In the present case, the relevant authorities chose not to come to Court to give an explanation, if any, for the inordinate delay in establishing and operationalizing the customary land tribunal and district land tribunal in respect of the Traditional Land Management Area in which the land in dispute herein is situated. In these circumstances, it cannot be said that the establishment of the said customary land tribunal and district land tribunal has been done as soon as practical or without undue delay. Put differently, the time taken by the executive to do the needful is inordinate, excessive, unwarranted and neither accounted for nor explained.

12. In the matter at hand, section 46 of the General Interpretation Act has to be read together with section 74 of the Constitution and sections 20 and 9 of the General Interpretation Act.

13. Section 20 of the General Interpretation Act allows for the exercise of powers between assent and commencement of an Act. Where an Act which confers power to make any appointment, to make subsidiary legislation, to prescribe forms or to do any other thing for the purposes of the Act, has been assented to by the President in accordance with the Constitution, such power may, unless a contrary intention appears, be exercised at any time after such assent, so however that any subsidiary legislation or appointment made or other thing done in exercise of such power shall not take effect until the Act comes into operation except to the extent necessary for bringing the Act into operation.

14. Among other matters, section 20 of the General Interpretation Act is meant to enable the taking of steps to ensure that everything, including administrative structures, should be in place by the time the Act comes into operation. In this connection, it is important to remember that the application or operation of an Act extends to the whole of Malawi unless a specific provision is inserted in the Act restricting its application to one or more particular areas. It is sometimes necessary to preserve flexibility in this matter and this can best be done by giving a designated office holder (e.g., the President, the Chief Justice, etc.,) the power to apply the whole or part of the Act to such areas as he or she may by order or notice designate from time to time. A good example of this can be found when, under the

Constitution or other legislation, a state of emergency is declared in respect of part only of Malawi and is later extended by a further declaration affecting another part or the remainder of Malawi. To my mind, this is the approach that has to be resorted to where the intention is to introduce an Act or parts thereof on pilot basis. It has to be mentioned that introduction of law on pilot basis has its own legal challenges, notably possible violation of non-discrimination clause.

15. With regard to the present matter, it will be recalled that the Customary Land Bill, 2016 was assented to by the President on 1st September 2016 and the Act commenced on 1st March 2018. I reckon that this intervening period of more than 18 months was used to determine the preparedness and readiness on the part of the executive to implement the Act. The Court takes judicial notice that the Customary Land Regulations, 2018 were made on 7th March 2018: see Government Notice No.18 of 2018 published in the **Malawi Gazette Supplement,** dated 20 April 2018. I believe that by bringing the whole Act into operation at one time, the executive was certain that it would establish and operationalize the dispute settlement bodies provided for under Part VII of the Act countrywide without undue delay.

16. Where it is obvious that, for one reason or the other, not all provisions of an Act can be brought into force at the same time then it is advisable that the Commencement Notice should expressly state the provisions that will not come into operation until a later date to be published in the Gazette. This approach has been taken with respect to a number of Acts. For instance, the Copyright Act, 2016 came into operation on 13th March 2017 save for Part XIII thereof: see Government Notice No. 21 of 2017, published in **Malawi Gazette Supplement** dated 5th May 2017. Part XIII of the Copyright Act, 2016 deals with matters related to the Copyright Fund. Needless to say, if the executive envisaged challenges in establishing or operationalizing dispute settlement bodies provided for under Part VII of the Act, then the commencement of Part VII of the Act should have been pended.

17. The bringing of different provisions of an Act into operation on different dates is allowed by section 74 of the Constitution and section 9 of the General Interpretation Act. Section 74 of the Constitution deals with the coming into force of laws. It states that no law made by Parliament shall come into force until it has been published in the Gazette, but Parliament may prescribe that a law shall not come into force until some later date after its publication in the Gazette.

18. Section 9 of the General Interpretation Act makes provision regarding time when written law comes into operation and the section states as follows:

"(1) Subject to subsections (2) and (3), an assented to by the President shall come into operation immediately on the expiration of the day next preceding the day on which it is published in the Gazette.

(2) Where it is enacted in the Act, or in any other written law, that such Act or any provision thereof shall come or be deemed to have come into operation on some specified day, the Act or, as the case may be, such provision shall come or be deemed to have come into operation immediately on the expiration of the day next preceding such day.

(3) <u>Where it is enacted in an Act, that such Act shall come into operation on such date as may be appointed by any person, such person may, by notice or order, bring the Act into operation on day specified in the notice or order, or may by the same or by different notices or orders bring different provisions of the Act into operation on different dates</u>." – Emphasis by underlining supplied

19. It is not difficult to understand the reasons behind section 74 of the Constitution and sections 9, 20 and 46 of the General Interpretation Act. Once an Act goes into operation, it is binding and it has to be obeyed by all concerned parties, including the Courts. Actually, there is a duty on the Courts not to deny an Act: see the case of **Nippo v. Shire Construction Co. Ltd.** HC/PR Civil Cause No. 372 of 2011, wherein the duty was explained in the following terms:

*"Judicial Duty not to Deny the Statute – Subject only to the Constitution, it is the duty of the court to accept the purpose decided on by Parliament. This applies even though the court disagrees with Parliament. It even applies where the court considers the result unjust, provided that it is satisfied that Parliament really did intend that result. In the apt observation by Lord Scarman in **Duport Steads Ltd v Sirs [1980] 1 WLR 142, 168**-*

> *"… in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactment. In this field, Parliament makes and unmakes laws [and] the judge's duty is to interpret and apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgement best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute"*

20. One of the leading cases in Malawi on the principle of "*judicial duty not to deny statute*" is **Polypet Packaging Industries Limited v. OG Plastic Industries (2008) Limited,** HC/CD Commercial Appeal Numbers 1 and 2 of 2016. The following paragraphs in the judgment of Katsala J, as he then was, in the said case are instructive and illuminating:

"The High Court is a court of law. I do not think it is the duty of the High Court to cover up for failures or lapses in the implementation of the law by those that are legally entrusted

to do so. The fact that the Minister has for reasons best known to himself, not empaneled the Tribunal does not render section 35(1) of the Registered Designs Act or section 74 of the Patents Act invalid. I have searched in the two Acts and I have not found any provision which says that these sections will only be in force when the Tribunal has been empaneled.

In my judgment had this been the intention of the Legislature it would have been expressly stated in the two Acts. To hold that section 35(1) should be ignored because the Tribunal is not empaneled would be tantamount to amending the law. And we all know that that is not how the law is amended. Such 'amendment' would be unlawful. If the Minister is of the opinion that it is impracticable or impossible to empanel the Tribunal and that instead the High Court should handle the appeals from the decisions of the Registrar then the best thing to do is for the Minister to initiate an amendment to that effect. Otherwise, for as long as the law remains as it is the Tribunal must empaneled so that it can handle the appeals as dictated by law.

It has been argued by the applicant that where the forum provided for under the law for the determination of rights is non-existent, the law would expect that person to proceed to the next available forum, in the present case, the High Court, for a final settlement of the legal issues. With the greatest respect, I do not subscribe to that line of thinking. Firstly, why should we fail to bring into operation a dispute resolution forum which is created under our own law enacted by our own Parliament? Surely if we are serious about the rule of law I cannot think of anything that can justify a failure to put such a forum into being. Secondly, should this Court sanction, condone or promote such failure or neglect by assuming and discharging the functions of the forum as an interim measure? I do not think so. This Court by law is mandated to uphold the law as long as that law is in line with the Constitution. There is no suggestion that section 35(1) of the Registered Designs Act offends the Constitution. I do not see why this court should not insist on its being complied with. This Court cannot therefore proceed in contravention of an express provision of the statute simply because it would be convenient to the members of the public to do so in view of the Minister's unexplained neglect of his responsibility under the statute. The Court's duty is to dispense justice according to the law and not convenience. In any case is it not obvious that if public officers neglect or abdicate from their duties members of the public who are beneficiaries of such duties will suffer? And should this Court really say that where there is such neglect or abdication, it will come in to salvage the situation in order to avert the suffering of the public? I do not think so. Rather, it is the duty of this Court to uphold the law as it stands on the statute book and where necessary ensure that public officers discharge their duties under the law. The citizen's right to an effective remedy provided under the Constitution in my view entails an effective remedy according to law and not convenience or anything else. The law must be enforced without fear or favour, ill will or affection. That is the only way that we can ensure that justice is consistently to the citizens."

21. I cannot agree more with what is stated by His Lordship in the above-quoted paragraphs. I have nothing useful to add except to stress one point. It is critically important that an Act, or parts thereof, should not be brought into operation until the administrative structures provided in the law for its implementation are ready to perform their duties in accordance with the Act.

22. In deference to the principle of judicial comity and in the general interest of developing jurisprudence, it has to be mentioned that the Claimant cited the case of **Kennes Msuku v. Elizabeth Manesi & Others**, HC/PR Civil Cause No. 204 of 2021 in support of the argument that it would not be in the interest of justice for people who have land issues to have no remedy at all since 2016 just because the land tribunals have not been established. The case of **Kennes Msuku v. Elizabeth Manesi & Others**, supra, appears, on the face of it, to contain sentiments that go contrary to the decision in **Polypet Packaging Industries Limited v. OG Plastic Industries (2008) Limited,** supra**.**

23. Before discussing **Kennes Msuku v. Elizabeth Manesi & Others**, supra, a word or two about the principles of judicial comity and stare decisis might not be out place. Judicial decorum, no less than legal propriety, forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if judicial officers sitting in courts of co-ordinate jurisdiction begin overruling one another's decisions. If a judicial officer is not able to distinguish a previous decision of a judicial officer sitting in a court of co-ordinate jurisdiction, and holding the view that the earlier decision is wrong, himself or herself gives effect to his or her view the result would be utter confusion. In such a situation, legal practitioners would not know how to advise their clients and all courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of the High Court.

24. In order to avoid conflict of authority and to secure certainty, uniformity and continuity in the administration of justice, the principle of judicial comity, as well as legal propriety, requires that a Judge of the High Court should follow the decision of another Judge of the High Court unless the decision falls within the category of decisions discussed in paragraphs 27 to 31 below.

25. Stare decisis is the system adopted by judges where the judges follow previous decisions. It simply means that previous decisions made by judges in similar cases are binding upon future cases depending on the hierarchy of the courts. The primary purpose of stare decisis is to promote consistent and predicable judgments on cases of similar nature.

26. The principle of stare decisis involves ratio decidendi and obiter dictum. "ratio decidendi" is the legal principle of the case which is binding on the lower courts. It is also the reason for deciding. "obiter dictum" is a comment or incidental remark made by a judge. Obiter dictum is not binding on the lower courts but it is only persuasive. As such, the judges have the choice whether to follow or not to follow obiter dicta.

27. It has to pointed out that the rule that a Court should follow the decision of another Court of co-ordinate jurisdiction is subject to a number of exceptions: see **Salmond's Jurisprudence**, 11th Edn., at pages 199 to 217. Firstly, a precedent ceases to be binding if a statute, or statutory rule, inconsistent with the precedent is subsequently enacted, or if it is reserved or overruled by a higher Court.

28. Secondly, a precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute. Thirdly, a precedent loses its binding force if the court that decided it overlooked an inconsistent decision of a higher Court.

29. Fourthly, a Court is not bound by its own previous decisions that are in conflict with one another. If the new decision is in conflict with a previous decision, the new decision is given per incuriam and is not binding on a later Court. Although the later Court is not bound by the decision so given per incuriam, this does not mean that it is bound by the first case. Perhaps in strict logic the first case should be binding, since it should never have been departed from, and was only departed from per incuriam: see the Indian case of **State of Gujarat v. Gordhandas Keshavji Gandhi and Others** AIR 1962 Guj 128. However, this is not the rule. The rule is that where there are previous inconsistent decisions of its own, the Court is free to follow either of the inconsistent decisions. It can follow the earlier inconsistent decision, but equally, if it thinks fit, it can follow the later inconsistent decision.

30. Fifthly, precedents sub silentio are not regarded as authoritative. Sub silentio is a legal Latin term meaning "under silence" or "in silence". It is often used as a reference to something that is implied but not expressly stated. A judgment is said to be given sub silentio when a particular point of law involved in the judgment is neither perceived by the court nor present to its mind. For instance, a precedent sub silentio is a legal decision that is made without being directly addressed or mentioned in the court's ruling. It refers to a situation in which a court makes a ruling or applies a principle without taking into account the applicable law or any argument.

31. Sixthly, decisions of equally divided courts are not considered binding.

32. Time to revert to the case of **Kennes Msuku v. Elizabeth Manesi & Others**, supra. The claimant averred to be the owner of a piece of land situated at Banana in Bangwe in Blantyre City. He sued the defendants in the High Court for encroaching on the said land without his consent. The claimant obtained a default judgment on the defendants' failure to file a defence. Thereafter, the defendants made an application to set aside the default judgment. The High Court held that the

requirements of Order 12, rule 21, of the Courts (High Court) Civil Procedure Rules, 2017 had been met. The application was, accordingly, granted.

33. Having rendered its decision on the application to set aside the default judgment, the High Court in **Kennes Msuku v. Elizabeth Manesi & Others**, supra, proceeded to make by the way observations as follows:

> *"17. On a different but very important note, this Court observes that this is a matter concerning customary land and that new legislation has been enacted instituting a new dispute resolution regime with regard to customary land, namely the Customary Land Act, 2016. See Part VII of the Customary Land Act.2016.*
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> *18. Regrettably, some districts in Malawi, including Blantyre, appear not to have instituted the relevant customary land tribunals. The consequence of this is that such matters come before this Court at first instance and this is not an ideal situation. This court is meant to sit on appeals only on such disputes as they relate to customary land. However, given the lacunae in the new dispute mechanism on the ground this Court is compelled as a matter of principle to exercise its unlimited original jurisdiction to entertain customary land disputes in a bid to ensure an effective remedy to the citizens as guaranteed in the Constitution. This is however not a license to those authorities that are required by law to institute the relevant statutory dispute resolution mechanisms to procrastinate for too long.*
>
> *19. This court is aware of the fact that there are a number of statutory tribunals that are not functional and which in turn clogs the High Court system to the detriment of everybody concerned. For instance, the tribunal under the Public Roads Act that ought to deal with disputes relating to compensation relating to public roads construction is another example. This Court wishes to bring this vital aspect to the attention of the office of the Honourable the Attorney General. And to implore his office to see to it that all statutory tribunals are enabled by the relevant authorities so that we have an efficient tribunal system without the High Court being clogged with matters at first instance instead of at appellate level. This Court does not wish to join in refusing to entertain matters that are meant to go before statutory tribunals at first instance when such tribunals are non-existent and only exist on the statute book. The day this Court shall be compelled to do so will be a sad day for justice and the rule of law. Hopefully, the Attorney General will sooner rather than later do a stock taking exercise to see what statutory tribunals are not yet operational and to take steps to ensure their operationalization. Otherwise, if that is not done and when the High Court is compelled to send litigants back to the non-existent statutory tribunals the High Court will have done its part in reminding the relevant authority about the importance of those statutory tribunals enacted by Parliament."* – Emphasis by underlining supplied

34. It is crystal clear that the above-quoted passage is not in respect of an issue that was before the Court for its determination. To be fair to the High Court, it went out of its way to state at the outset that it was simply making observations. In its

observations, the High Court in **Kennes Msuku v. Elizabeth Manesi & Others**, supra, did not make any reference to any authority (for instance, **Polypet Packaging Industries Limited v. OG Plastic Industries (2008) Limited,** supra) dealing with the legal effect of non-establishment or non-operationalization of tribunals envisaged by an Act of Parliament that has been brought into force. In short, the above-quoted observations are obiter dicta and were made per incuriam. In this regard, between **Polypet Packaging Industries Limited v. OG Plastic Industries (2008) Limited**, supra, and **Kennes Msuku v. Elizabeth Manesi & Others**, supra, I am very much persuaded to follow the decision in the former case, that is, **Polypet Packaging Industries Limited v. OG Plastic Industries (2008) Limited,** supra.

35. The proceedings herein were commenced in around 2022 and this was at the time when the new regime for the administration and management of customary land under the Act was in place. The Act is, therefore, the applicable law that the Court must have recourse to since the Act was in operation at the time that the proceedings were commenced.

36. In terms of the procedure set out in Part VII of the Act, a dispute involving customary land must be lodged with the customary land tribunal covering the Traditional Land Management Area in which the land in dispute is situated. If the dispute is not settled by the customary land tribunal, the dispute should be referred to the district land tribunal of the district in which the land in dispute is situated. If still the dispute is not settled by the district land tribunal, the appeal against the decision of the district land tribunal lies to the Central Land Board.

37. As already found out at paragraph 11 above, there is no evidence before the Court regarding there being a justification or sufficient reasons as to why a customary land tribunal and a district land tribunal in respect of land in dispute in Lilongwe District have not been established as required by sections 44 and 46 of the Act. It is plainly contrary to the intention of the Parliament that customary land in Lilongwe, or elsewhere in Malawi, should not be administered and managed in accordance with the Act having regard to the fact that the Act was enacted more than 7 years ago and it came into operation more than 5 years ago. To my mind, the executive has, to borrow the phrase used in the case of **Kennes Msuku v. Elizabeth Manesi & Others**, supra, *"procrastinate(d) for too long"*. In the circumstances, the Court is obliged to ensure that the intention of the Parliament prevails. This entails that the Court should determine the matter herein as if customary land tribunals, district land tribunals, and the Central Land Board were established, as envisaged by sections 44, 46, and 48 of the Act, and are operational to deal with disputes over customary land situated in Lilongwe District.

38. All in all, as consideration of Part VII of the Act has already established, the High Court is not mandated to deal with customary land disputes at first instance. In this regard, this action has been commenced in the wrong forum contrary to the express provisions of Part VII of the Act. In the circumstances, the action herein is dismissed for having being commenced in the wrong forum and being brought to the High Court prematurely.

39. Before resting, I wish to make the following important points. Firstly, I believe that the decision herein is one that does not come with a sense of surprise or shock to the executive because the executive concedes that the provisions of Part VII of the Act are being implemented, if at all, at a very slow pace and the same is adversely affecting delivery of justice: see **Ministerial Statement on the Progress of Implementing Land Reform Programme in Malawi**, July 2023, presented to the National Assembly on 24th July 2023, at page 13:

> *"Secondly,* ***Madam speaker,*** *the establishment of Customary land administrative structures on the ground is affected by the Ministry's over-dependence on other projects that have a Land Component. The delay in the establishment of customary land administrative structures has negatively impacted on people's access to justice in the absence of the structures such as Land Tribunals. This is a matter of urgency as the conventional courts stopped handling land disputes because that function is now provided for in the land laws. Therefore. Government will prioritize establishing land administrative structures in the current financial year."* – Emphasis by underlining supplied

40. It would be remiss of me if I were to omit to point out that the statement in the quoted paragraph that "*conventional courts stopped handling land disputes"* is not accurate in a number of respects. In the first place, the words "*land disputes*" have to be qualified. It is not all land disputes that "conventional courts" stopped handling: they stopped handling only those land disputes that fall within the purview of Part VII of the Act, that is, disputes over customary land. Further, as exemplified by the case of **Kennes Msuku v. Elizabeth Manesi & Others**, supra, it is not all Judges of the High Court that stopped entertaining cases meant to be dealt with at first instance by land tribunals. As a matter of fact, this Division has all along handled disputes relating to customary land.

41. Secondly, if the intention of the executive was, from the outset, to implement Part VII of the Act initially on pilot basis before a national roll-out of the same, then appropriate legislative means should have been utilised to make it plain that implementation of Part VII of the Act would be in stages, beginning with a pilot phase thereof. The challenges with introducing legislation on pilot basis has already been touched upon: see paragraph 14 above

42. Thirdly, one of the critical issues to be addressed as a draft law is being (a) prepared by a line Ministry, (b) considered by Cabinet and (c) debated in the National Assembly is the issue regarding the financial implications for implementation of the draft Bill in the event that it is enacted into law. A clear idea must be gained of how the draft law is to be carried into effect, with particular reference to the finances available. The matter is covered in **Parliament of Malawi's Guidelines for Bill Drafting and Analysis** as follows:

"5.6.1 Financial implications

5.6.1.1 Analysis of Bills needs to assess the resources, both financial and administrative, needed to enforce or implement the proposed legislation. This is important because if these resources are not provided, the legislation will fail. Important questions to ask when analyzing a bill include:

- *What are the financial costs and human resources required to implement the law? These costs and human resources include start-up costs, educational, training and informational costs, and ongoing administrative and enforcement resources and costs, and monitoring and review costs*
- *Are the required expenditures part of the current approved expenditures of Parliament under the Budget Law? If not, how will the cost be paid?*
- *What are the potential human and financial benefits of the proposed legislation?*
- *Do the benefits of the proposed legislation outweigh the costs?*

5.6.1.2 In cases where the estimated costs have already been budgeted, the analyst needs to answer these questions:

- *Which government department is responsible for financial oversight?*
- *Are any financial components of the law missing? For instance, will the law add an additional burden on existing government departments or the court system, and has that been taken into account in financial and human resource planning?"* – Emphasis by underlining supplied

43. Looking at the facts of the present case, I very much doubt that Part VII of the Act was the subject of a considered analysis of the financial implications of implementing the said Part. It is acknowledged world-wide that "*creating new tribunals is complex and involves considerable start-up and ongoing costs. Creating a new tribunal should be a last resort and only be considered if no other viable option exists*.": see Legislation **Design and Advisory Committee Legislation Guidelines, New Zealand, 2018 Edition** available at www.ldac.org.nz. I hope that

a lesson has been learnt from the muddle that the executive finds itself in and that in future all those involved in preparing legislation, at various stages, will give due attention to **Parliament of Malawi's Guidelines for Bill Drafting and Analysis** as they carry out their respective duties.

44. Fourthly, it would appear the clarion call by the High Court in **Kennes Msuku v. Elizabeth Manesi & Others**, supra, that the office of the Attorney General should "*sooner rather than later do a stock taking exercise to see what statutory tribunals are not yet operational and to take steps to ensure their operationalization"* has not been heeded. I end by reiterating the clarion call in **Kennes Msuku v. Elizabeth Manesi & Others,** supra.

Made in Chambers this 1st day of September 2023 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE