



IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CIVIL DIVISION
CIVIL CAUSE NO.02 of 2017

Between

Sylvia MadikhulaPlaintiff

-and-

Idesi GobaDefendant

CORAM:

HONOURABLE JUSTICE D.A. DEGABRIELE

Mr. G Kadzipatike

Counsel for the Plaintiff

Mr. C. Ghambi

Counsel for the Defendant

Mr. A. Kanyinji

Official Interpreter

DeGabriele, J

JUDGEMENT

Introduction

The Plaintiff in this matter Sylvia Madikhula took summons *ex parte* for an order of an interlocutory injunction pursuant to Order 29 RSC and the order was granted on 13th January 2017, restraining the defendant Idesi Goba from taking possession, cultivating, trespassing or in whatever way deal with the 2 Hectares of sugarcane plot of land situated in Chikasa Village. Traditional Authority Kafuzira in Nkhotakota District, up until the hearing of their *inter partes* summons for continuation of injunction hearing.

The Plaintiff then took originating summons in which she is seeking reliefs as follows;

- a. A declaration that the plaintiff is the rightful and lawful possessor of the disputed land, and that the plaintiff has user rights over the 2 hectares plot of land,
- b. A declaration that the defendant's possession and cultivation is wrong, illegal and unconstitutional as the defendant has at no point in her life been in possession of the said 2 hectares of the plot of land,
- c. A declaration that the process of dispossessing the plaintiff of her possession of the 2 hectares is wrongful and illegal and the defendant should stop claiming rights over the said piece of land,
- d. An order of permanent mandatory injunction restraining the defendant his servants, agents, any institution or department whosoever from taking possession, cultivating or trespassing on the said 2 hectares of plot of land,
- e. An order that the defendant pay damages for the inconvenience suffered by the plaintiff as a result of the defendant's wrongful, illegal and baseless conduct of dispossessing the plaintiff of the said land,
- f. An order for costs and any other orders the court deems fit.

The application

The plaintiff swore an affidavit in support of the originating summons. She stated that her father was given a 12 hectare piece of land in the 1990s by VH Chikasa and that they have used the land up to 2012. She stated that government established the Dwangwa Cane Growers Trust (DCGT) which was allocated a vast area in VH Chikasa's area. She said the Trust had to disposes all people that were holding customary land and in the process she was allocated 2 hectares of land that had been acquired by the DCGT, just like many other people in the area. She said she was given a license (**SCM1**) first and then a piece of land was allocated to her. She said having peacefully used the piece of land up to 2016, the defendant came to disposes her of the land regardless of the

fact that the defendant never had possession of that 2 hectares of land. The plaintiff claims that the 2 hectares allocated to her by the DCGT are situated in the parcel of land that was previously cultivated by her family. The plaintiff further stated that the land that the defendant used to cultivate was allocated to other members of the community and not her or any member of her family.

In her affidavit in support of not vacating the injunction she states that Mary Goba was claiming a plot of 2 hectares land from VH Chikasa. She also states that Lois Madikhula, who is her mother, was the one given the 2 hectares that was the subject of the decision of Nkhunga Magistrate Court. She claims that the High Court in upholding the judgement of Nkhunga Magistrate Court, and dismissing the matter of Lois Madikhula without deciding on merits, meant that the case of Idesi Goba was also dismissed. She acknowledged that the defendant and the plaintiff herself were not party to the Nkhunga Magistrate Court case.

The response

The defendant Idesi Goba swore an affidavit in opposition of the originating summons, stating that a piece of customary law was allocated to her husband by GVH Bondo in 1988, and after his death in 2006, the land was divided in two plots for the use of her and her daughter Mary Goba (**MG1**). The defendant acknowledges that before the dispute arose, the plaintiff had her own piece of land adjacent to their plot of land which she was farming. She states that Illovo Sugar Company did an experiment with new species of sugarcane planted and irrigated in the plots of land owned by the farmers in 2010. After that year, the villagers and the defendant in particular started using their own land again. The defendants' land was then taken from her and her daughter by VH Chikasa who gave the land to the plaintiff in 2012. The defendant claims proprietary rights through inheritance from her deceased husband. She also pointed out that the plaintiff's parents had sued her and her daughter on the same (**LG1**). She is seeking a declaration that she is the rightful owner of the land with exclusive proprietary rights, an order of permanent injunction restraining the plaintiff and his agents from interfering with her constitutional right to property, an order for payment of damages for trespass, damages for inconveniences caused by

holding onto the land wrongly, costs of this action and any orders the court deems just in the circumstances.

The second affidavit in support of the defendant's affidavit in opposition was sworn by Mary Goba, the defendant's daughter confirming what the defendant stated in her affidavit. Mary Goba added that when efforts to claim her land through the chiefs from the area had failed, she sued VH Chikasa at Nkhunga Magistrate Court. The said court entered a default judgement on 29th August 2013, ordering VH Chikasa to give back the land to Mary Goba, and also pay MK19,000 to Mary Goba. Mary Goba has stated that the decision of the court was never challenged. She said that while she was working on her land in accordance with the court judgement she received an order of injunction in November 2013. She also states that the plaintiffs in that case at the High Court, Lois and Macdonald Madikhula had snatched the whole inherited land, which had been demarcated into 2 plots by T/A Kafuzira for her and Idesi Goba (MG2).

There is also a sworn affidavit of Samuel Ranson Phiri, a clerk to Chief Kafuzira who confirms the content of the defendant affidavit and add that the land in question belongs to the defendant and it was arbitrarily taken by the plaintiff. Again GVH Bondo swore an affidavit in support of the affidavit of the defendant stating that he had indeed allocated the land in 1988 to the defendant's husband and VH Chikasa had arbitrarily taken the land and given the same to the plaintiff. GVH Bondo attempted to solve the dispute together with GVH Chipunungu by calling VH Chikasa on 3 occasions but he did not avail himself. GVH Bondo also stated that the land that was snatched belonged on one part to Mary Goba and on the other part to Idesi Goba. Further, James Banda who is GVH Chipunungu confirms that he had tried to solve the problems together with GVH Bondo

Issues

The main issue the Court is called upon to determine is whether the plaintiff herein has user and occupation rights over the disputed land, thereby making her the legal and lawful possessor of the said land.

Brief Background of the dispute

From the evidence before this Court, the dispute over this piece of land seems to be an old one. Before I proceed with the current application, I will outline the other "disputes" for the record.

The first dispute was between Mary Goba and VH Chikasa as regards the land she had inherited together with her mother from her deceased father. Mary Goba instituted a civil claim against VH Chikasa at the Magistrate Court sitting at Nkhunga in Nkhotakota District. The sued party, VH Chikasa did not appear at court for the hearing and the magistrate entered a judgement in default on 29th August 2013, ordering VH Chikasa to return the disputed piece of land and also pay Mary Goba the sum of MK19,000.00. A number of issues are worth noting. Firstly, because this was a judgement in default, the merits were not discussed, which include the size of the land as well as the boundaries of the land. Secondly, it is worth noting that this default judgement was never challenged by VH Chikasa through a stay of execution or an appeal; or indeed through the revisionary powers of the High Court instituted by the interested parties whose rights were affected. The magistrate courts in this country have jurisdiction to hear and determine disputes regarding customary land. Again, a magistrate's decision has the force of law and remains enforceable until such a time that the decision has been modified or overturned by a higher court. It is the finding of this Court therefore that as far as the default judgement of the Magistrate Court is concerned, it is valid and remains so valid unless it is overturned by an order of a higher court.

Mary Goba was within her legal rights to be on that piece of land in November 2013 when she was served with an order of injunction by Lois Madikhula. She was not trespassing, encroaching or taking possession of land that she was not duly authorised to use under custom and by the law.

The second dispute was between Lois Madikhula and Mary Goba. Lois Madikhula was one of the persons affected by the default judgement entered by Nkhunga Magistrate Court. As such, she sought an order for an injunction from this court pursuant to Order 29 of the RSC restraining Mary Goba from taking a

sugar cane plot of 2.5 hectares that had been allocated to her by DCGT in April 2012. The injunction was granted in November 2013. A perusal of that court record (**Civil cause No 248 of 2013**) shows that initially the matter was between Lois Madikhula and Mary Goba. Then Idesi Goba seeing that her rights were affected applied and was granted leave to be added as a defendant. Later on, MacDonald Madikhula applied and was granted leave to be added as a plaintiff because his rights as the buyer of the 12 hectares of land from VH Chikasa were affected.

In that case, Lois Madikhula stated in her affidavit in support of that claim marked in this case as **IG1** that she and her husband had bought a 12 hectares parcel of land in the year 2000 from VH Chikasa and the parcel of land was adjacent to the land allocated to Mr Goba, the father of Mary Goba and the husband of Idesi Goba. She further stated that 7 hectares of land were given to her and her daughters Sylvia, Abigail and Patience by the DCGT, and only 3 hectares therein covered some of the land belonging to the defendants. She stated that the DCGT divided the land into plots without regard as to who previously owned the land and from which village they came from. Lois Madikhula herself was allocated 2.5 hectares of sugarcane plot by the DCGT.

On hearing the matter pertaining to the case of *Lois Madikhula and MacDonald Madikhula v Mary Goba and Idesi Goba Civil cause No 248 of 2013*, Justice Madise held that the lower court had made a judgement that the land belonged to the defendant Mary Goba, and the plaintiff, having been aggrieved did not appeal in time, or seek leave to appeal out of time, or indeed apply for a stay of execution or the revisionary powers of the High Court. The court found that in the absence of an appeal or of a stay order the matter was *res judicata* as the magistrate court at Nkhunga was a court of competent jurisdiction and the decision of that lower court had to be given the force of law it deserves. Consequently, the summons failed on a technicality and was dismissed without discussing the merits.

It is this Court's considered opinion that the course of action for Lois Madikhula at that stage was not to seek an *ex parte* order of an injunction, but to pursue a stay

of execution or an appeal through VH Chikasa, or indeed institute revisionary powers of the High Court. In the absence of any of the processes above, the default judgement of Nkhunga Magistrate Court has the force of law, and the High Court did not alter or modify the matter.

In other words, an injunction or any claim, be it under writ or through an originating process, would not lie on the same piece of land under dispute as long as the judgement of the magistrate remain valid, and was not challenged in accordance to the law and procedure pertaining in our courts; unless and until the person seeking such an injunctive relief shows that there was a serious matter to be tried and that they would not be able to access any adequate remedy elsewhere. The matter was subsequently dismissed by the Court without discussing the merits and it remains so dismissed. In conclusion, having looked at these two preceding disputes, it is my considered opinion that there are huge uncertainties which could have been cured had a proper hearing been conducted at Nkhunga Magistrate Court, or the decision of that Court had been appealed against or stayed, or reviewed at the instigation of interested parties.

The third and last dispute, the one which this court is to determine is between Sylvia Madikhula and Idesi Goba, as outlined in their affidavits in support and in opposition outlined above. The plaintiff herein obtained an injunction and also filed this originating summons to state that she was being dispossessed of a sugar cane plot of 2.5 hectares

The Law and Analysis of Evidence

The plaintiff herein is claiming that the piece of land under dispute belongs to her as she was given a licence by the DCGT to use cultivate sugarcane on the said piece of land. She stated in her affidavit that the piece of land which is the subject of the current dispute is distinct and separate from the land which was the subject matter before Justice Madise. The question that arises is whether or not, based on the evidence before this court the disputed piece of land is the same in all these 3 disputes.

From the evidence before this Court, the land under the present dispute is connected to the land in the first and second dispute. The connection is shown by

the evidence of Lois Madikhula in her affidavit which is exhibited as **IG1** in the present matter. Firstly, under paragraphs 14 and 15 of the affidavit, Lois Madikhula states that she, together with her 3 daughters including the plaintiff herein Sylvia Madikhula, were allocated 7 hectares of sugarcane plot by the DCGT and the 3 hectares allocated to her covered some part of the land which the defendants customarily owned before the government acquisition of the said land. Because the dispute was never heard fully, the actual land boundaries were not cleared. I find that at present the balance of probabilities lies in favour of the defendant. I find that the plaintiff herein, seeing that her rights will be affected by virtue of being a licensee on a parcel of land that was under dispute should have sought to have been added as a party to the matter together at the time her father was so added. The plaintiff has resorted to Section 41 of the Constitution of the Republic of Malawi to underscore her right to access any court of law and seek effective remedy. The sections reads as follows:

"(1) Every person shall have a right to recognition as a person before the law,

(2) Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for the final settlement of legal issues,

(3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law"

While it is true that the plaintiff has a constitutional right to be recognized as a person, to access any court of law for a final settlement of legal issues and a right to effective remedy, it is clear from the evidence before this Court that the right she sought to be protected was intertwined with another person's right, and it ought have been heard as part of one proceedings and not piecemeal. This is more so because it is not clear what size of land on the 3 hectares that belonged to the defendant the plaintiff herein was holding. In view of the admission by Lois Madikhula that 3 out of the 7 hectares of land allocated to her by the DCGT belonged to the defendants, it is the finding of this court that the plaintiff herein was an interested party who ought to have applied to be joined as a party in that particular matter. Again, by bringing the matter again to this court through an ex

parte application for an injunction shows me that the plaintiff herein is guilty of abuse of court process.

Secondly, Lois Madikhula stated in her affidavit that VH Chikasa oversaw the allocation of sugarcane plots to people who had the means to cultivate. Lois Madikhula does not dispute that this land was originally customary land and was being used by the people, including the defendant as customary land. Under section 25 of the Land Act, all customary land in Malawi is the property of the people of Malawi and is vested in perpetuity in the President. The Minister responsible for land is given a legal mandate to administer and control all customary land for the use or common benefit of the inhabitants of Malawi, (**see section 26 of the Land Act**). Further the Chief in the area where the land is situated is given a legal mandate to authorise the use and occupation of customary land in accordance with custom.

According to section 7 of the Chief's Act, the chiefs who have such functions are the Paramount Chief, Senior Chief and Chief, and not a village headman. The functions of a village headman extends to the functions delegated to him by the Chief, who is the Traditional Authority. It has been held that the usage and occupancy of customary land passes to heirs and any other person, see *Kuwali v Kanyashu Civil Cause No. 109 of 2010*. In this matter, the user and occupation rights of the disputed land that was given to the defendant's husband in 1988 by the Chief Bondo, passed on to his daughter and his widow on 2006. Indeed having used and occupied the land for such a long period of time, VH Chikasa acted arbitrarily in allocating the land to other people. I find that the actions of VH Chikasa, in allocating the purported customary land to other people in the absence of the legal users of that land under customary law was tantamount to arbitrary deprivation of the land from the defendant. This essentially means that, going by the facts as deposed by Lois Madikhula, the claim by Mary Goba that her land had been arbitrarily taken by VH Chikasa had merit. Consequently, the claim by Idesi Goba has merit as she was equally affected by the action of VH Chikasa. I also find that the claim by Mary Goba and Idesi Goba is supported by the Chiefs of the area, who have sworn affidavits to

show that the disputed land has been always in the use and occupation of Mary and Idesi Goba, and not the plaintiff or her family.

The plaintiff herein claims that the land used to be customary land but was acquired by Government and was reassigned to DCGT. To begin with, it is true that customary land can be declared as public land when the Minister responsible for land has determined that there is need for that land. In order to do so, the law has outlined a process in section 27 and section 28 of the Land Act. The law is clear that when Government intends to acquire customary law for public use, the Minister must declare by notice published in the *Gazette* that such customary land is designated public land, either permanently or temporarily. If the designation is temporary, that is the public use is for a period of less than seven years, the land will be used for public purposes for that period but will remain customary land. In both situations, any person who had user and occupation rights must be compensated for the loss, damage or disturbance in their use of the land. Failure to follow this procedure and compensate appropriately will lead to arbitrary deprivation of users and occupiers of land contrary to section 28 of the Constitution of the Republic of Malawi, see *The Administrator of the Estate of Dr. H. Kamuzu Banda v Attorney General Civil Cause No 1839 (A) of 1997*.

The plaintiff's claim that government acquired the land and leased it out to the DCGT is not supported by any documentation, while the claim by the defendant that the disputed land has always been in her use is supported by sworn affidavits of the Chiefs. Furthermore, the land in question has been in the use of the defendant's family from 1988, against the use of the plaintiff which was from 2012. I find that at this point, it is not clear whether or not the DCGT purported lease existed at all; and whether it indeed held any legally acquired lease from the Government, or indeed that the DCGT only had special user rights and occupation rights authorized by the Chiefs in the area for purposes of a specific development activity. If indeed the DCGT had a lease in the said land, the plaintiff and her counsel would have produced the same before this court as the *Gazette* and the deed of the lease are public documents. I therefore conclude that from the evidence before me, and in the absence of any evidence to the contrary, it is more probable than not, that in the pursuit of developmental activities, the DCGT

had user rights and occupation rights authorized by the Chiefs in the area for a specific exercise. This is supported by the evidence in the affidavit of the defendant that there was an experiment which was done on a new variety of sugar cane grown using irrigation and farmers participated in their own sugar plots in the year 2010.

The plaintiff herein argues that she was legally holding and using the disputed piece of land as she had a valid license from DCGT who had leased the land from government. As seen above, I am not persuaded that the DCGT had a valid lease. The defendant argues that a licensee, who does not have proprietary rights over a property where he holds a licence, does not have *locus standi* to take an action against a third party, see *Hill v Tupper (1863) 159 ER 51*. Such a licensee has a remedy in forcing the licensor to commence an action against a third party. I would agree with this position. The plaintiff herein had no legal title to the sugarcane plots, but the DCGT purportedly had legal title. It was incumbent of the title holder to enforce his own proprietary rights against trespassers and encroachers.

The plaintiff alleges that as a licensee who has invested in the property has a right to sue to enforce her economic rights. While it may be true that she invested in the cultivation of sugarcane, her remedy would lie in damages for any destruction of her crop. However, in this case, she has not sought damages, but is seeking a permanent injunction restraining the defendant from entering or claiming the land. I am of the considered opinion that the licensee would enforce the rights at the same time the licensor is enforcing their proprietary right against encroachment etc. The right party to sue the defendant then would have been the DCGT, whose right in holding and using the land under a legitimate lease would have been interfered with.

The plaintiff claims that she was given a licence by DCGT, which she has exhibited as **SCM1**. There are a number of observations I make on this purported license. First of all, a quick examination shows that this was an interim License, meaning that a substantive license was to be issued later and there is no evidence that such a formal and final license was ever issued. Secondly, the

licensing agreement was not dated and was not duly signed or witnessed. The document is incomplete. Thirdly, the interim license agreement was not signed by the plaintiff herself. Fourthly, there is a stamp of Chief Kafuzira headquarters dated 11th March 2012 endorsed on the interim license but the stamp was signed on behalf of the Chief. Finally, there is no official stamp of the DCGT, who were granting the license. In my view, this purported license is invalid as it looks like a document that was put in place quickly but was never finalized, a document intended to intimidate others, but one that lacks legal effect in its own right.

In civil matters the burden of proof is to be discharged on a balance of probabilities. In this case, the story of the defendant is more probable than that of the plaintiff as it is supported by evidence from the Chiefs from the area, who are legally mandated by law to manage issues of user and occupation rights on customary land. Again, the evidence shows that the defendant was first in title from family usage dating as far back as 1988, while the plaintiff's claim dates back to the year 2012. I find that while the plaintiff has a right to economic activity pursuant to section 29 of the Constitution of the Republic of Malawi, that right does not give her a license to unjustifiably evict the defendant from the usage and occupation of the customary land that was legally allocated to her and her family.

Determination

Having discussed thus, and bearing in mind that parties have prayed for any other orders that the court deems fit in the circumstances, this Court will give the following orders and directions

1. The *ex parte* order of injunction obtained by the plaintiff on 13th January 2017 is hereby vacated with costs. The plaintiff is further ordered to indemnify the defendant as per her undertaking in the said order of injunction.
2. The remedies that the plaintiff is seeking in her originating summons fail in their entirety
3. This Court, having looked at the evidence before me, I find that the land that the plaintiff herein is claiming forms part and parcel of the land


belonging to the defendants. To this end, the plaintiff has no user or occupation rights on the 2 hectares of the sugarcane plot. The 2 hectares of the sugarcane plot must immediately be handed over to the rightful owner who is Idesi Goba.

4. The Court grants the defendant and her family a permanent mandatory injunction restraining the plaintiff, her family, her servants, agents, any institution or department whosoever from taking possession, cultivating or trespassing on the said 2 hectares of plot of land, or interfering with her constitutional right to property.
5. The Court makes an order that the plaintiff compensate the defendant for trespass, and makes a further order that the plaintiff pays damages for inconveniences caused by holding on to the piece of land since the date she was granted the order of injunction which was the 13th of January 2017.
6. That the defendant has all proprietary rights based on her user and occupation rights as inherited from her deceased husband and so recognized by the Chiefs in the area under custom and under the laws of Malawi.
7. In the absence of any evidence to the contrary, the license granted by DCGT is hereby revoked as it is invalid and there is no proof that DCGT was ever granted a lease by the Government in accordance to the law. Had the plaintiff brought in evidence of the lease, this Court would have reached a different conclusion

Costs

Costs normally follow the event and in this matter herein, the plaintiff is hereby condemned in costs for these proceedings

Made in Chambers at Mzuzu Registry this 22nd day of May 2017


D.A. DEGABRIELE
JUDGE