JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CIVIL APPEAL NO. 90 OF 2015
(Being Civil Cause No. 1261 of 2014 in the Magistrate's Court Sitting at Blantyre)

BETWEEN

BENADETTA KAPANDA ..... APPELLANT

-AND-

GEOFFREY MISANJO ..... RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Sudi, of Counsel, for the Appellant
Ms. Mndolo, of Counsel, for the Respondent
Mrs. Jessie Chilimapunga, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

This is an appeal by the Appellant following her dissatisfaction with the decision of the Magistrate's Court sitting at Blantyre (lower court) contained in its judgment dated 26th March 2015. The appeal concerns a land dispute. The claim by the Appellant was that the Respondent had encroached onto her land. The Respondent denied the claim. The lower court found for the Respondent.

The Appellant is dissatisfied with the whole judgement of the lower court and he has put forward the following three grounds of appeal:

"1.1 The Learned Magistrate erred in both law and fact in disregarding the evidence of the Appellants;

1.2 The learned Magistrate erred in law and fact in ordering or finding that the Defendant acquired the land in dispute through adverse possession yet there was and there is evidence that the Plaintiff contested to the Defendant's conduct;

1.3 The Learned Magistrate erred in law in disregarding the laws of inheritance, section 16 and 17 in particular"

The Notice of Appeal also shows that the Appellant seeks the following reliefs:

"2.1 An order nullifying the Judgment of the lower court;

2.2 An order that the Appellants are the rightful owners of the land in dispute;

2.3 An order that the Respondent do pay the costs in the court below and costs of the Appeal;

2.4 In the alternative an order that the land be divided to both (all) parties for all (both) were dependents of the deceased; and or

2.5 An other Order deemed appropriate by the Honourable Court."

The appeal essentially raises three issues for the determination, namely, whether or not the lower court (a) ignored the evidence of the Appellant, (b) erred in finding that the Respondent acquired the land in dispute through adverse possession and (c) disregarded the Deceased Estates (Wills, Inheritance and Protection) Act [hereinafter referred to as the "Act"].

Whether or not the Lower Court Ignored the Appellant's Evidence?

Counsel Sudi contended that the lower court disregarded four vital pieces of evidence. The said evidence is set out in paragraphs 4.1, 4.2, 4.3 and 4.4 of the Appellant's Skeleton Arguments, which paragraphs are couched in the following terms:

"4.1 The lower court ignored the Appellant's evidence that the she inherited the land from her parents. And upon getting married to Misanjo, Misanjo followed her and stayed with her on her parent's land under matrilineal marriage.

4.2 The lower court ignored the Appellant's evidence that the father used or cultivated on the land because it was his wife's land. He was using it by virtue of marriage.

4.3 The lower court also ignored the Appellant's evidence that she protested when the Respondent started constructing the house on the land hence the consultation to the chief for a written document conferring or confirming ownership of land to her whose custody at the material was entrusted in the hands of Robert Misanjo her son. The Appellant further tendered a document to that effect.

4.4 In 2013, the Respondent's father died at Yasin where he remarried. Following the death, the Respondent mobilised materials to construct or reconstruct a house on the Appellant's land where he had initially built a house in the pretext that he was building it for Mr. Misanjo. It was at this time or in this year when the Appellant and her son Robert Misanjo complained to the Chief about Respondent's encroachment."

Counsel Sudi cited the case of **Sumana v. Hara and another [1993] 16 (2) MLR 843** for the following holding:

> *"It is hardly the function of the court in a civil matter to refuse to admit any particular piece of evidence; the party against whom evidence is given must object to the evidence during the trial."*

With due respect to Counsel Sudi, his arguments do not hold water. A perusal of the judgement of the lower court shows that the lower court had its reasons for not giving weight to the evidence by the Appellant and her witnesses. This is to be found at page 7 of the judgement and the relevant part reads as follows:

> *"The task of the court is to determine whose story is more probable than the other.*
>
> *I have carefully considered the totality of the evidence and I am of the view that I should buy the defendant's story because of the following reasons ..."*

In view of the foregoing, it is not true that the lower court ignored evidence given by the Appellant and her witnesses. The truth of the matter is that the lower court considered all the evidence adduced before it but chose to believe the evidence given by Respondent and his witnesses. The lower court gave cogent for its position.

Further, the case of **Sumana v. Hara and another**, supra, does not seem applicable to the present case. The facts in that case, as gleaned from the Editor's

Summary, were as follows. The Plaintiff suffered a dislocation of the pelvis and sustained lacerations at the back and a deep cut wound in the head. At the time of hearing the case, the plaintiff still passed blood in the urine, suffered incessant bowel opening, was in a state of mental instability and could not have sex with his wife. The pleadings did not include these four aspects. The plaintiff, however, laid evidence on them. The defendant never objected to the evidence during trial. Judgement having being obtained by default, the only matter before the Registrar was assessment of damages. The defendant contended that the Registrar should exclude the evidence on the four aspects the pleadings never covered. The plaintiff contended that the aspects were covered by the wording of the pleadings.

The Registrar held, among other matters, that the four aspects complained of were not a departure from the pleadings. I do not understand how the case of **Sumana v. Hara and another**, supra, is relevant to the present case. The decision of the lower court was not premised on anything to do with pleadings. In any case, the decision in **Sumana v. Hara and another**, supra, being that of the Registrar, the same is not binding on this Court.

By reason of the foregoing, I reject the contention by Counsel Sudi that the lower court simply ignored evidence adduced in support of the Appellant's case. The lower court gave cogent legal grounds why it could not rely on the said evidence. Accordingly, ground 1 of the appeal is dismissed.

Before moving on to consider the other two issues, I wish to observe that in so far as the arguments in support of the Appellant's case on these two issues are based on the evidence by the Appellant and her witnesses which evidence was rejected by the lower court, the arguments are bound to fail.

Whether or not the Lower Court Erred in Finding that the Respondent Acquired the Land in Dispute through Adverse possession?

It is the case of the Appellant that the evidence before the lower court was not sufficient to establish adverse possession. The contention was put thus by Counsel Sudi in the Appellant's Skeleton Arguments:

> *"4.5 To amount to adverse possession there should be inconsistent acts or use of the land with the lawful owner's enjoyment of the soil for the purpose for which he intended it; and such inconsistence should be for longer than 12 years.*
> *4.6 In the matter at hand, the Respondent constructed the house on the land for Misanjo who happened to be the husband of the Appellant who shared and lived*

in the house as wife and husband together with their sons Robert Misanjo and Geoffrey Misanjo, the Respondent herein. The construction therefore was for the benefit of all the members hence not inconsistence.

4.7 If the same was inconsistence with the use by the owners, the Appellant herein, the same was protested by the Appellant evidenced by the document tendered in the lower court.

4.8 From the proceedings the requirement of adverse possession upon which the lower court judgment is premised falls short."

Counsel Sudi buttressed his submissions by placing reliance on the case of **Mbekani v. Nsewa [1993] 16(1) MLR 295** and the provisions of the Limitation Act. It might not be out of order to set out in full the relevant part of the Appellant's Skeleton Arguments:

*"3.1.1 In the case of **Mbekani v Nsewa** [1993] 16(1) MLR 295 the court in deciding that the Plaintiff had succeed in establishing his claim for the repossession of the land encroached upon by the Defendant, the Court held that:-*

1. The Defendant's occupation had no legal basis. He was evicted from the land in the early 50's and, like everyone else who was then evicted, he moved off the land. It was only in 1989 that he moved back to the land to open his gardens.

2. The defeating of lawful title to land through adverse possession could in the present case only succeed if it could be shown that the unlawful possession had been for longer than 12 years. However, such adverse possession was not enough: coupled with the possession it had also to be shown that the possession encompassed the commission of acts which were inconsistent with the owner's intended use of the land. Thus, for instance, if the owner had planned on erecting a building on the land, it would have been necessary for the adverse possessor to have erected a building of his own on the property. The growing of crops did not fulfil this second leg of the requirement of adverse possession, even if it were to be shown that the defendant had been in such possession for longer than 12 years.

*3.1.2 The person in adverse possession is assisted by Statute of Limitation to extinguish the lawful owner's right to claim possession of the land: see The Law of Real Property by **RE Megarry and HWR Wade,** (3 ed) at 996. These Limitation Acts which assist persons in possession of land in this way have been described as Acts of peace on the ground that "long dormant claims have often more of cruelty than justice in them": A'Court v Cross (1825) 3 Bing 329 at 332*

*3.1.3 Section 6 of the **Limitation Act Cap 6:02** provides as follows:*

3.1.4 "No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

*3.1.5 **Section 7 of the Limitation Act** provides:*

1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof, and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

2) Where any person brings an action to recover any land of a deceased person, whether under a will or on intestacy, and the deceased person was, on the date of his death, in possession of the land or, in the case of a rent charge created by will or taking effect upon his death, in possession of the land charged and was the last person entitled to the land to be in possession thereof, the right of action shall be deemed to have accrued on the date of his death.

3) Where any person brings an action to recover land, being an estate or interest in possession assured otherwise than by will to him, or to some person through whom he claims, by a person who, at the date when the assurance took effect, was in possession of the land or, in the case of a rent charge created by the assurance, in possession of the land charged, and no person has been in possession of the land by virtue of the assurance, the right of action shall be deemed to have accrued on the date when the assurance took effect.

*3.1.6 To amount to adverse possession the Defendant must commit acts which are inconsistent with the lawful owner's enjoyment of the soil for the purpose for which he intended it. In the case of an owner who wanted to develop the land in future, the defendant's use of the land in breeding greyhounds and subsequently cultivating it was found to be insufficient to amount to adverse possession: see the case of **William Brothers Direct Supply Ltd v Raftery** [1958] 1 QB 159"*

The submissions by Counsel Mndolo on the issue pertaining to adverse possession were also concise and brief. She argued that the lower court's finding that Respondent had acquired the land by adverse possession was not an error in fact or in law. The argument was put in the following terms:

> *"In her evidence, the Appellant stated that she is the owner of the land and that at some point she left the land and went to Ntcheu where she stays now. The Respondent gave evidence that he has been on the land for more than 35 years and that when he built houses he was never questioned or stopped by the Appellant or anybody. Therefore, more than 12 years elapsed."*

Counsel Mndolo also contended that, as the issue of adverse possession was not before the lower court, the lower court ought not to have decided on the issue.

I have considered the submissions by the parties on this issue. It is important to put the lower court's decision on the issue of adverse possession in its proper perspective. The relevant passage is to be found on page 8 of the judgement of the lower court:

> *"Further it is in evidence that the defendant and indeed his father used this land for over 35 years without any disturbance. The law says that if a person occupies a piece of land without the sanction of the owner and uses it for a period of 12 years without intervention from the owner he is deemed to have acquired through adverse possession. In this case even if I am mistaken in my analysis above the defendant having used the land in question for over 12 years as evidence by fruit trees growing on the land is deemed to have acquired the land through adverse possession."*

I have gone through the record of the appeal and I have found nothing therein which controverts the lower court's finding that the Respondent had been growing trees over the land in dispute for over 12 years. I fail to understand how such action can be said not to fall within *"inconsistent acts or use of the land with the lawful owner's enjoyment of the soil for the purpose of which he intended"*. It is important to bear in mind that the Appellant led no evidence to show that she did not intend to use the land in dispute for growing trees.

In any case, as was rightly argued by Counsel Mndolo, the issue of adverse possession was not before the lower court. The case of the Respondent has throughout been that he acquired the land in dispute from his father. In the premises, the Appellant's argument that the requirements to establish adverse possession were not met lacks merit and it has to be dismissed.

Whether or not the Lower Court Erred in Law in Disregarding the Act?

Counsel Sudi submitted that if the land in dispute really belonged to the Respondent's father, then the lower court erred in disregarding sections 16 and 17 of the Act since:

> *"4.10 Both the Appellant and Respondent had lived or depended on the deceased father. It follows therefore per section 17 of the Deceased Estates (Wills, Inheritance and Protection) Act both are entitled to the land as dependants."*

With due respect to Counsel Sudi, I am at a loss how the Appellant expected the lower court to have regard to the provisions of the Act. It is trite law that a court's decision must be confined to the issues raised by the parties' pleadings: See **Gurmair Garments Manufacturing (EPZ) Ltd (In Liquidation), Crown Fashions Ltd v. Ismail Properties Ltd [2007] MLR 17.**

In the case under consideration, the claim by the Appellant was that the Respondent had encroached on her land which she allegedly inherited from her parents. The claim had nothing to do with distribution of intestate property. That being the case, the lower court would have erred if it had decided the case on the basis of the Act when inheritance was not an issue before the lower court.

In the circumstances, this ground of the appeal lacks merit and has to be dismissed.

In the final result, premised on all the facts, evidence and principles of law considered, this appeal has failed and it is, accordingly, dismissed with costs.

Pronounced in Court this 30th day of January 2018 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE