IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 7 OF 2000

(Being High Court, Lilongwe District Registry

Civil Cause No. 531 of 1995)

BETWEEN:

CATHERINE J KACHALE.....APPELLANT

- and -

ALEXANDER J ASHANI.....RESPONDENT

BEFORE: THE HONOURABLE JUSTICE KALAILE, JA

THE HONOURABLE JUSTICE TAMBALA, JA

THE HONOURABLE JUSTICE MSOSA, JA

Banda, Counsel for the Appellant

Mvalo, Counsel for the Respondent

Mchacha, Court Interpreter/Recorder

J U D G M E N T

Kalaile, JA

The appellant in this case is Catherine J Kachale. She was offered by the Malawi Government a 99 year lease effective from 1st September 1976. This was an agricultural lease under which she was expected to pay a rental of K37.00 per month. The lease

stipulated that she should spend K36,000.00 by 31st August 1979 by way of development on the land.

The respondent, the late Alexander John Ashani, was also granted a similar lease for 99 years over the same land effective from 1st August 1972. He was expected to pay a monthly rental of K37.00 and spend K20,000.00 by way of agricultural improvements by 31st July 1973.

How did it happen that the same land which was leased to the respondent was later leased to the appellant on 1st September 1976? The explanation to this puzzle is given by a Memorandum to the President issued by the erstwhile Secretary to the President and Cabinet, the late John R Ngwiri.

The late Ngwiri wrote the late State President, Dr Kamuzu Banda, indicating that the District Commissioner for Mchinji had inspected the farm owned by the respondent when the development period had expired, and, advised that the development by the respondent was limited to the construction of a house and office valued at K9,000.00.

Furthermore, the District Commissioner advised the late Ngwiri that:

(a) the land had not been farmed since the 1972/3 season;

(b) should Mrs Ashani's assessment of the value of improvements be correct, the figure involved was in any case considerably less than the total expenditure stipulated in the lease; and

(c) no farming operations for the current season had commenced by the 16th October 1975 being the date upon which the estate was last inspected.

The late Ngwiri accordingly recommended to the State President that the existing lease be determined for the continuing breach of the development covenant. The State President accepted the recommendation and the lease was determined. It would seem, therefore, that the lease was legally and properly determined.

The reason why the District Commissioner was dealing with Mrs Ashani and not the respondent is that the respondent was arrested and detained with effect from 13th August 1973. According to the testimony of Henry S Sabola, PW3, a retired police officer, the respondent was arrested amongst other reasons, for stealing tobacco belonging to Dr Kamuzu Banda and certain Malawi Young Pioneer farms. A total of five arrests were

made, including that of the respondent, on the same grounds.

However, according to the testimony of the respondent, the appellant acquired the estate through the backing of the late Honourable A A Muwalo, who was at that point in time Minister of State in the President's Office, and after his fall from power, through the backing of the Honourable J Z U Tembo. We found that these allegations were based on hearsay evidence and we accordingly ignored them as the basis upon which the appellant acquired the estate.

The respondent also testified that he spent K24,000.00 in developing the estate prior to his arrest and detention on 13th August 1973. There was no documentary evidence in support of this contention. We, therefore, believe that the correct amount which the respondent spent was K9,000.00, as indicated in the late Ngwiri's Memorandum dated 20th November 1975, and, as supported by the evidence of PW4, Mr Walter M Chalemba, who was the Senior Lands Inspector in the Department of Lands, Housing and Physical Planning.

It is the evidence of the respondent that in September 1995, after the change of government from the one-party State to a multi-party system of government, he sent his Manager and employees to the disputed estate to commence farming thereon. This conduct is what prompted the appellant to commence proceedings in the Court below. Again, this Court is satisfied that the respondent's conduct was illegal, since he lost his legal title to the estate in November 1975.

It is not the intention of this Court to examine the individual grounds of appeal as argued by the appelant's Counsel, because we believe that this case turns on who had legal title to the disputed land. We are satisfied, on a balance of probabilities, that the appellant acquired her title to the estate from the Government of Malawi legally. We take the view that the respondent committed trespass when he entered the appellant's estate in 1995. One point though requires the further attention of this Court. This is the failure by the trial Judge in the Court below to award damages for trespass to the estate by the respondent. What was particularised in the amended statement of claim related to Zingalume Estate. But surprisingly, the appellant's grounds of appeal in paragraph (d) stated that the learned Judge erred in failing to assess damages for trespass against the defendant/respondent in respect of Msulula Estate. Nowhere in the grounds of appeal is Zingalume Estate referred to regarding the issue of damages for trespass. We, therefore, decline to award damages with regard to Zingalume Estate.

It is evident from the way the trial Judge in the Court below came to his judgment that he did not evaluate or assess the evidence before him, but chose to endorse the judgment of **Kumange, J**, who made his judgment based on the provisions of Order 113 of the Rules of the Supreme Court. Mr Mvalo, Counsel for the respondent, urged this Court to

consider ordering a retrial in the Court below, because the trial Judge appeared to have ignored the numerous facts such as the Memorandum to the late Dr Banda by the late Ngwiri which were brought to his attention in the course of the second trial. Our response to this prayer is that we had sufficient evidence on record to come to the decision which we have arrived at.

The second trial at which **Nyirenda, J** presided was wholly independent of the first at which **Kumange, J** presided, and, the rulings of **Kumange, J** were not res judicata and were, therefore, not binding on**Nyirenda, J** at the second trial which, in any event, was a trial de novo. See **Bobolas v Economist Newspaper Ltd [1987] 3 All ER 12**. This is not a case where fresh evidence was being sought for purposes of the proposed retrial. Our view is that all the evidence that was required was on record, and**Nyirenda, J** misdirected himself by thinking that he was bound by the rulings of **Kumange, J**. We are of the clear opinion that the appellant's lease was legally valid, so that her appeal should succeed. We accordingly allow the appeal.

The appellant shall have the costs of this appeal.

DELIVERED in open Court this 17th day of September 2002, at Blantyre.

Sgd .....

J B KALAILE, JA

Sgd .....

D G TAMBALA, JA

Sgd .....

A S E MSOSA, JA