JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL AT BLANTYRE

MSCA CIVIL APPEAL NO. 55 OF 2019

(Being High Court of Malawi, Lilongwe Registry, Civil Cause No. 829 of 2008)

BETWEEN:

DR KUTENGULE..1ST APPELLANT
COWEN NGALANDE..2ND APPELLANT

- AND -

GENERAL FARMING LIMITED...........................RESPONDENT

CORAM: THE HONOURABLE JUSTICE TAMBALA SC, JA
THE HONOURABLE JUSTICE TEMBO SC, JA
THE HONOURABLE JUSTICE TWEA, JA

Absent, of Counsel for the Appellant
Kaluwe, of Counsel for the Respondent
Mr E.W. Mwale – Official Interpreter

JUDGMENT

Twea, JA

This is an appeal against the ruling of Justice Chombo delivered on 14th July, 2009, dismissing the appellants' application to discharge an order of injunction granted in favour of the respondent.

The respondent, General Farming Limited, by writ of summons sued the first and second appellants, for possession, damages for trespass, a declaration that the appellants are not entitled to the use of the land and an

injunction restraining the appellants from entering or using the land in issue, on 7th November 2008. On 13th November, 2008 the respondent obtained an injunction, ex – parte, restraining the appellants, their servants, agents or whosoever from entering upon or continuing to construct structures on the land. An inter – parte hearing was set for and heard on 13th February, 2009 when, again, the court held in favour of the respondent.

On 20th March, 2009, the appellants filed a summons to discharge the order of injunction on grounds, inter alia, that the respondent suppressed some material facts. The application to discharge was supported by an affidavit and supplementary affidavit of counsel, Happy Thengolose, on behalf of the appellants, sworn on 18th March and 2nd April, 2009 respectively.

The gist of the appellant's affidavits was that the service on the first defendant was irregularly effected under Order 10 r 4 of the Supreme Court Practice Rules, because the respondent did not obtain leave of the court and that the plaintiff then, Press Agriculture Limited, had no standing to sue as the proper party was the respondent.

The summons to discharge was heard on 2nd July, 2009. However, before the hearing the respondent sought, and were granted, leave to amend the summons by substituting Press Agriculture Limited with the respondent as the plaintiff.

We must mention at the outset however, that it would appear that the Judge, when making her ruling, overlooked the amendment and continued to treat the suit as brought in the name of Press Agriculture Limited. At the hearing of the appeal, however, the appellants conceded that the amendment settled the issue of the wrong party suing. We will not, therefore, dwell on this substantively.

When this appeal was called, after preliminary issues, the appellants decided to pursue grounds 1, 2 and 3 only of the appeal, which related to service of the summons. Nonetheless we shall still comment on the other submissions.

The respondent herein purported to have served the process on the first appellant under Order 10 r 4 of the Supreme Court Practice Rules. This rule provides that:

> "4 - Where a writ is indorsed with a claim for the possession of land, the court may –
> (a) if satisfied on an ex – parte application that no person appears to be in possession of the land and that service cannot be otherwise effected on any defendant, authorize service on that defendant to be effected by affixing a copy of the writ to some conspicuous part of the land;
> (b) if satisfied on such an application that no person appears to be in possession of the land and that service could not otherwise have been effected on any defendant, order that service already effected by affixing a copy of the writ to some conspicuous part of the land shall be treated as good service on that defendant."

The learned Judge in the court below held that –

> "The particular order in question does not make it mandatory for a party to specifically make an application for particular service before it is effected".

With due respect, we find that the Judge misled herself. Both paragraphs (a) and (b) of Order 10 r 4, pre – suppose that there be an application upon which the court will be "satisfied." The notes to this rule make it clear that such application shall be before the Registrar. It is our view that had the learned Judge quoted the whole rule, she would not have come to such a conclusion. It is important to note that the rules require that, ordinarily, a writ for possession of land should be served personally on each defendant in the ordinary way. Other modes of service however, for example, service by post, may be employed. Only if such other modes of service cannot be effected would one apply to invoke Order 10 r 4. In any case, by the notes thereto, one must show why and/or how other modes are ineffectual to justify such a service. This mode of service is therefore an exception. It puts a high onus on the applicant to satisfy the court that such service is justified by showing that no person appears to be in possession of the land to be recovered and that service could not otherwise be effected on any defendant. In the present case it is on record that the second appellant was in custody and it appears that, although the respondent knew who the first appellant was, no effort was made to discover where he was or lived. We find that there was someone in possession of the land and that service could have been effected otherwise. We hold therefore, that this mode of service was bad at law. However, we are mindful of Order 2 r 1 of the

Supreme Court Practice Rules. Such failure to comply with the rules would be deemed an irregularity but would not nullify the proceedings. We so hold

We now come to the issue of trespass and the injunction.

Trespass to land, by definition, consists of any unjustifiable intrusion by one person upon the land in possession of another[1]; where possession means occupation or physical control[2]. There is no dispute that the respondent had occupied and controlled this piece of land, which is delineated in the lease hold title. The first appellant, this notwithstanding, averred that this land was customary land which he purchased from the second appellant. It is clear from the evidence however, that there was a period of non activity on the land which the second appellant exploited to "sell" the land. We find that the period of inactivity and the conduct by second appellant did not defeat the long and continued assertion of title to and possession of the land by the respondent: See ***Fowley Marine (Emsworth) Ltd V Gafford [1968] 2QB. 618.*** This case also supports the proposition that a person in possession of land has a perfectly good title against the whole world except the rightful owner. Further that a defendant cannot set up the title of a third party unless he himself claims under it. In the present case, as we already found, there was no dispute as to the title of the respondent. Further, the first appellant's assertion, that he bought customary land from second appellant, cannot be sustained. First and foremost no one can sell and, therefore, buy customary land: See ***Jayshree Patel V Khuze Kapeta and Kaka Holdings Ltd, Civ. Cause 3277 of 2003*** also ***Nicco J. G. Kamanga V Josianne Leclerq and Regional Commissioner for Lands, Civ. Cause 2829 of 2006.*** Secondly, to sustain such an argument, from the possessory point of view, the appellants would have to show who was in possession of that land before the purported "sale." The second appellant did not establish that he was in possession of the land in issue before the purported "sale". We further note that the first appellant did not claim possessory right from any person, institution or the State. His claim was for ownership. It is our judgment therefore, that, other factors notwithstanding, the respondent's possession was not defeated and therefore they were entitled to bring the action for trespass. Our recent decision in ***Chitakale Plantation Limited V Mary Woodworth and Lisneti Gremu MSCA. Civ. Appeal 68 Of 2009,*** further supports this.

[1] Clerk and Lindell on Torts, 14th ed, par 1311

[2] Ibid par 1318

On whether or not the injunction should have been prohibitory or mandatory, we find that the prohibitive injunction was proper in this case. A trespasser who enters and expels the person in possession cannot, without acquiescence, give himself possession at law: See ***Thompson V Park [1944] K. B. 408.*** The appellants entered upon the land of the respondent: thereon the first appellant cultivated maize and groundnuts and was constructing permanent structures. It was fitting and proper to restrain them from entering on the land and carrying thereon any further activities. To hold otherwise would lend the trespass some colour of right. The status quo in issue is that which obtained before the appellants entered on the land and not what obtained after their wrongful entry.

It is our judgment therefore, that this appeal must fail entirely with costs to the respondent.

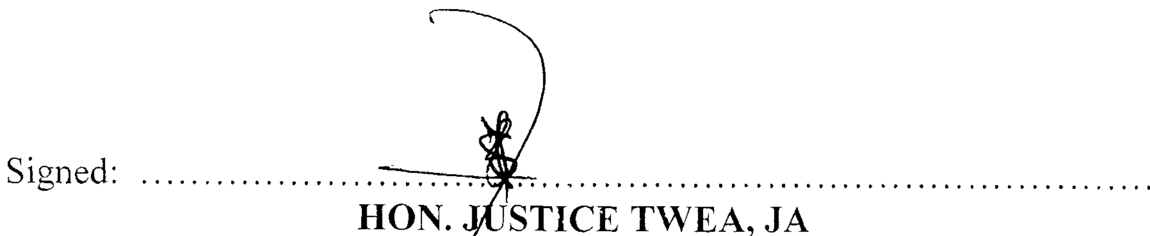
Delivered **in** Open Court on this 2nd day of September, 2010 at Blantyre.

Signed: ....

HON. JUSTICE TAMBALA SC, JA

Signed: ....

HON. JUSTICE TEMBO SC, JA



Signed: ....

HON. JUSTICE TWEA, JA