JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE

MSCA CIVIL APPEAL CASE NO. 42 OF 2008
(Being High Court Civil Cause No.2276 of 2007)

BETWEEN:
CARLOS TCHINGA.....APPELLANT

-AND-

CORLEN NANSETA.....RESPONDENT

BEFORE: **HON. JUSTICE TAMBALA, SC, JA**
HON. JUSTICE TEMBO, SC, JA
HON. JUSTICE SINGINI, SC, JA
Mr. Makhalira.....Counsel for the Appellant
Mr. Chisama.....Counsel for the Respondent
Mr. Balakasi.....Recording Officer

J U D G M E N T

Tambala, SC, JA

Carlos Tchinga, the appellant brought this appeal against the decision of Twea, J, who refused to discharge an order of injunction restraining the appellant from exercising the duties of village headman Chingondo and further restraining Traditional Authority Mwambo from enthroning the appellant as village headman Chingondo. The learned Judge's decision was made in a ruling given on 24th January 2008.

The facts relating to the appeal are that there exists a long outstanding dispute between the appellant and the respondent regarding the lawful heir to the village headmanship of Chingondo, in the area of Traditional

Authority Mwambo, in Zomba District. In the year 2000, Traditional Authority Mwambo resolved that the appellant was the proper and rightful heir to the disputed village headmanship. The respondent was dissatisfied. Through the Chief Legal Aid Advocate, he sought the intervention of the District Commissioner, Zomba. The latter caused the appointment of an independent body to inquire into the dispute and reach a proper decision. The appointed body included some traditional leaders from Mangochi and Machinga. It comprised Senior Chief Jalasi, Tradtional Authority Chimwala and Sub Traditional Authority Mkoola. The body convened and carried out its investigations. It reached a conclusion that the proper and lawful heir to the disputed village headmanship was the respondent. That decision was made on 24th July, 2006. This time, it was the appellant who was dissatisfied. He commenced an action by way of judicial review proceedings against Zomba District Assembly, the Ministry of Local Government and Attorney General in the High Court Principal Registry. The action related to the decision to appoint the independent body which considered the village headmanship dispute. Instead of proceeding to full trial, the action was settled by the parties and the Court entered a consent judgment. The terms of the consent judgment were that the appellant would be enthroned village headman Chingondo and that each party would pay its own costs.

The respondent, who was not a party in the judicial review proceedings, was dismayed when news of the consent judgment reached him. He commenced an action by means of originating summons seeking an order to set aside the consent judgment made in the judicial review proceedings. He then applied **ex-parte** for an order of interlocutory injunction. On 17th October, 2007, the High Court at the Principal Registry granted the order of injunction in the following terms:-

> *"1. That the 1st defendant (appellant) be restrained from conducting the duties of Group*

Village Headman Chingondo until a further order of this court.

2. That the 2nd Defendant (Traditional Authority Mwambo) be restrained from enthroning the 1st Defendant as Group Village Headman Chingondo until the determination of the Originating Summons herein or a further order of this court."

TAKE NOTE that the applicant is required to file an **inter-partes** summons for an interlocutory injunction within 14 days of this order.

The respondent failed to file an **inter-partes** application for interlocutory injunction within 14 days as directed by the Court. About 3rd December, 2007, the appellant appeared before the High Court in the Principal Registry with an application for the discharge of the **ex-parte** order of injunction granted on 17th October, 2007. The respondent did not appear. The Court was informed that counsel for the respondent had gone some place to attend a seminar. Then the matter was adjourned to 13th December, 2007. When the court assembled to hear the appellant's application on 13th December, 2007, the respondent was, again, absent although his counsel had been served with the notice of hearing. The Court proceeded to hear the appellant on his application. However the Court disallowed the application to dissolve the injunction on the ground that the appellant acted improperly and unfairly when he brought an action in judicial review without the knowledge of the respondent and when the action ended in a consent judgment in the absence and to the detriment of the respondent. The learned judge reasoned that the appellant did not appear before him with clean hands and since the remedy which he was seeking was equitable the learned judge felt constrained to reject the application. Dissatisfied with the decision of the learned Judge in the Court below, the appellant appealed to this court.

The order of injunction issued by the Court below against the appellant was obtained **ex-parte.** The appellant was not heard before the order was made. Such orders of injunction have a tendency to violate the basic principle of natural justice that no one shall be condemned without being heard. That is why ex-parte orders of interlocutory injunction are generally given for a short period to enable the plaintiff to prepare an inter-partes application giving the defendant notice and opportunity to prepare a defence to such application. This view seems to be supported by the following passage in paragraph 29/1/8 of the Supreme Court Practice 1991 edition:-

> *"An ex-parte injunction should generally be until a certain day, usually the next motion day..... where an injunction is granted to extend over a certain day or until further order, it means that the injunction may be dissolved at an earlier date than the day limited, but cannot continue beyond such date without a fresh order."*

According to the terms of the injunction granted on the 17th October, 2007, it would appear to us that the operation of the **ex-parte** order of injunction was limited to 14 days. To go beyond a period of 14 days required a fresh application brought by the respondent **inter-partes** and granted by the court following such application. That was clearly the intention of the Court when it granted the ex-parte order.

When the appellant's application to dissolve the injunction came before the Court below on 17th October, 2007, the respondent had failed to comply with the courts requirement that he brought an inter-partes application within 14 days. No explanation was given to the court why there was noncompliance. As a matter of fact the respondent did not appear before the court. The respondent was in breach of a requirement imposed by the court. He disobeyed the court's order to appear before it on 13th December, 2007 to answer to the appellant's application. The respondent was in contempt

of court. It is amazing that the court below was able, on its own and without submission from the respondent, to employ principles of equity to make a decision in favour of the respondent. We take the view that, when the matter came before the court on 13th December, 2007, there was no order to either discharge or extend, the same having elapsed 14 days after 17th October 2007. Besides, the appellant's application was unopposed, the respondent having elected not to attend the court on the date set for the hearing of the application. The learned Judge, in the Court below, had no discretion to exercise, in the circumstances, but to decide in favour of the appellant.

In the circumstances this appeal succeeds. It is allowed with costs.

DELIVERED in open Court on this 13th day of October, 2010 in Blantyre.

Signed.....

D.G. Tambala. SC, JA

Signed.....

A.K. Tembo, SC, JA

Signed.....

E. M. Singini, SC, JA

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 0f 2009,*** further supports this.

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[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

appellant. Where no specific time is stipulated for any transaction prudence would dictate that the transaction be concluded within a reasonable time. What amounts to reasonable time will depend on the facts of the case, and the practice in such transactions.

Indeed the transaction opened in April, 2001. The appellant deposed that he resold the property to Mr Phekani in 2005, notified the respondent in 2008 by then, in 2007, the property had been transferred to a Mr Mulli by a Mr Katopola. The court below was of the view that such a "sale" was occasioned, first, by the delay by the appellant to effect the transfer of title, and secondly, by the default of the adjudicating officer in registering the charge. The court below found that while the adjudicating officer complied with Section 6 of the Adjudication of Title Act, that is, issuing of notice of the adjudication section, he failed to comply with Section 16(1) (c) of the Act, to register the charge over the property that the respondent had. Is such a finding supported by the evidence.?

The evidence of the respondent clearly shows that it did not register the charge on the land. According to Exhibit MM1(a), it was the adjudication officer who noted that there was default on the part of the respondent and sent it the claim forms. Further, according to Exhibit MM1(b), the respondent after filling the said claim forms forwarded them to the Principal Adjudicating Officers without title deeds or copies thereof. It informed the Principal Adjudicating Officer that the title deeds were with it's lawyers then, Messrs Saidi and Company, and directed the Principal Adjudicating Officer to get in contact with it's lawyers directly. There was no instruction or directive to Messrs Saidi and Company on this issue. Further there was no evidence that Messrs Saidi and Company, their agent, submitted or made copies of the title deeds for the Principal Adjudicating Officer or, indeed, that the respondent or Messrs Saidi and Company appeared before the Adjudicating or Records Officer in terms of Section 8 of the Act to lay their claim. Further there is no evidence that, during the adjudication period or indeed after, when the notice of the completion of the exercise was published in the Gazette, the respondent or their lawyers verified the records for accuracy in terms of their interests. We find as a fact, that the respondent never verified the record. Had it done so it would have discovered that the charge was not recorded and would have objected or appealed within the stipulated period in accordance with Section 20 and 23 of the Act. We bear in mind that the adjucating exercise was in 1992, eleven years before the sale of the land to the appellant and 15 years before a