MALAWI JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL

MISC CIVIL APPEAL CAUSE NO. 21 OF 2013

(being High Court Commercial Cause No 6 of 2012, Sitting at Lilongwe.)

BETWEEN:

HETHERWICK MBALE……..APPELLANT

AND

HISSAN MAGANGA……..… RESPONDENT

CORAM HON JUSTICE DR ANSAH SC, JA
HON JUSTICE CHINANGWA SC, JA
HON JUSTICE MBENDERA SC, JA

Mr Chilenga, Counsel for the Appellant
Mr Kita, Counsel for the Respondent
Mrs Mhone, Court Reporter
Mr Minikwa, Court Interpreter

JUDGMENT

MBENDERA SC, J.A.

1. My Lady, My Lord, this appeal arose from the judgment of Chikopa, J as he then was, delivered on 10 November, 2012. Justice Chikopa heard this matter when he was a judge in the Commercial Division of the High Court. The case was filed as **Commercial Case No. 06 of 2012**.

The Back Ground to the Matter

2. The background to this case is as follows. There is a piece of land along the lakeshore at Salima known as Plot No 36 where a cottage is built. This property was conveyed to the appellant by way of Lease for the term of 78 years from 1 September 1989. The Lease is dated 25 September 1989 and registered as Deed No. 61612 in the Deeds Registry. The appellant received keys to the property from the District Commissioner, Salima. He went into occupation on 1 September 1989. The Acting Commissioner for Lands indicated in defence exhibit HM1 that prior to 1989, the property had been rented to Leyland Motor Corporation from as far back as 1975 and that the property was guarded by government security guards. These guards were only discharged on 29 August 1989 when the keys were handed over to the appellant.

3 Defence exhibit 'HM 1' is a letter addressed to M/s Lawson & Co. It is curious that defence exhibit HM 1 was written in reference to Civil Cause No 3105 of 1998: **E.Z. Kaphwiti Banda v. H. M Mbale** over the same piece of land.

4. In the present matter, the evidence before the court below did not support this background or prove the above facts. The Acting Commissioner for Lands who wrote defence exhibit HM 1 was not called to give evidence. He was not made to swear an affidavit deponing to the facts he had mentioned in his letter. The deed referred to in this exhibit was not produced before the Court. I will deal with these issues later in this judgment.

Proceedings in the Court Below and Grounds of Appeal

5. The respondent brought these proceedings by originating summons. In the action he sought a declaration that he is the lawful owner of a piece of land allegedly encroached by him. He based his claim on the doctrine of adverse possession. The court considered the following issues:

(i)Whether the appellant had paper title to the land in question ;
(ii) Whether the respondent had adverse possession of such land; and
(iii)Whether the respondent had acquired title by adverse possession.

6. The learned judge found that the respondent had been on the said land for more than twelve years prior to the commencement of the case. As such, the learned judge found that the respondent had acquired title by adverse possession to the land he had encroached. A declaration was therefore granted in favour of the respondent. It is against these findings that the appellant appeals to this Court.

The appellant raises the following grounds of appeal:-

(i) The learned judge erred in law in finding that the plaintiff has proved on the balance of probabilities that he was in adverse possession of the Defendants property.

(ii) The Learned Judge erred in finding that the plaintiff had been in occupation of land since 1979 as opposed to the Defendant who occupied the land in 1989.

(iii) The learned judge erred in law in finding that the doctrine of adverse possession applied with the effect that the Defendant lost part of his land.

(iv) The learned judge erred in law in conferring rights on the plaintiff who was a mere squatter as opposed to the title holder.

(v) The learned judge erred in law in conferring title on part of the Defendant land to the plaintiff by way of adverse possession.

(vi) The finding of the learned judge was misconceived in law and fact.

(vii) The judgment of the Court is misconceived and wrongful in Law.

I will deal with these grounds of appeal later in this judgment. But presently I must deal with preliminary issues raised by this Court of its own motion.

Preliminary Issues

7. At the hearing of this appeal, the Court raised two preliminary questions

(i)Whether the Commercial Court had the necessary jurisdiction to hear this case; and

(ii)Whether the Limitation Act can be used as a spear and not merely as a shield.

8. The riders to these two questions are as follows. If the Commercial Court had no jurisdiction, then what would be the effect of acquiescence of the parties to the court assuming jurisdiction. As to the second preliminary question, the point can be couched in different language. The question is, is there any case known to common law under which a party successfully sued and recovered under the Limitation Act who was himself an avowed trespasser or encroacher?

9. The parties were given the opportunity to investigate and address us. We received skeleton arguments complete with supporting cases from counsel for the appellant. We did not receive any skeleton arguments from counsel for the respondent. He was however able to argue the two questions when he appeared before us.

First Preliminary Issue

10. As regards to preliminary issue number 1, the question of jurisdiction is fundamental. If it be shown that the court below had no jurisdiction, a judgment given in excess of the court's jurisdiction is to that extent a nullity. See per Edwards J, in **Bhima v Bhima** (MSCA) (Civil Appeal No 1 of 1973) 7 ALR (Mal) 163, at 167.

11. Mr Chilenga who appeared for the appellant, argued that the court below had jurisdiction by virtue of S. 108 of the Constitution. He cited the case of **Liquidator of Finance Bank (in voluntary Liquidation) v Kadri Ahmed and Sheith Aziz Bhai Issa (Aziz Issa** case**)** MSCA Civil Appeal No 39 of 2008 as authority. In that case the Supreme Court held that by virtue of S. 108 of the Constitution of the Republic of Malawi, the High Court has unlimited original jurisdiction to handle any civil matter. He therefore urged us that although the Commercial Division of the High Court is a specialized court established to handle commercial matters, it can legally handle any matter by virtue of S. 108 of the Constitution.

12. His second strand was that even if the court had no jurisdiction, the practice of the courts is to preserve the case and not to dismiss it outright. The remedy has always been to transfer the case to the court with jurisdiction to handle it. He cited **Mpungulira Trading Ltd. v. International Commercial Bank Ltd.** Civil Cause No 493 of 2012.

13. Mr Chilenga, had a secondary argument on this. He contended that once judgment is pronounced, the court becomes *functus officio* as regards the issues before it. The parties having conceded to the Commercial Court assuming jurisdiction and the court having pronounced its final judgment, the issue of jurisdiction cannot arise on appeal. He argued that this Court cannot undo the whole proceedings in the lower court at this stage on the basis of lack of jurisdiction when there is already a final judgment.

14. Mr Kita who appeared for the respondent argued that the lower court had jurisdiction in this matter. He drew our attention to O.1, r. 5 of the High Court (Commercial Division) Rules, 2007 (hereafter referred to simply as "the Rules") and pointed out that the categories of cases a Commercial Court can preside over are not limited. He contended that the court could assume jurisdiction even in non contractual matters. He argued that the present case was a commercial matter because it involves land of considerable value. He drew attention to plaintiff's exhibit HM 1 which related to residential development. Plaintiff's exhibit HM 1 is the respondent's application for a lease over the land in question.

15. Mr Kita also contended that the wider holding of this Court in **Aziz Issa** case would enable the Commercial Division of the High Court to assume jurisdiction over this case. On this argument, there is some

congruence between the respondent and the appellant with regards to the effects of the holding in **Aziz Issa** case. I will therefore not repeat Mr Kita's arguments on this issue.

16. With due respect to Mr Kita, I am unable to accept the argument that the wording in O. 1, r. 5 of the Rules would confer jurisdiction on the Commercial Division to hear this case. The respondent brought these proceedings seeking a declaration that by alleged adverse possession he became the owner of the land forming part of Plot No 36 Salima belonging to the appellant. There is absolutely nothing commercial about this suit. To be fair to Mr Kita, I did not get the impression that he advanced that strand of his argument with any conviction or seriousness. I reject this submission. Accordingly, I will deal with the submissions of the respondent as if this strand was completely absent from the brief. The real issue for consideration is the import and effects of this Courts' decision in the **Aziz Issa** case.

17. We need to investigate and interrogate the jurisprudence presented in the cited cases. It is clear that both counsel place reliance on the **Aziz Issa** case. There is another case which was decided by this Court but counsel did not cite it in their address to us. This case is **Stanbic Bank v. Lenson Mwalwanda** MSCA Civil Appeal No 22 of 2007.

18. In the **Aziz Issa** case, proceedings were filed in the General Division. The Liquidator brought an application to object to the General Division handling the matter. The court of first instance dismissed the application. Manyungwa J., who heard the application dismissed it on two grounds; Firstly, that the case before him was not a commercial case. The parties were not in a commercial relationship. The plaintiffs were challenging the Liquidator's failure to do his job. If the plaintiffs were suing the bank, the situation would have been different. It would have been commercial. Secondly, that the High Court had unlimited original jurisdiction as is provided in S. 108 of the Constitution. It therefore followed that S. 108 being a constitutional provision the court (General Division of the High Court) had the jurisdiction to hear this case.

19. On appeal by the Liquidator, this Court (Munlo CJ, Tambala and Tembo JJA) held dismissing the appeal

> "*That the unlimited first instance jurisdiction of the High Court general division, as provided in S. 108 of the Constitution, remains un affected by Order 1 rule 4(3) and Order 1 rule 6 of the High Court (Commercial Division) Rules. …The scheme of S. 108 of the Constitution was to give unlimited power to every judge of the High Court to hear and determine any case. To empower a sub rule of the Commercial Division to take away such power by excluding the majority of the High Court judges from exercising jurisdiction over commercial matters would be tantamount to amending or modifying a provision of the Constitution by a sub-rule of a Commercial Division of the High Court."*

Accordingly, the Supreme Court confirmed the lower courts' judgment.

20. The emphasis in the Supreme Court's decision was that S. 108 of the Constitution gives unlimited original jurisdiction to every judge of the High Court and that this jurisdiction extends to hearing and determining commercial matters.

21. In the **Lenson Mwalwanda** case, the question that arose was whether, just because the High Court has unlimited original jurisdiction, it was proper for a litigant to commence proceedings over a labour dispute in that court when it was clear that the Industrial Relations Court was established for that very purpose. In determining that question, this Court (Kalaile Acting CJ, Tambala and Tembo JJA) held that unless there were compelling and/or convincing reasons for the applicant to avoid the Industrial Relations Court, the action ought to have been brought in that court since that specialized court was established to handle cases as the one which had been brought in the High Court.

22. The correctness and effect of these two seemingly contradictory decisions of this Court was recently examined by Mbvundula J, in **Mpungulira Trading Ltd. v. International Commercial Bank.** In that case proceedings which were clearly commercial in nature were filed in the General Division of the High Court at the Principal Registry, Blantyre. An application was taken by the defendant bank seeking that the plaintiff's application for interlocutory injunction and the whole action should be dismissed on grounds that the action should have been commenced in the Commercial Division and not in the General Division of the High Court.

23. Justice Mbvundula held that the decisions in **Aziz Issa** and **Lenson Mwalwanda** cases were not contradictory but actually complemented each other. When read together, the correct position would be that although every

judge of the High Court has unlimited jurisdiction to hear and determine matters which are commercial in nature, such cases nevertheless ought to be commenced in the Commercial Division of the High Court, not because it has exclusive jurisdiction in such matters, but because it (the Commercial Court) was established to handle such cases, unless of course there are compelling or convincing reasons for not doing so. He declined to dismiss the matter out right but ordered its transfer to the Commercial Division.

24. Counsel would wish us to follow the **Aziz Issa** route. The Supreme Court in that case confirmed the lower court's finding that the parties were not in a commercial relationship. It held that respondents in that case were merely challenging the appellant Liquidator's failure to do his job. Accordingly the matter before the court was not a commercial case. The decision of the Supreme Court dismissing the appeal was justified having regard to that finding. It is however the words that fell from the Court when it referred to S. 108 of the Constitution and the jurisdiction of the General Division that opens up that decision to some doubt. Fortunately for me, the present case does not compel me to follow the ***Aziz Issa*** case. With all due respect to counsel, I am inclined to distinguish the ***Aziz Issa*** case and depart from it.

25. The case before us presents a peculiar difficulty. In consequence, a nice question of law arises. The present case is not one in which by legislation, jurisdiction has been given to a division or a specialized court to deal with the particular area of law. The **Aziz Issa** case and others like it present a problem in which a specialized court was avoided by litigants in preference for the General Division. In those cases the General Division had been approached by litigants to exercise jurisdiction where a court or division had been created specially to handle such cases.

26. In the present case, a specialized court created to handle cases of a special kind is being asked to go outside and beyond its mandate. The Commercial Division is being asked to handle a case which by the legislation creating the division, is non- commercial. I bear in mind that non-commercial matters are expressly prohibited for handling by the Commercial Division. They are outside the division's competence. See **O.1, r. 4(2)** of the Rules.

27. In the **Aziz Issa** case this Court emphasized S. 108 of the Constitution. The unlimited jurisdiction to handle civil matters of any kind has been given to the High Court. The High Court is one. But it operates its business under different divisions. See Mwaungulu J, as he then was, in **Reserve Bank of Malawi v. Finance Bank of Malawi Ltd** (**in Voluntary Liquidation**) Constitutional Cause No 5 of 2010. The establishment of divisions is for reasons of expediency and efficiency. It is not a constitutional construct. In order to improve service delivery, specialization has been encouraged. One looks forward to the day when criminal, family, probate and other divisions will be created. The creation of such divisions greatly increases proficiency and consequent productivity. S. 108 states that

> *"There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law".*

28. The provision does not require any elucidation. It is both clear and unambiguous. It is when we come down to the operations of the High Court that one encounters confusion. When one reads the reasoning in the **Aziz Issa** case, it is as if the Commercial Division is outside the High Court. It is as if a court different from the High Court had been established. I am confirmed in this view upon consideration of the words that fell from Lord Justice Tambala SC, JA when he lamented

> "*What will remain of the unlimited trial jurisdiction of the High Court once divisions of the High Court such as the Family Division, Criminal Division, Administrative Law Division and Employment Law Division are created and similar sub rules are in place? This Court takes the position that Order 1 rule 4(3) has a tendency to undermine the basic principles and values of our Constitution, if interpreted and given effect in the manner Potani J., did. We find the approach unacceptable."*

29. The truth is that all that was established was a Division to deal with commercial matters. I consider that their Lordships in the **Aziz Issa** case were misled. The basis of their Lordship's decision seems to be that the expression 'High Court' is synonymous with 'the General Division of the High Court'. Clearly, that cannot be correct.

30. As for the lamentation itself, I am inclined to think that when divisions are fully created, the jurisdiction conferred by S. 108 of the Constitution will inevitably be dispersed and diffused to the divisions. The judges will be

assigned to the Divisions of the High Court. The dispersion of the jurisdiction will not undermine the Constitution. The intention of S. 108 of the Constitution was to empower High Court judges to deal with cases of whatever kind and dispense justice. What better way to achieve this then than by specialization under divisions. Besides, creation of divisions does not necessarily mean locking up judges to attend to a narrow field for life. There might be those who enjoy their proficiency in a particular field and are motivated to carry on for years. But for those who easily get bored, a scheme of divisions should imaginatively allow for rotation so that in due course, there is established a cadre of very well grounded and seasoned judges of the High Court with well rounded experience. This will be good for justice. It will be excellent for Malawi. The Supreme Court too should consider operating in at least two Divisions; the Criminal and Civil Divisions. I must get back to the jurisdiction of the Commercial Division!

31. The Commercial Division was created in order to establish a specialized court to dispense justice in commercial matters only. The Commercial Division is established by and under the Rules. When one reads the Rules, it is clear that the Commercial Division has limited jurisdiction. The limitation was by design. It was deliberately set up that way so that judges serving in the Commercial Division give themselves completely to providing and dispensing commercial justice. O. 1, r. 5 of the Rules defines the Commercial Division as the division of the High Court dealing with commercial matters. O. 1, r. 4(2) of the Rules provides that:-

> *"Subject to O.1, r.3 (of the Rules) no proceedings shall be commenced in the High Court (Commercial Division) unless the same relate to a commercial matter".*

32. A commercial matter is defined in O. 1, r. 5 of the Rules and a compendium is provided on what constitutes a commercial matter. When one examines the compendium under O. 1, r. 5 of the Rules, it does not matter how and by what stretch of imagination you approach it, a case founded on the Limitation Act or prolonged encroachment amounting to adverse possession is not within the purview of commercial matters as used under the Rules.

33. The enquiry is not whether generally speaking judges of the High Court have unlimited jurisdiction. Of course they do. The question is whether when such judges are assigned to and take their seats in the Commercial

Division, they can in that same capacity, handle matters outside the legitimate limitations imposed by the Rules governing the Commercial Division.

34. Put differently, does the fact that every High Court judge has unlimited original jurisdiction in civil matters justify a litigant to file a non-commercial matter in the Commercial Division of the High Court. It is significant that O.1, rr. 4(2) and 5 of the Rules prohibit the commencement of non-commercial matters in the Commercial Division. It is the division that is prohibited from handling non-commercial matters. The High Court judges who sit in that court would *pro tanto* be similarly prohibited while sitting as Commercial Division Judges.

35. This does not mean such judges can never handle other matters. They can do so. As a matter of fact judges of the Commercial Division regularly do so. But in order to handle non-commercial matters, such judges should go to the division that has jurisdiction to handle the non-commercial matters. Such matters are filed and processed in that other division.

36. I will presently illustrate this necessary duality by citing notorious examples to emphasise that the divisions should be guarded jealously. The Hon. Justice Dr Michael Mtambo and the Hon. Justice Annabel Mtalimanja are both High Court judges assigned to the Commercial Division. Justice Dr Mtambo is at the Blantyre Registry whilst Justice Mtalimanja is at the Lilongwe District Registry. Both judges have recently handled criminal cases which are 'cashgate' related. The criminal cases handled by them were filed in the Criminal Registry of the Lilongwe District Registry of the General Division. They handled those criminal cases in the General Division as follows:- Justice Dr. Mtambo in **Republic v. Mc Donald Kumwembe & Others** Criminal Case No. 65 of 2013 and Justice Mtalimanja in **Republic v. Maxwell Namata & Another** Criminal Case No 45 of 2013.

37. In addition and paradoxically, the Constitution by S. 108, confers unlimited original jurisdiction to the High Court in criminal matters. Yet it has never been and cannot be suggested that the Director of Public Prosecutions (DPP) should be at liberty to file criminal cases in the Commercial Division merely because every judge in that division has or enjoys unlimited original jurisdiction in criminal matters as well.

It is axiomatic that the same result must follow with every non-commercial matter of whatever description having regard to O. 1, r. 4(2) of the Rules. I must emphasise that the purpose of the rule is to prohibit the filing of non-commercial matters in that division.

38. Having regard to the preceeding analysis of the law, I am compelled to come to the conclusion that the Commercial Division has no jurisdiction or competence to preside over a non-commercial matter. I therefore find that the court below did not have the necessary jurisdiction to hear this case.

Consequences of want of jurisdiction

39. But Mr Chilenga has pressed upon us that even if the Commercial Division had no jurisdiction to hear the case, this Court cannot undo those proceedings because there is a final judgment. He suggested that to the extent that the parties conceded to the lower court exercising jurisdiction, the issue of jurisdiction cannot arise on appeal because the issue, so he argued, is not before this court.

40. These are weighty submissions. Let me deal with the question whether the issue of jurisdiction can be avoided. Firstly, this court raised the question *suo motu*. It then allowed the parties time to consider the issue. Therefore the issue is properly before us. Secondly, the correct position is that the question of jurisdiction can and should be raised at any time including on appeal.

41. It is trite that the issue of jurisdiction can be taken up in the Supreme Court, or before the Court of Appeal or the High Court at any stage of the proceedings, even for the first time on appeal. See Kalgo, J.S.C. in **Maáji Galadima v. Alhaji Adamu Tambai & others**. (S.C. 217/1994) Supreme Court of Nigeria.

42. Achike J.S.C, agreed with the lead judgment when he said:

> *"Issue on the court's jurisdiction is very pivotal and fundamental. Because of its fundamental nature, on the authorities, it can be raised at any stage of the trial or even on appeal, and even before the apex court. The reason for this latitude to jurisdiction is obvious. A court that lacked jurisdiction to entertain a suit, either as a trial court or*

appellate court, is incompetent to pronounce a judgment in respect of any aspect of the matter in controversy before it.

Time never runs against a court to decide on the issue of jurisdiction. The consequence of a court continuing a case where it lacks jurisdiction is, as it were, like the court embarking on a frolic which would indisputably result in a nullity for which an appellate court, so invited, would have no compunction whatsoever to declare null and void."

'...it is necessary to caution that whenever there is a challenge to jurisdiction the court should expeditiously attend to it in limine.'
'…it is important to state that jurisdictional issue being so pivotal can be raised suo motu by the court so long as the parties are accorded the opportunity to react to the issue.'

43. On the specific submission by Mr Chilenga that this Court cannot undo all that took place in the lower court, I would wish to resist that argument by simply saying that the fundamental or pivotal nature of the issue of jurisdiction will often have that devastating effect.

As Kalgo J.S.C. has observed in **Maáji Galadima** case that

"The fundamental nature of the issue of jurisdiction has been echoed in many cases in this court…It has been said times without number that the jurisdiction of a court is fundamental. It's being raised in the course of proceedings can neither be too early or premature nor be too late"

44. In the **Maáji Galadima** case the matter had been pursued in five different courts: the Zaria City Area Court No 1, the Upper Area Court in Ikara, the Kaduna High Court, the Court of Appeal in Kaduna State and then to the Federal Supreme Court of Nigeria. Because the case had wrongly originated in the court of first instance which had no jurisdiction in the matter, Achike J.S.C, stated that …

'Consequently, all the proceedings in this case throughout its journey in the various courts were a mere exercise in futility'.

45. The court was not persuaded by the long journey the case had taken. I am not unsympathetic with the plight of the respondent. I am also familiar with local jurisprudence on this vexing issue of jurisdiction. However, these decisions are of the High Court and

therefore not binding on this Court. Nevertheless, I have considered them. I have come across three cases apart from **Bhima v. Bhima**.

46. The first of such cases is **Mauwa v. Chikudzu** 5 ALR (Mal) 183. That case dealt with the issue of jurisdiction of subordinate courts to handle cases involving title or ownership of land. Pilie, J. observed that want of jurisdiction is not a matter which can be remedied. However, Pilie J, did not close the door in that case. He held that

> *'Since the appeal is allowed on the ground of want of jurisdiction the respondent is at liberty to bring his suit again in such court having jurisdiction to hear it as he may be advised to bring it.'*

47. The second case is **Village Headman Chakwera v. Village Headman Mponda** Civil Appeal No 30 of 1997 (H.C.) In that case the second grade magistrate sitting at Karonga purported to preside over a matter which concerned title or ownership of land. Chikopa J, as he then was, found that the magistrate lacked jurisdiction. However, he rescued the case and proceeded to decide it on merits. This is how he resolved the matter

> *"The question now is what to do. We have on the one hand clear enough evidence that the appellant has no case on the merits. The respondent has. On the other hand there is the clear fact that the lower court had no jurisdiction. We think the law is clear. Because the lower court had no jurisdiction it means in effect that the proceedings are a nullity. They never took place…*
>
> *However, this court is not unaware that appeals to this court are by way of rehearing. It is clear that the respondent has a good case on the merits. Whereas the lower court had no jurisdiction to entertain this matter this court has. It also has power to order that which the lower court could not. Taking all matters into consideration therefore this court is of the view that the justice of this case demands that this court make the order that the lower court in its zeal to do justice made in the absence of the requisite jurisdiction."*

Chikopa J, accordingly found for the respondent. He avoided nullifying the proceedings or the judgment of the lower court.

48. In the third case, **Chiseka v. Majamanda** Civil Appeal No 42 of 2006, an appeal was brought to the High Court against the judgment of the First Grade Magistrate sitting at Lilongwe. The case involved title or ownership of land. Clearly the magistrate who heard the case had no jurisdiction.

Mzikamanda J, as he then was, found that the magistrate lacked jurisdiction. However, on consideration of the merits, he found for the respondent.

He did so by following Chikopa J's approach in **Village Headman Chakwera's** case.

49. I sympathise with the approach that the High Court took in **Village Headman Chakwera** and **Chiseka** cases. However, I am of the firm view that what was allowed in those cases, though laudable, was in fact wrong and unlawful. Where proceedings are conducted by a court without jurisdiction they are and should be declared null and void. There is nothing to save. There is nothing to salvage.

As Kalgo J.S.C. so eloquently put it in **Maáji, Galadima's** case

> *'For if there is want of jurisdiction; the proceedings of the lower court will be affected by a fundamental vice and would be a nullity however well conducted the proceedings might otherwise be'*

Achike J.S.C puts it bluntly when he says

> *'Consequently, all the proceedings in this case throughout its journey in the various courts were a mere exercise in futility'.*

50. I further express grave doubts on the powers of the High Court on appeals from subordinate courts. In **Village Headman Chakwera** and **Chiseka** cases the High Court expressed the view that the court could correct a case started before a court without jurisdiction based on the power of the High Court on appeal. The High Court drew this power from the fact that an appeal before the High Court is by way of rehearing. O. 58, r. 1 of the Rules of the Supreme Court (RSC) would appear to support the view expressed by the High Court.

51. O. 58, RSC is now dealt with under Part 52 of the Civil Procedure Rules (CPR). CPR Part 52 which came into force in May 2000 created a uniform system of appeals. It replaced the former RSC O. 55 (appeals to the High Court from court, tribunal, or person), O. 56 (appeals to the High Court by case stated). O. 58 (appeals from masters, registrars, referees, and judges), O. 59 (appeals to the Court of Appeal), O. 60 (appeals to the Court of Appeal from the Restrictive Practices Court) and O. 61 (appeals from tribunals to the court of appeal by case stated). See practice note 52.0.6

52. By S. 8 of the Supreme Court of Appeal Act (the Act) (Cap 3:01 of the Laws of Malawi) the practice and procedure that applies in this Court is in accordance with the Act and any rules of court made there under. The proviso to S. 8 takes the issue further. It says that if the Act or any rules made there under do not make provision for any particular point of practice and procedure, then the practice and procedure of this Court shall be…

> *(b) in relation to civil matters, as nearly as maybe in accordance with the practice for the time being observed by the Court of Appeal in England*

There is a controversy as to which rules of practice apply in this Court. Justices of Appeal do not appear to be in agreement. Some are using the old RSC, 1965. While others have progressed to the CPR post 2000. The amendment to S. 29 of the Courts Act in 2004 did not affect S. 8 of the Act. To the extent that S. 8 has remained intact, there ought not to be this controversy. Where the Act and the Rules made there under have not made provision for any particular point of practice and procedure, it is clear that we are compelled to look to the practice and procedure observed by the Court of Appeal in England. I therefore find that ordinarily the CPR as opposed to the RSC are current in this Court.

53. CPR Part 52 has altered the nature of appeals. The rule that required trial of appeals to be by way of rehearing as was provided in O. 58, r. 1. RSC has been abolished. CPR Part 52.11 provides that every appeal will be limited to a review of the decision of the lower court unless--

a) A practice direction makes different provision for a particular category of appeal; or
b) The court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

With regards to (a), 52PD. 43 Paragraph 9.1 provides that the hearing of an appeal will be a re-hearing (as opposed to a to a review of the decision of the lower court) if the appeal is from the decision of a minister, person or other body and the minister, person or other body—

1) did not hold a hearing to come to that decision; or
2) held a hearing to come to that decision, but the procedure adopted did not provide for the consideration of evidence.

54. But our law on practice and procedure in this Court is expressly provided for by the provisions of the Act or the rules made there under. We only look to the Court of Appeal in England when there is no provision made in our law for any particular point of practice or procedure. S. 22 of the Courts Act pertaining to appeals from subordinate courts to the High Court is worded extensively and gives vast powers to the High Court which accords with the practice and procedure under the old O. 58 of the RSC. Similarly, S. 22 of the Act is worded in a similar language and gives vast powers to this Court. This Court is therefore not obliged to follow the English practice insofar as trial of appeals is confined to review only and not rehearing. S. 22 compels this Court to undertake an actual rehearing during trial of appeals and I so find.

However, the issue for consideration is whether a rehearing as used in the rules would empower the High Court or indeed this Court to resurrect a dead case. I hold the view that no appellate court has power to inject life into proceedings that the law declares a nullity. Once it is established that the court that purported to preside over the case had no jurisdiction, that very fact kills the case. The case instantly dies. No order made by that court can be resuscitated. No part of those proceedings can be revived however immaculate the proceedings might otherwise appear. Once dead, those proceedings remain dead. Pilie J, got it right; want of jurisdiction is not a matter which can be remedied. The only remedy is to restart the case before an appropriate court with jurisdiction to hear it. This will entail filing new originating process like for any case that has not seen the light of day. This indicates and emphasizes how 'dead and buried' the original case becomes.

55. For the avoidance of doubt, the powers under S. 22 of the Courts Act (Cap 3:02 of the laws of Malawi) pertaining to the power of the High Court on appeals and those in S. 22 of the Supreme Court of Appeal Act (cap 3:01 of the laws of Malawi) pertaining to the powers of this Court on appeal do not enable the High Court or this Court to revive any aspect of proceedings adjudged defective for want of jurisdiction. The appellate courts can only correct judgments arising from proceedings competently held and validly pursued. This is why the authorities press tribunals to deal with issues of jurisdiction *in limine*. The tribunal should do this expeditiously at whatever point that issue arises. This approach prevents the tribunal from dealing with the merits of the case, but in the end find that it is constrained to invalidate the whole of the proceedings.

56. One issue that persuaded the High Court in the two cases, was the relative indigent status of the litigants. The High Court thought it was utterly unjust to require a party that is suing as a pauper to start the process all over. This is a very gallant approach. But with all due respect, justice should not change on account of the relative wealth or poverty of a party unless the other party is using that factor as a tool of oppression.

57. For completeness, I have considered the factors taken into account in **Village Headman Chakwera** and **Chiseka** cases and have in the end emphatically discarded them. In the case before us both parties were represented by counsel. The plaintiff went to a more expensive court than the General Division. The parties were therefore in the wrong court by deliberate choice. The parties have themselves to blame when in the end they are told that the court of choice had no jurisdiction.

58. What is the effect of the parties having conceded to the Commercial Division assuming jurisdiction? On the case authorities, this factor is irrelevant. In **Bhima v. Bhima**, this Court (Chatsika, Edwards and Mead, JJ) quoted with approval **Spencer Bower's Estoppel by Representation**, 2nd edn., at 136, para. 142 (1966) where it is stated:

> *"Not even the plainest and most express contract or consent of a party to litigation can confer jurisdiction on any person not already vested with it by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal; it is equally plain that the same results cannot be achieved by conduct or inaction or acquiescence by the parties.*
>
> *Any such attempt to create or enlarge jurisdiction is in fact the appointment of a judicial officer by a subject and as such constitutes a manifest usurpation of the Royal prerogative…"*

It follows therefore that the acquiescence of the parties in this case to confer or enlarge the jurisdiction of the Commercial Division was misconceived and impotent. This Court will not accede to it or endorse it. Therefore, the judgment of the lower court is hereby vitiated for want of jurisdiction and is accordingly null and void.

59. Just on that preliminary issue, I would allow this appeal. Effectively, my conclusion on the jurisdictional issue disposes of this appeal whatever findings and conclusions I make on the issues that follow. But the issues

that follow are equally important because this Court being an apex court, must provide guidance to the courts below as well as the bar.

Second Preliminary Issue

60. The second preliminary issue relates to the question whether the Limitation Act can be used as a spear and not merely as a shield. The question is whether a litigant can found a cause of action on the Limitation Act.

61. In dealing with this issue, Mr Chilenga unfortunately seems to have understood the court as enquiring whether the Limitation Act can confer any rights on a trespasser. On the contrary, the question was solely whether a party can use the provisions of the Limitation Act as a spear and not merely as a shield. So the authorities cited by counsel pertained to the merits of the case, rather than the technical issue of pleadings.

On the other hand, Mr Kita conceded that he was not aware of any case in which an encroacher successfully sued and recovered land under the Limitation Act.

62. In this case, the respondent, an encroacher, approached the court. He sued the appellant who was the owner of the land. Can an encroacher or a trespasser who has continued in wrongful occupation of land sue the owner for title to be passed to him? The question here is not whether the court recognizes adverse possession. If that were the question the answer would be a vehement 'yes'. The question is rather an enquiry into the mechanics the law uses to recognise adverse possession. Is a suit by the encroacher a viable method for this purpose?

63. We are dealing here with a question pertaining to land. Whether one can sue or not depends on the nature of title and the regime that applies. Under S. 134(1), in part IX of the Registered Land Act (Cap 58:01 of the Laws of Malawi)

> '*The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of twelve years'.*

Any person who claims to have acquired the ownership of land by virtue of S. 134(1) aforesaid may apply to the Land Registrar for registration as proprietor thereof. – see S. 134(2). This right to acquire by adverse possession and to be so registered does not apply to customary land or public land. – see the proviso to S. 134(1) of the Act.

64. A litigant who satisfies S. 134(1) and who claims landed property to which the Registered Land Act applies, would be entitled to bring proceedings against the Lands Registrar were the Registrar to refuse recognition of the title. However, the cause of action would not primarily be against the title holder. The action would be under the Statute Law (Miscellaneous Provisions) Act (Cap 5:02 of the laws of Malawi) for a like order of *mandamus* to compel the Registrar as a public officer to perform his duty under S. 134. No doubt, such a Registrar would not proceed to register the encroacher without giving notice to the title holder on the Register.

65. The evidence on record does not show that plot 36 in Salima is under the Registered Land Act. It has not been contended that these proceedings were taken under the Registered Land Act. So it comes down to this, can a litigant who claims adverse possession of land other than registered land, found an action on the Limitation Act?

66. Mr Chilenga pointed out that S. 6 of the Limitation Act refers to the owner of the land. The owner of the land is barred from bringing any claim to recover the land if he neglects to commence proceedings before 12 years is up. It does not address the trespasser. I agree with this submission.

67. As a general rule the law is that the Statute of limitation does not confer any right on the defendant. It only imposes a time limit on the plaintiff. See per Lord Denning M.R. at p 718 in **Mitchell v Harris Engineering Co Ltd.** [1967] 2 Q.B. 703

68. Furthermore, in general the operation of the Limitation Acts does not extinguish the debt or other cause of action but merely bars the remedy of bringing the action after the lapse of the specified time from the date when the cause of action arose. See per Lord Goddard at p 704 in **Jones v Bellgrove Properties Ltd.** [1949] 2 K.B. 700

69. In relation to claims for the recovery of land, the law is quite radical. **Kelvin Gray** in **Elements of Land Law** at p 283 states that the central feature of the Limitation Act … 'is the idea that if the owner of the property fails within a certain period to secure the eviction of a squatter or trespasser from his land, his own title is extinguished and he is thereafter statutorily barred from recovering possession of the land.

70. Although the owner's title is extinguished, it does not enable the squatter to sue the owner or to compel him to transfer title. The old case of **Tichborne v. Weir** [1891-4] All E. R. Rep 449 is a Court of Appeal decision that illustrates this disconnect. In that case the facts were as follows. In 1802, the Land Lord's predecessor in title granted to B, a lease of the house for a term of 89 years containing a covenant to repair. Sometime later, B created an equitable mortgage of the property by deposit of title deeds with G. In 1836 B defaulted and thereupon G entered into possession. G continued to pay the landlord the rent agreed in the lease granted to B. Possession by G continued until 40 years later in 1876, when by deed, G assigned all his interest in the estate to the defendant who continued in possession and paid the same rent to the landlord until 1891 when the defendant delivered up possession to the Landlord. The landlord sued the defendant for breach of the covenant to repair contained in the lease granted to B.

It was held that the effect of S. 34 of the Real Property Limitation Act 1833 (now S. 16 of the Limitation Act, 1939) was not to transfer to G the rights and title of B. Accordingly, G did not become subject to the covenant of the lease which he assigned to the defendant. S, 34 only extinguished the rights and title of B by barring the remedy.

71. The statute of Limitation can only be used as a shield. For this reason, the Statute must be pleaded specifically as a defence. Even where the facts show that the action was brought after the relevant period had expired, the action will not be dismissed automatically. The issue of limitation must be specifically pleaded and evidence raised on it. See **Bullen & Leake and Jacob's Precedents of Pleadings, 12th Edition, at p 1192.**

72. For over one hundred years, this law has remained unchanged. Therefore I hold that S. 6 of the Limitation Act does not enable the squatter to sue. It only bars the remedy of recovery by the owner of the land. It

follows that the respondent could only use S. 6 as a defence. He could not sue based on alleged adverse possession. Even then, as we shall see later in this judgment, enforceable adverse possession requires satisfaction of certain conditions.

The upshot of this analysis is therefore that the claim in the court below was misconceived and entirely incompetent. Again, the appeal succeeds on the second preliminary issue.

73. I will now turn to the grounds of appeal merely to complete the task that was placed before us. The conclusions I have arrived at on the preliminary issues will override issues canvassed on the merits. To recap, I have found that the court below lacked jurisdiction and in consequence, all the proceedings before it and the resultant judgment were an exercise in futility. I have also found that the respondent's claim in the court below was misconceived and entirely incompetent.

The Trial and Nature of Evidence in the Court Below

74. Before I proceed with the issues raised in this appeal it is important to consider the manner in which the trial of the matter was conducted in the court below. This has a bearing on the appeal as I endeavour to show hereafter. I bear in mind that both parties were ably represented by counsel. The evidence before the court was entirely by affidavit evidence. The respondent who was the plaintiff in the court below filed one affidavit, which was one page long to which was exhibited an application for Lease in respect of the land in dispute. See plaintiff's exhibit 'HM 1'.

75. The appellant as defendant in the court below filed two affidavits in opposition to the respondent's claim. The first affidavit was by the appellant himself to which were exhibited three documents received as exhibit 'HM 1', 'HM 2' and 'HM 3'. The second defence affidavit was by witness H. Mandoya to which was exhibited a report again marked 'HM 1'. To the report were 3 annexes headed diagram 1, deed plan No 178/69 and deed plan No. 203/2007.

76. The exhibits in this case were all prefixed HM presumably because all witnesses who swore affidavits had those letters in their names. Clearly this was shoddy work. Let me demonstrate. There are now three exhibits

marked ‘HM 1’ without distinction as to whether it is a plaintiff’s exhibit or the defendant’s exhibit. The defence has two exhibits from different witnesses bearing the same exhibit number. Given my findings as to the nature of appeals in this Court which is by way of rehearing, the record of appeal ought to be meticulous.

77. Where trial of appeals is by way of actual rehearing, the mandate of this Court must be understood. This mandate does not mean witnesses are heard afresh. The mandate of this Court indicates that the appeal is not limited to a consideration whether the misdirection, misreception of evidence or other alleged defect in the trial has taken place, so that a new trial should be ordered. The mandate of this Court means that we are not limited to consideration of the points raised in the notice of appeal. The Court will consider, so far as may be relevant, the whole of the evidence given in the court below and the whole course of the trial. It is as a rule, a rehearing on the documents including the judge’s notes and transcript of the shorthand notes of the evidence. To the extent that we are enjoined to exercise the powers under S. 22 of the Act, the practice under the old **O. 59, r. 3 RSC** and **practice note 59/3/2** is alive and well.

78. It is therefore absolutely essential that the record should be as complete as possible. The record should also be devoid of mistakes. Having three exhibits bearing the same exhibit number does not assist in trial of an appeal. It is bound to obscure the evidence. By the same token, having two defence exhibits bearing the same number does not speak well of the care and attention given to the matter. Accordingly, and for the purposes of distinction, I have referred to exhibits by direct reference to the party that produced such exhibits. When dealing with the defence side I have distinguished the exhibits by referring to the second ‘HM 1’ produced by witness H. Mandoya as ‘Mandoya HM 1.’

79. I have examined the court record. The trial took place on 6 August 2012. The record of the trial is at p. 42 of the record. It was a showpiece of a trial in its brevity. Mr Kita of counsel addressed the court first. This is how he addressed the court according to the record.

> *“This is our Originating Summons. We are asking for possession of a piece of land at Salima. The defendant alleges the land is his. We filed originating summons, affidavits and skeletals (skeleton arguments).*

We adopt them. We would like the Court to decide this matter on that basis".

Mr Matumba of counsel who appeared for the appellant in the court below then addressed the court. In his very short address he said

"*We filed an affidavit in opposition to the Originating Summons. We also have affidavit of Mandoya, Surveyor at Lands. He did the tracing. We have skeletals (skeleton arguments). I adopt all these in support of our case. That is all."*

80. With those short addresses the trial was ended. The record then shows that the court adjourned the case for judgment. No witnesses were called for cross examination. This happened despite disputation on the facts which were plain to see on the affidavits. The 28 page judgment that followed indicates that the learned judge was alive to the various shades of disputation on the evidence. The learned judge expressed dissatisfaction with the nature of evidence that was before him. He expressed the view that the documentary evidence that was before him was not certified. He found that the appellant produced a document purporting to be a deed, defence exhibit 'HM 3' which was not executed or registered. (see p.7 of the Judgment, at p. 52 of the record). He grappled with this issue extensively at pp 7 – 10 of the judgment where after analysing the evidence before him he said:

"If however the answer be in the negative it appears to us that the consequences might be far from those intended by either party. The plaintiff might have to bring an altogether different claim and most likely not against the defendant".

81. If the evidence of title brought by the defendant is discounted as the learned judge seemed justified to do on the documents before him, it follows that there was no evidence whatsoever to prove title. Surprisingly, at p12 of the judgment, the learned judge finds that the issue of paper title is a non-issue. He seems to have resolved the issue by a circuitous route at p11 of the judgment where he said:

"The only problem, which brings us to the second aspect, we have is the plaintiff's story in this case. He admits that the defendant has paper title to the land known as (to) Plot No 36 Lakeshore Salima. See paragraph 4 of his affidavit."

82. I have examined the respondent's affidavit in the court below. Nowhere does the respondent affirm the appellant's paper title. Paragraph 3 of the respondent's affidavit says that the respondent has been an occupant of the land at Juma Bunguzi village. And in paragraph 4, the respondent says that he is aware that the appellant has been an occupant of the plot adjacent to his. With all due respect to the learned judge, I am unable to read any affirmation in paragraph 4 of the respondent affidavit. Paragraph 4 is no affirmation of the appellant's paper title any more than paragraph 3 proves that the respondent had paper title to the plot he alleged was occupied by him.

83. Now in further damnation of the respondent's case, in paragraph 8 of his affidavit, the respondent disputed the allegation of encroachment. He claims that he was in occupation from the 1970s. That is before the appellant bought and occupied the property in 1989. This is a curious twist. The essence of adverse possession is a direct or implicit admission of encroachment that has lasted for so long. Given his disputation of encroachment, it was hardly possible to proceed with a claim based on adverse possession.

84. To go further on the examination of this case, the appellant disputed that the respondent had ever been in occupation of any part of Plot 36. – see paragraphs 6.1, 7, 8 and 9. Admittedly, the appellant stated at paragraph 4 of his affidavit that the respondent had encroached on his plot and not that the respondent's plot was adjacent to the appellant's plot.

85. All these issues should have been thoroughly investigated. There was material divergence of evidence on which the parties should have gone to trial. The result is that the evidence before the court was hugely unsatisfactory. The court below should have exercised its powers under O. 28, r. 8 RSC instead of handing down a judgment on such divergent and unsatisfactory evidence. The power to order the parties to proceed as if the matter was begun by writ is exercisable at anytime and at any stage of the proceedings. This is now covered by CPR Part 8 Rule 8.1 paragraph 3.

86. The further point to be made is that the Originating Summons procedure as was adopted here was not appropriate. Originating Summons is the appropriate method of beginning proceedings

a) In which the sole or principal question at issue is, or is likely to be, one of the construction of an Act, or of any deed, will, contract or other document or some other question of law; or

b)In which there is unlikely to be any substantial dispute of fact.

In my years at the bar, you never used this procedure unless the proceedings arose under an Act of Parliament and one was compelled to use it. In all other circumstances you would only use it if the facts were agreed on all sides and all you sought from the court was construction or a question of law arising from the agreed facts. Here the facts were in dispute. I therefore find that the procedure adopted was altogether unsuitable. I further find that given the serious shades of disputation, the learned judge should have directed the parties to proceed as if the case was commenced by writ of summons with appropriate directions as to how the affidavits would stand.

Consideration of grounds of appeal

87. I have considered the seven grounds of appeal. I propose to condense the grounds into one. The principal issue raised by this appeal is the question whether adverse possession was proved in the court below.

This appeal on the merits largely turns on the meaning and establishment of adverse possession. Both parties come before this Court with a common understanding that **Miller v. Minister of Pensions** [1947] 2 All E. R. 372 applies with regards to the standard of proof required in civil cases. They are also agreed that 'he who asserts' carries both the evidential and legal burden of proof. In this particular case, the respondent had to discharge this burden in order to succeed in his claim. The appellant carried no burden to prove anything. The parties differ sharply on their analysis of the evidence before the court below. The appellant contends that the respondent failed to discharge this burden. On the contrary, the respondent has argued most strongly that he discharged the burden to the requisite standard.

88. As I have observed earlier, the evidence before the court was hugely unsatisfactory. There was no evidence of title in respect of plot No 36, Salima. The learned judge in the court below came to the same conclusion. He found that defence exhibit 'HM 3' which was produced to prove title in the appellant fell short. He found that the document was not a certified

copy. He also found that this document purporting to be a deed was not executed or registered. There was no other evidence or document to prove title. I have also endeavored to show that there was no basis for avoiding the question of paper title. I have disagreed with the learned judge on his finding that paragraph 4 of the respondent's affidavit affirmed the appellant's paper title. In the face of this colossal failure on such a seminal aspect isolated by the learned judge as an issue before him, this case immediately floundered.

89. The simple question is whether the evidence as produced at the trial proved adverse possession. In the case of **Mbekeani v. Nsewa** [1993] 16 (1) MLR 295, Tambala J, as he then was, stated that the defendant would be assisted by the Limitation Act to defeat the plaintiff's title if he could show that he was in adverse possession of the land for more than 12 years. Tambala J, went further to say

> *'To amount to adverse possession, the defendant must commit acts which are inconsistent with the lawful owner's enjoyment of the soil (land) or the purpose for which he intended it.'*

Moreover Tambala J, buttressed his holding by drawing analogy to the case of **William Brothers Direct Supply Ltd v. Raftery** [1958] 1 Q. B. 159. He stated that

> *'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'*

Mbekeani v. Nsewa is a High Court decision and therefore not binding on this Court.

90. In the case before us, plot No 36 is a lakeshore cottage development. The plot measures 0.8355 hectares which is slightly over 2 acres. See diagram 1 annexed to defence exhibit Mandoya HM 1. The respondent did not bring any evidence of what he had done on the land encroached by him. Its not clear whether he built a house on this land. Or he was planting crops. Or he was using the land for pasture. There is simply no evidence of developments or activity of any description. The evidence on record is simply that the respondent occupied the premises sometime in the 1970s. There is no indication by what means he asserted this occupation. It was

encumbent upon the respondent to demonstrate to the court all acts of occupation which indicate actual possession coupled with the necessary *animus possidendi.* The respondent's evidence in support of his assertions that he had adverse possession did not rise to the occasion.

Mr Chilenga argued that the respondent should have shown evidence of taking up the land or living on the land or undertaking some activity or development. I agree that there was no such evidence.

91. I would fail in my duty to do justice if I did not consider the House of Lords decision in **J.A. Pye (Oxford) Ltd. v. Graham** [2002] 3WLR 221. We cannot avoid this case. The respondent relies on this authority. Additionally, the lower court's judgment has this case as its main stay. I should caution that a House of Lords decision is not binding on this Court. However, where the House of Lords decision relates to an issue that is on all fours with what is under consideration, or where the House has provided interpretation of a statute that is *pari materia* with a statute under consideration by this Court, then such decisions are highly persuasive in this Court.

92. I notice that the court below examined exhaustively the law discussed by the House of Lords. However, the learned judge did not attempt an evaluation of the facts in **Pye's** case. Lord Browne-Wilkinson who delivered the leading judgment set out the material facts and historical context of the case *in extenso*. I propose to adopt this factual analysis as laid out in his judgment before I proceed to examine the utility value of this case. Lord Browne–Wilkinson stated the facts as follows:

Facts

93. Until 1977 Pye was the owner of Henwick Manor together with a substantial amount of surrounding land. In 1977 Pye sold the farmhouse and approximately 67 hectares of the land (Manor Farm) but retained some 25 hectares (the disputed land) which was considered to have development potential. It was Pye's intention to retain the disputed land until planning permission could be obtained for development.

94. the disputed land consisted of four fields, the Drive Field, Hill Field, Paddocks and Wallis Field. The farmhouse at Manor Farm was approached

by a private drive owned with Manor Farm which ran from a public highway to the farmhouse. Abutting the southern side of the drive was the northern boundary of the disputed land. There was a further part of the disputed land to the west of the driveway and immediately south of the farmhouse and farm buildings. The eastern boundary of the disputed land abutted the public highway. Apart from the gates, all the boundaries of the disputed land were separated from the adjoining land by hedges.

95. On the eastern boundary, there was a gate from the public highway into Drive Field. That gate had been padlocked at all material times, the key to that padlock being held by Mrs Michael Graham. The hedge between the driveway and Drive Field and the Paddocks had three gates. Pye had no rights of access over the driveway. There was a fourth gate on to the disputed land on its northern boundary from the farmhouse into Hill Field. There was a public footpath going through Manor Farm and then, over a stile, through Hill Field.

Acquisition of Manor Farm

96. In 1982 Mr John Graham and his wife purchased Manor Farm. From then on, until his unhappy death in 1998, the farming activities at Manor Farm were the day-to-day responsibility of their son Michael Graham. Initially he was farming the land for the benefit of a family partnership but later on behalf of himself and his wife Caroline Graham.

97. At the time the Grahams acquired Manor Farm, they were aware that the disputed land had been used as grazing land under agreements between the owners of Manor Farm and Pye. The Grahams were aware that this disputed land was owned by Pye and had been acquired by Pye in the hope of being able to develop it in the future. The disputed land was fully enclosed so as to exclude the whole world except for access with the use of the key held by the Grahams from the public highway and by foot over a footway.

Grazing agreement

98. On 1 February 1983 Pye entered into a written agreement with John Graham who is described as "the grazier". That agreement permitted use of the disputed land until 31 December 1983 in return for a payment of £2,000. It limited the use of the disputed land to grazing or mowing for one cut of grass and the grazier was obliged to restrict the use of the disputed land to the grazing of sheep, cattle and horses. He was also obliged to keep the disputed land free of weeds, the gates, fences and ditches in good order, and to use the land in a good and husband-like manner. It further provided that Mr Graham would not permit any trespass upon the land and further that he would not part with "possession" of the disputed land. It further reserved to Pye the right to terminate the agreement and gain "possession" on the service of six months' notice. It also expressly provided that any grazing after its expiry would have to be by a new and distinct contract.

99. The Grahams had previously enjoyed an informal licence to graze the disputed land from September 1982 until 1 February 1983. It is not clear whether the Grahams vacated the land prior to the commencement of the 1983 agreement on 1 February 1983. The Grahams occupied the land under the grazing agreement until 31 December 1983. On 30 December 1983 Mr Evans, a chartered surveyor acting for Pye, wrote to Pye suggesting that Mr John Graham be granted a fresh grazing agreement for 1984. On the same day he wrote to Mr John Graham noting that the grazing agreement was on the verge of expiration and requiring the Grahams to vacate the land. In January 1984 Pye refused the request for a grazing agreement for 1984 because they anticipated seeking planning permission for the development of all or part of the disputed land and were firmly advised that it would be sensible for them to have the disputed land in hand at the time of the proposed planning application and the planning appeal which would almost certainly ensue. The Grahams were also led to believe that Pye would soon be making an application for planning permission and did not want the disputed land to be grazed because such grazing, in Pye's view, might damage the prospects of obtaining permission. No change of attitude on the part of Pye was ever communicated to the Grahams.

100. Notwithstanding the requirement to vacate the land at the expiry of the 1983 agreement on 31 December 1983, the Grahams remained in occupation on 1 January 1984 and remained in occupation at all times since that date. Even though there was no grazing agreement in place in 1984, Michael Graham spread dung and loose housing straw on the disputed land

during the winter of 1983-84. He was aware at the time he was spreading the dung that he was doing so at his own risk as a grazing agreement for 1984 might not be forthcoming.

101. In approximately March 1984 the Grahams turned cattle out on to the disputed land and left them to graze until about November 1984. He harrowed, rolled and fertilized the land and spread dung and straw in February and March 1984. He did this on the basis that it was his intention to carry on using the land for grazing until requested not to do so. No request to vacate or to pay for the grazing which was taking place was made. If it had been made, Michael would happily have paid. He took advantage of the ability to use the disputed land as no one challenged him and he was keen not to waste the effort that he had put into preparing the grazing during 1983 and over the winter of 1983-84.

102. In June 1984 an agreement was reached whereby Pye agreed to sell to John Graham the standing crop of grass on the disputed land for £1,100. That grass was cut by the Grahams and the judge made a finding that the cut was completed by 31 August 1984. The charge of £1,100 was paid in November 1984. In the circumstances, all use of the disputed land by the Grahams from 1 September 1984 onwards was made without the permission of Pye.

103. In December 1984, pursuant to a request from the Grahams an inquiry was made of Pye whether the Grahams could take another cut of hay or preferably have a grazing agreement in 1985. There was no answer to this letter from Pye or to subsequent letters sent to Pye in May 1985. Thereafter, the Grahams did not attempt to make contact with Pye.

104. From September 1984 onwards until 1999 the Grahams used the whole of the disputed land for farming. The Grahams never vacated the disputed land: they kept farming all the year round. Dry cattle and yearlings were kept in a shed on part of the disputed land throughout the year. Dung was spread two or three times during 1984/85 and the disputed land was harrowed and rolled in February/March 1985, fertilized at Easter 1985 and limed in early 1985. In doing this Michael Graham was aware that there was a risk that he would not obtain the benefit of the work as there was no grazing agreement or agreement to take a cut of hay. He would have been prepared to pay Pye for a grazing licence or the hay but in the absence

of any agreement he was willing to take a chance that an agreement would be forthcoming later.

105. The same use and management of the whole of the disputed land for grazing was maintained until 1994 when the use of Drive Field changed to arable. Save during the mid-winter months there would be between 80 and 140 cattle grazing on the disputed land. In addition part of the disputed land was limed in 1985 and re-seeded in 1988. The boundary hedges were trimmed every year from 1983 onwards by someone employed by the Grahams and from 1984 onwards the boundary fencing was maintained by the Grahams as were the ditches on the disputed land.

106. Various witnesses confirmed that the disputed land appeared to them to be part of Manor Farm and some gave evidence that they believed that Michael Graham owned it. When asked in cross-examination what an occupying owner of the disputed land might have done, over and above what had been done by the Grahams between 1984 and 1997, Mr Evans, an experienced chartered surveyor, was unable to think of anything.

107. In his draft witness statement Michael Graham said that in the light of the lack of interest shown by Pye in the land he continued to use the land for what he considered to be its best use. He hoped a further agreement would be forthcoming in 1984. After he received no replies to his inquiries in 1985 he "gave up trying" and waited to see if Pye contacted him. He anticipated that Pye would contact him at some point and was happy to leave matters until they did. From May 1985 at the latest, his attitude was simply that he would have preferred to have obtained a formal agreement and, if Pye had asked him to pay for his occupation, he would have done so. In his draft witness statement he said that at the time he believed that it was possible to obtain ownership of land after it had been occupied for a sufficient number of years which he mistakenly thought to be seven years.

108. As to the activities of Pye on the disputed land between 1984 and 1999, there were none. In 1993 a representative of Pye visited the disputed land to inspect it but even then he only viewed it from the road and from the drive; he did not actually go on to the land. Pye showed no interest in the agricultural management of the land. Pye carried out certain paper transactions during this period relating to the disputed land. But it is not suggested that they were sufficient to constitute possession. Indeed nothing

was done by or on behalf of Pye to the land itself from 1 January 1984 onwards.

109. In 1997 Michael Graham registered cautions at the Land Registry against Pye's title on the grounds that he had obtained "squatter's title" by adverse possession. Pye's solicitors sought to warn off those cautions. In early February 1998 Michael Graham agreed to release the cautions in relation to certain land needed for a relief road. Shortly thereafter his draft statement was prepared. On 19 February 1998 Michael Graham was most unhappily killed in a shooting accident.

110. On 30 April 1998 Pye issued the originating summons seeking cancellation of the caution. A week or so later, further cautions were registered on behalf of Caroline Graham, Michael's widow, and in September 1998 letters of administration to Michel's estate were granted to Caroline Graham and her father. On 20 January 1999 Pye issued further proceedings seeking possession of the disputed land.

111. Neuberger J who tried the case found for the Grahams and gave them a squatter's title. That decision was reversed by the Court of Appeal. The Grahams appealed to the House of Lords.

112. The House of Lords held allowing the appeal;

(i). That for the purposes of the 1980 Act the words "possession" and "dispossession" bore their ordinary meaning so that "possession" as in law of trespass or conversion, connoted a sufficient degree of occupation or physical control coupled with an intention to posses and "dispossession" occurred where the squatter assumed "possession" as so understood; but that notions that the squatter should be required to oust or exclude the paper title owner as well as all others or to act inconsistently with his user or adversely towards him had no place in the 1980 Act and the phrase "adverse possession" referred to in paragraph 8(1) was, on a proper construction, directed not to the nature of the possession but to the capacity of the squatter; that to establish factual possession the squatter had to show absence of the paper owner's consent, a single and exclusive possession and such acts as demonstrated that in the circumstances, in particular the nature of

the land and the way it was commonly used, he had dealt with it as an occupying owner might normally be expected to do and that no other person had done so; that the requisite intention was, not to own or acquire ownership, but to posses and on one's own behalf in one's own name to exclude the world at large, including the paper title owner, so far as was reasonably possible, and that it was not, therefore, inconsistent for a squatter to be willing, if asked, to pay the paper title owner while being in possession in the meantime.

(ii). That, on the facts found by the judge and having regard to the evidence as a whole, since the Grahams were in factual possession of the land from January 1984 onward from September 1984 onwards had used it as their own in a way normally to be expected of the owner, and since Pye had done nothing on the land and were effectively excluded from it throughout that period, the Grahams had manifestly intended to assert possession; and that, accordingly, they had established possessory title.

What effect does Pye's case have on the present?

113. My Lady, My Lord, I regret that I have quoted Lord Browne-Wilkinson *ad nauseum* on his analysis of the factual situation in **Pye's** case. I thought that this was necessary because the learned judge from whose judgment this appeal arose did not appear to have paid attention to the facts in **Pye's** case. I feared that we also might run into similar difficulty if we did not undertake an appropriate understanding of those facts. I wish to state that I am in complete agreement with Lord Browne-Wilkinson on both the factual and legal analysis of **Pye's** case. Unfortunately, the evidence before us in the present case is scanty. The reason for this is that the evidence presented to the learned judge in the court below was unbelievably lacking in material detail.

114. As observed earlier, the learned judge's decision was largely driven by **Pye's** case. I have observed that the evidence adduced in the court below was hugely unsatisfactory. There are several aspects of **Pye's** case which are significant points of departure for our present case.

Firstly, the decision was based on the Limitation Act, 1980 which had provisions which expressly excluded the requirement for adverse possession

to be manifested by inconsistent usage of the land by the squatter. See par 8(4) to schedule 1 of the Limitation Act, 1980. Unlike Malawi's S. 6 of the Limitation Act, the English provisions are more elaborate.

Secondly, for purposes of our S. 6, **Pye's** case decision is important because upon analysis of the authorities going back to 1833, the House of Lords rejected the notion that the squatter should be required to oust or exclude the paper title owner as well as all others or to act inconsistently with his user or adversely towards him. It was sufficient for the squatter to prove actual possession in the same way and extent to which possession must be proved to maintain an action for trespass. To establish actual possession, the squatter had to show absence of the paper owner's consent. He had to show also a single continuous and exclusive possession. In addition, the squatter had to show such acts as demonstrated that having regard to the circumstances and the nature of the land and the way it was commonly used, he had dealt with it as an occupying owner might normally have been expected to do and that no one else had done so.

Thirdly, the analysis by the House of Lords casts doubt on the correctness of the decision in **Mbekeani v. Nsewa** even though it was decided based on the old law.

115. Notwithstanding the modern approach in **Pye's** case, that decision has not gone so far as to suggest that a mere statement that the squatter is in occupation without more will suffice and satisfy the courts. The squatter must show much more. It may now not require him to go to the extent of **Mbekeani's** case. But there must be cogent evidence beginning with acts of occupation, possession, usage and exclusivity.

116. The respondent failed to do this. Adverse possession was not shown. There is no doubt in my mind that the respondent failed to prove adverse possession on whatever formula that concept is measured, whether under the **Mbekeani** or **Pye** formulation of the standard. I am satisfied that this appeal should be allowed on the merits as well.

For the reasons I have given, this appeal succeeds and I would allow it with costs in this Court and the court below.

Delivered in Open Court this **1ST** day of **JUNE 2015.**

SIGNED : **……**
HON JUSTICE DR ANSAH SC, JA

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HON JUSTICE CHINANGWA SC, JA

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HON. JUSTICE MBENDERA SC, JA