JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL

MSCA Civil Appeal No 1 of 2016

(Being High Court, Mzuzu District Registry, Civil Cause No 9 of 2009)

MERVIS CHIRWA APPELLANT

AND

FAIZER KARIM 1ST RESPONDENT

AND

DICKSON PWELENJI 2ND RESPONDENT

CORAM: THE CHIEF JUSTICE, AKC NYIRENDA

JUSTICE D F MWAUNGULU, JA

JUSTICE ADK KAMANGA, JA

Nyirenda, for the appellant

Mwale for the respondents

Chintande, Official Court Interpreter

Legislation

Chiefs Act

Section 2, 9 (1), 9 (2)

General Interpretation Act: Sections 2 (1); 57

Land Act:

Sections: 2, 25, 26

Lands Acquisitions Act: section 3Supreme Court of Appeal Rules:Order 3, rule 2

Cases

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Words and phrases

Hold

Nyirenda, CJ

Mwaungulu, JA

JUDGMENT

On beautiful Lake Malawi shores are three land parcels. The first respondent's adjoins one belonging to a former Chief Justice, Richard Banda. This customary land and the one disputed belonged to the second respondent's family, the Umagomba family. The first respondent bought the land from the Umagomba family in 1993. The first respondentalways desiredacquiring more of the Umagomba family adjacent land. Something happenedin 2008 that changed things.

On 6 February, 2008 the appellantand herbrother met the Umagomba family. The appellant, who lives in South Africa, learnt thatMadam Magomba Kanyasu was selling customary land.The appellant paid K 550, 000. The agreement was in writing. The appellant, Madam Kanyasu, the second respondent and Chief Malandasigned the document. The appellant paid Madam Kanyasuwho, apparently, used all the money herself. Several months later, a government land officer stopped the appellant's surveyor surveying the land because government leased it to the first respondent.The second respondent, who, a member of the Umagomba family that signed the agreement, contradicts this account only on that the contract based on the first respondent, ownerof the land, acceding to the sale. The court below, because of the approach taken,made no finding on this.

Under Order 3, rule 2 of the Supreme Court of Appeal Rules, civil appeals are by rehearing. This court, on appeals from the lower court's original jurisdiction, is on matters of fact a second tier.It, therefore, considers all evidence and can reexamine findings of fact. This court presumes that the finding of fact, as long as there was evidence for it, is correct. Where, therefore, in the court below, there was evidence and the court below never considered the evidence and found the facts the evidence entails, this court, subject to credibility, can determine those facts.Equally, this court can overturn such a finding not supported by the facts or a finding which is, on the evidence, outrageous or unreasonable. Here, the court, despite the evidence, never found as a factthat the second respondent mentioned to the appellant, before the contract, that the first respondent had to approve the transaction.

The evidence actually establishes the contrary. As the Chief Justice probed, it is incredible that the Umagomba family would have signed the contract, take the money and then pretend to all and sundry that this transaction was subject to the first respondent, the owner of the property, abdicating the interest in the land. One would have thought that the Umagomba family would have directed the appellant to the true owner, if they were not the (true) owners. Neither the second respondent nor a member of the Umagomba family, therefore, informed the appellant of the first respondent's title or interest in the land. Moreover, the contract being silent on the matter, evidence to introduce further terms in a written contract is very seldom permissible.

The first respondent's evidence on ownership is ambivalent. In his witness statement, which never mentions purchase of land at K15, 000, the first respondent said:

> All along, I had intentions, as early as 1998, of extending the land for developmental purposes and I informed the Umagomba Family about the same hence they knew, all along, that I was the one who was interested in extending the same.
>
> It was because of the same interest and that I was the first to be interested that I still communicated my interest and that I was the first to extend the land, which extension included the land in dispute herein, that the Umagomba Family, in 2008, told me that I should pay K710,000.00 for the land that is the subject matter herein.

That K15, 000 was paid for part of the land in dispute only arises in evidence in chief. It was not part of the statement:

> They told me that the land adjacent to me has been sold to Mervis. They had come to give back the MK15000 I had paid in 2004 for this land. I refused to get the money. I had already bought the land. ... The Umagomba had a cousin who said they told me that they had told Mervis that in the event that I refused to give up the land they would refund her money. They said they needed MK550,000 to give back to Mervis. They had finished using the original sum. I was told to give them the MK550,000. They charged me K710,000.00 after negotiations. I

accepted and paid the following week. Umagomba family sold me.They set the price. This is agreement of sale for the said part of land in dispute.

Moreover, the contract for sale of the land sold at K15, 000 was not established to be in writing. It is, therefore, caught by the Statute of Frauds.

The real scenario is that, the first respondent, knowing that the Umagomba family sold the same parcel of land to the appellant at K550,000.00, was ready to pay more – K221, 000 - for the land and enable the Umagomba family repay K550,000.00 to the appellant. After paying the K771,000.00, the first respondent was on 2 December offered a grant for a lease of 99 years with effect from 1 December 2008 under section 5 (1) of the Lands Act. Clothed with this lease, the first respondent, well before the Court below rejected the injunction, started construction on the land.

The appellant commenced proceedings against the respondents for damages. The appellant, because the Umugomba family were no longer owners or in possession of the land, also sought a declaration that that there was no land to sell to the first respondent. The appellant sought a further declaration that thecontract of sale between the first respondent and the Umagomba family is invalid;it was made in bad faith and undue influence. The appellant also sought an order for the appellant to enter and enjoy the right of use of her land and a permanent injunction restraining the first respondent, his servants, agents and whoever person of whichever authority and/or status employed and /or authorised by the first respondent from doing any act of whatsoever.

The first respondent denied the appellant's claims and alleged that he complied with the procedure for application for a lease and that now he is the lawful and proper owner of the property effective 1 December, 2008.The second respondent equally denied the appellant's claims and counterclaimed for damages and declarations that there was no land to sell because it was partly owned by the first respondent and that the appellantwas no longer a party to any dealings which the second respondent had over the land.

In the court below it was submitted for the appellant, on P W D Redmond in General Principles of English Law, 1979, 5th Edition, M & E Handbooks, 82, that the contract for sale of land was in writing. It was contended that, without such a memorandum in writing, on *Monickendam v Lease* (39) T L R, the contract for sale of land wasunenforceable. Since, it was contended for the appellant, under the contract the land was sold to the appellant, the first respondent's erecting of a building was, because of *Westripp v Baldock* [1938] 2 All E R 799, trespass to land. It was argued for the appellant, on *Holmes v Wilson* (1839) 10 Ad & E L 503, that this was a continuing trespass and thatthe appellant should recover damages up to judgment. It was further submitted that the appellant, on *Granada Group Ltd v Ford Motor Co Ltd* [1972] F S R 103, could obtain an injunction against the trespass since, based on *Colebourne v Colebourne* [1876] 1 Ch D 690, the claim for an injunction was substantial object of the action.

It was submitted for the first respondent in the court below, first, that the appellant, who had the onus of proof, never proved her case on a balance of probabilities. Relying on *Robbins v National Trust Co* [1927] AC 515, 520; *Constantine Line v Imperial Smelting Corporation,* [1942] A C 154, 157 and *Seldon v Davidson,* [1968] 1 WLR 1083, that, the appellant, who was asserting, had to prove that, based on *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd,* [1915] AC 847; and *Tweddle v Atikson,* (1861) 1 B & S, 393; 121 ER 762, there was privity of contract between the appellant and the first respondent. It was further submitted, based on *Abrath v N E Railway* (1883) 11 QBD 440, and *Wakelyn v L & S W Railway,* [1896] 1 QBD 189, 196, that the case fails if onebearing the burden of proof, offers no evidence or the evidence is weakened and, based on *Pick Up v Thames Insurance Co,* (1878) 3 QBD 594, 600 and *Wakelin v L & S W Railway,* (1886) 12 App Cas 41) the case must be decided against the person with the burden of proof. Further, it was submitted, based on *R v Dunne* [1943] KB 516, that where there was no issue the question of burden of proof does not advance. The standard of proof it was submitted, based on *Bonnington Castings Ltd v Wardlaw* [1956] 1 613, 620, is on a balance of probabilities and, based on *Lee v Johnstone* (1869) LP 1 Sc & Div 426,that the burden of proof for fraud or undue influence rests upon a party asserting. More importantly, it was submitted, based on *Bater v Bater* [1951] P 35, that the standard of proof on allegation of fraud is a higher degree of probability.

It was submitted that the first respondent was not privy to the contract between the appellant and the second respondent. If there was, therefore, breach of contract between the appellant and the second respondent, the first respondent was not liable. The first respondent occupied the land based on a government lease and could not, therefore, be liable in trespass(Maya *v R* [1981-83] 1 MLR 101 and *Gregory v Piper* (1829) 9 B & C 591).

In the court below, it was submitted for the second respondent, relying on *Ali v Mandala* [1994] MLR 11,that without meeting of minds between the Umagomba family and the appellant, there was no contract in law and in fact. The argument premised on that the contract was on condition that the first respondent agrees to cede the land. Consequently, relying on *Tikumbe Limited v Press (Properties) Ltd*, [1992] 15 MLR 458, there could not be specific performance of the contract for the sale of land. Conceding that trespass to land involves the slightest intrusion on the property of another, it was submitted for the second respondent that, without establishing the right to land, there was no trespass (*Heagn v Carlolon* (1916) 2 Ir R 27, *Ellis v Lofts Iron Co.* (1887) LR 10, *Browne v Davison* (1840) 12 A & E 624, *John Trenberth* (1979) 253 EG 151 and *Chikonde v Kassam* [1981-83] 10 MLR 234.

The court below resolved, earlier inits judgmentthat the appellant's intimidation and economic coercion allegations were untenable. Its analysis of the evidence oncoercion was immaculate and needs no further or better comment. The legal effect of this finding, moreover, is unclear. The appellant was not privy to the contract between the first and second respondent. So much so that, even if there was economic coercion, it is partiesto the contract who could claim under it. Intimidation amongthe parties to the contract themselves would be tortious. The appellant would not benefit from a tort committed on another. The appellant's could have claimed against the first respondent in tortfor interference with a contract. The appellant, however, never pleaded this tort.

The court below also aptly resolved the fraud claim.Fraud must be specifically pleaded and proved strictly(*Malunga v Fitness Consultants and another* (2009) MLR 263, *NBS Bank Ltd v BP Malawi Ltd*(Commercial cause No 12 of 2017(unreported), *Engen Ltd v Kachingwe t/a Michiru Station*(Commercial cause no. 260 of 2015(unreported), *Kamwendo v Bata* shoe company Ltd (Civil Cause No 2380 of 2003(unreported), *Lumley v Gye* (1853) 2E &B 216, *Rookes v Bernard* (1964) A.C. 1129). The second respondent, who signed the contract for sale of land for the appellant and the first respondent, never refuted the signatures. He admitted that he had signed both contracts on behalf of the Umagomba families. The court below found nothing wrong with this; the second respondent signed for the family.

The appellant's contention, assuming she is understood correctly, is that the second appellant acted other than honestly in signing a second contract havingsigned an earlier contract. Madam Kanyasu, who sold the land to the appellant, told the court that all the money in the first transaction was given to her. The second respondent. therefore, never benefitted. The second respondent, a literate member of the family,always signed whenselling family land. The second respondent was not any different from the chief whose imprimatur was needed for the transaction. There was no fraud.

There are, however, serious matters from the judgment and grounds of appeal to consider. The court below determined that the Umagomba family could not authorize the use and occupation of the land because, the customary land being vested in the president, only the Minister and chiefs under section 26 of the Land Act could authorize such occupation and use.The Umugomba family, therefore, owned nothing and could not sell the land and pass any title to the appellant. Consequently, the only valid transaction, according to the court below,was the government lease.This, however, ignores that the lease basedon a similar transaction by the Umagomba family.It also obfuscates the customary law interest in land.

Partly, the problem arises because in the judgment of the court below and many cases, from the court below, cited, the words "ownership," "title," "individual," "community," "use" and "occupation" are used interchangeably and without analysis. It is true that under section 25 of the Land Act, all customary land is "vested" in perpetuity in the president for the purposes of the Land Act:

> All customary land is hereby declared lawful and undoubted property of the people of Malawi and is vested in perpetuity in the President for purposes of the Land Act.

The word "vested" in section 25 of the Land Act does not mean that the President is the owner, let alone the holder, occupier and user of customary land. Section 25 of the Lands Act is very clear about who customary land

is the lawful and undoubtedly property of – the people of Malawi. The one in whom customary land is vested in is not the one whose lawful and undoubted property customary land is.

Section 25 of the Land Act, however, is very clear about what is vested in the President: customary land. Customary land is defined by section 2 of the Act:

> "[C]ustomary land" means all land which is held, occupied or used under customary law, but does not include any public land.

What, therefore, is vested in the President is land at customary law. The land is held, occupied or used under customary law – the president, in whom the land is vested, is not the holder, user or occupier of the land. The vesture does not make the President the holder, occupier or user of customary land. The vesture does not make customary land. Customary land – as we see shortly, the customary land title or proprietary right in customary land – exists before the vesture and it is on which vesture premises. The statute is just declaratory – "All customary land is hereby declared." Customary land is declared to be the lawful and undoubted property of the people of Malawi. Section 2 of the Land Act – the section defining customary land – presupposes holders, occupiers and users at customary land; it presupposes holding, occupation and use.

Neither does section 26 of the Lands Act, authorizing the Minister to administer and control all customary land make the minister the owner, occupier or user of the land. This applies *mutatis mutandis* to a chief who, subject to the minister, may authorise use and occupation of customary land:

> The minister shall subject to this Act and to any other law for the time being enforce administer and control all customary land and minerals in, under or upon any customary land for the use or common benefit direct or indirect of the inhabitants of the land; provided that a chief may subject to the general or special directions of the minister authorise the use and occupation of any customary land within his area in accordance with customary law.

Section 25 of the Lands Act, vestingcustomary land in the president, section 26 allocates administering and controlling of customary land to a Minister. This does not make the Minister the holder, occupier or user of the land. Perhapsthe words, "administer' and "control" cover "occupation" and "use" of land. The Minister is only given the power to control and administer customary land. Customary land that the Minister can control and administer falls in three categories – customary land already allotted to citizens, customary land not allocated to citizens and land, if any, converted to customary land from public land.

Section 26 of the Lands Act gives the Minister and a chief different powers. The Minister has powers of control and administration. Section 26, however, allocates the power to authorise the "use" and "occupation" of "customary land" to "chiefs." Section 26 of the Lands Act gives no power to a Minister or chief on"holding" of customary land.

The definition section of customary land refers to three aspects of land, holding, use and occupation. Section 26 of the Lands Act only covers two: use and occupation. Holding is very different from occupying and using. Holding may entail occupation and use. There can, however, be use and/or occupation without holding. Holding can be freehold or leasehold. Section 26 of the Lands Act does not cover the holding of land at customary law. The holding of land, therefore, is governed by the general law, including customary law – not section 26 of the Lands Act.

Section 2 (1) of the General Interpretation Act, which applies the word "chief" in section 26 of the Land Act, provides:

> In this Act and, subject to section 57, in every other written law enacted, made or issued before or after the coming into operation of this Act, the following words and expressions shall have the meanings respectively assigned to them, unless there is something in the subject or context inconsistent with such

> construction or unless it is therein otherwise provided ... "Chief" has the meaning ascribed thereto by section 2 of the Chiefs Act

Section 2 of the Chiefs Act states:"

> "Chief" means a person holding or acting in the office of Chief under this Act.

That, however, is not all, at least, about the power of a chief in section 26 of the Land Act. Group Village Headmen and Village Headmen assist Chiefs in all functions, including those under section 26 of the Land Act. Section 9 (1) of the Chiefs Act provides:

> A Chief may appoint such number of Group Village Headmen and Village Headmen as he may consider necessary to assist him in carrying out his functions.

Section 9 (2) of the Chiefs Act provides:

> The functions of a Group Village Headman and a Village Headman shall be to assist the Chief or Sub-Chief by whom he is appointed in the performance of his functions and to bring to the notice of that Chief or Sub-Chief any matter in his village or group of villages which is relevant to such functions.

Section 26 of the Land Act, therefore, does not make a chief, a group village headman or village headman holder, occupier or user of customary land. Section 26 gives all powers – the Minister and the Chief – to authorise the use or occupation of land. They must do so, however, according to customary law.Besides, therefore, the general or special direction of the Minister, a chief authorizes the use and occupation of any customary land within the chief's area in accordance with customary law. There is, conceptually, a nexus between customary land and customary law.

Customary land is land held, occupied or used in accordance with or under customary law. The legal system attached to that land is customary law. It is land which is governed by customary law. Customary law is the law qualifying, defining or determining that land. Consequently, the vesting envisaged in section 25 of the Land Act applies to that land which is under the customary law system. The vesting does not making the land customary land. The vesting vests customary land in the president. Equally, the power to a Minister to administer or control customary land is for land – used or occupied under customary law. The chief authorizes occupation and use of customary land in accordance with customary law. Customary law, therefore, additionally, controls how a chief authorizes use and occupation of customary land.

Use and occupation of land, however, could be based on customary landholding, something enshrined in the definition of customary land. Much of customary land hinges on customary landholding. The definition of customary land proposes a holding under customary law. What is the nature of the interest in land under customary law?

The court below regarded the interest in the land on authorization of occupation or use as merely a license:

> No person in other words owns or claim ownership of customary land. Instead individuals are authorised to use or occupy land by chiefs under the chief's general authority to authorise the use and occupation of customary land in accordance with a particular area's customary land law. Such authority includes the power to allocate and reallocate the use and/or occupation of customary land. The most that one can, therefore, have in relation to customary land is a license to use and/or occupy the land.

The court below relied on three judgments of the same court: *Gama and another v Village Headman Chibula Moyo* (2002) Civil Cause No 166 (MHC) (MZDR) (unreported); *Chunga v Jere* (2000) Civil Cause No 176 (MHC) (MZDR) (unreported); and *Sakala and another v Village Headman Zithani* (2003) Civil Cause No 25 (MHC) (MZDR) (unreported). Counsel never considered decisions of the same court and one by the Supreme Court.

There is, because of delayed and not exhaustive law reporting, a real risk that views expressed here disagree or cohere with this court's earlier decisions. That conceded, these decisions never really examined and interrogated the nature of the interest in land at customary law. The very suggestion that the interest in land was a mere license indicates a prism – common law – in which the customary law interest or right was understood. Moreover, the statements were obiter.

In *Chunga v Jere,* the court below never considered *Regina v Damaseki* (1961-63) ALR (Mal 69; *Kambuwa v Mjojo* (1966-68) 4 ALR Mal 95 and *Mauwa v Chikudzu (1968-70) 5ALR Malo 183; Mkoka v Banda and another* [1992] M L R 278and *Jayshree Patel v Khuze Kapeta and Kaka Holdings Ltd* Civil Cause No. 3277, 2003 (unreported).In *Mkoka v Banda and another* the court below said:

A customary land title is neither freehold – fee simple – nor leasehold. Under section 2 of the Lands Act, customary land title is a holding. It is probably this statement – without citing *Mkoka v Banda and another,* that influences – the court below – and leads to the conclusion that customary land bases on license.Section 2 of the Lands Act envisages holding of land and that is inconsistent with customary landholding being a mere license.

The Canadian Supreme Court, and this court is likeminded, dealing with the equivalent of a customary land title, aboriginal title, in *Delgamuuk v British Columbia* [1997] 3 SCR 1010, thought that the nature of the customary land title was and has never been a license:

> This court has taken pains to clarify that aboriginal title is only "personal" in this sense, and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a license to use and occupy the land and cannot compete on an equal footing with other propriety interests: see *Canadian Pacific Ltd v. Paul*, (1988) 2S.C.R 654, at p. 677.

Customary landholding, therefore, is not a licence. Those decisions of the court below that hold that it is a license are not good law because the definition of customary land in section 2 of the Lands Act excludes notions of it being a license.

Two decisions of the court below in *Kabango v Banda* (2010) Civil Appeal Case No 91 (MHC) (PR) (unreported) and *Kishindo v Kishindo* (2013) Civil Cause No 397 (MHC) (PR) (unreported) describe the proprietary right in customary land as usufructuary. In *Canadian Pacific Ltd v Paul* the court said:

> Before turning to the jurisprudence on what must be done in order to extinguish the Indian interest in land, the exact nature of that interest must be considered. Courts have generally taken as their starting point the case of *St. Catherine's Milling and Lumber Co. v. the Queen* (1888), 14 App. Cas. 46 (PC), in which Indian title was described at p. 54 as a "personal and usufructuary right." This has at times been interpreted as meaning that Indian title is merely a personal right which cannot be elevated to the status of a proprietary interests so as to compete on an equal footing with other proprietary interest. However, we are of the opinion that the right was characterized as purely personal for the sole purpose of emphasizing its generally inalienable nature; it could not be transferred, sold or surrendered to anyone other than the Crown. That this was so was recognized as early as 1921 in *Attorney –General for Quebec v. Attorney General for Canada,* (1921) 1 A.C. 401(PC), where Duff J. speaking for the Privy Council, said at p. 408 "that the right recognized by the statute is a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown."

The Supreme Court of Canada accepted that describing customary title as personal and usufructuary was misleading:

> The starting point of the Canadian jurisprudence on aboriginal title is the Privy Council's decision in *St Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, which described Aboriginal title as a "personal and

> usufructuary right" (at p. 54). The subsequent jurisprudence has attempted to grapple with this definition, and has in the process demonstrated that the Privy Council's choice of terminology is not particularly helpful to explain the various dimension of aboriginal title. What the Privy Council sought to capture is that aboriginal title is a sui generis interest in land. Aboriginal title has been described as *sui generis* in order to distinguish it from "normal" proprietary interest, such as fee simple. However, as I will now develop, it is also sui generis in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.

Describing customary land title as ususfractuary or personal is inapt. Customary land title precedes the declaration of the protectorate. Customary law, before the protectorate, prescribes the nature of customary land holding. It is more than a right to enjoyment and occupancy. The statement of Judson J. *Calder v. Attorney – General of British Columbia*, (1973) S.C.R. 313 at p. 328 appeals to this Court:

> ...when the settlers came, the Indians were there, organized in society and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal" or usufructuary right."The inescapable conclusion from the Court's analysis of Indian title up to this point is that the Indian interest in land is truly sui generis. It is more than the right to enjoyment and occupancy although, as Dickson J. pointed out in *Guerin*, it is difficult to describe what more in traditional property law terminology,

One decision of the court below suggests an interest beyond license – seisin. *Roben v Bande* (2000) Civil Cause No 356 (MHC) (PR) (unreported) never considered *Mkoka v Banda and another.* It, nevertheless, never regarded the customary land title as a license. The occupant had seisin – which a leaseholder or licensee never has:

> S.25 declares all customary land to be lawful and undoubted property of the people of Malawi. The control of the customary land is given to the Minister and delegated to the Chiefs of the areas although the land is vested in the president. The land once allocated, the control over it passes to the allocatee who can use the land. He has lawful seisin of that land and can only lose it by forfeiture for misconduct or abandonment at custom.

The word 'seisin' comports that the person allocated the land has both possession and title. In *Temuwa v Gwirani* (2006) Civil Cause No 24 (MHC) (PR) unreported) the court below, with no reference to*Roben v Banda,* below said almost the opposite:

> Being customary land, it is vested in perpetuity in the president on behalf of Malawians. No individual holds title to it, according to section 25 of the Land Act: see *Mkoka v Banda and another* ([1992] 15MLR 278, and *Honourable David Faiti v Kandiado* Civil Cause No 1412 of 2005.

Section 25 of the Lands Act does not – by suggesting that the property is for all Malawians and vested in the president – suggest that individuals cannot hold title in customary land. I have not been able to read *Faiti v Kandindo* but, most certainly, *Mkoka v Banda and another* never decided that an individual never holds title to customary law. The proposition, however, occurs in *Botha v Kumwenda* (2009) Civil Cause No 28 (MHC) (MzDR) (unreported); *Mkandawire v Zulu* (2008) Civil Cause No 145 (MHC) (MzDR) (unreported. In *Chunga v Jere* the court said:

> In short, the law does not provide for individual title or ownership of customary land. The present law envisages communal ownership of customary land. The

> law would, therefore, find it strange for any individuals to claim title or ownership of a parcel of customary land.

In *Kuwali v Kanyashu* (2010) Civil Cause No 109 (MHC) (MzDR) (unreported) the court said:

> Customary land is for communal use and inhabitants/people of Malawi must use and occupy the said land as directed by their chiefs ...similar sentiments have been made in *Anna Botha vs Yakobe Kumwenda* (Civil Cause No 28 of 2009 Mzuzu District Registry (unreported) and *Florida Mkandawire v Village Headman Zulu* (Civil Cause No 145 of 2008 (Mzuzu District Registry (unreported). The position is now settled law.

In the court below, therefore, the dominant view is that an individual cannot own land, does not have title to the land. This is attributed to understanding customary landholding from other legal systems.

The temptation to consider the customary land title from the prism of legislation, common law, and equity, must be with circumspect. These tenets of received law assist only in analyzing the nature of the proprietary right in customary land. They are, by themselves, not without customary law, not exhaustive of the proper understanding of the proprietary right or interest in customary land. It is these considerations that make customary land proprietary rights or interests *sui generis*.

There is, of course, temptation to use alien concepts of law to an otherwise indigenous understanding of a customary law title (T Bennett, "Terminology and Land Tenure in Customary Law, An Exercise in Linguistic Theory," [1985] *Acta Juridica,* 173; Corrin, J, 'Customary Land and the Language of the Common Law, Common Law World Review 37 (2008) 305-333, DOI: 10.1350/clwr.2008.37.4.0176). *In Regina v Damaseki* (1961-63) ALR (Mal 69, Cram J., said:

> It is perfectly apparent that this African dwelling is in African trust land area, and that the English law of property can have nothing whatever to do with "ownership." In English law the house would be regarded as a real estate, inseparable from the land to which it was fixed, whereas in African customary law a dwelling house has not this fixed status, but is usually personal property."

In *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) Ngcobo J., in the Constitutional Court of South Africa said:

> When dealing with indigenous law every attempt should be made to avoid the tendency of construing indigenous law concepts in the light of common law concepts or concepts foreign to indigenous law. There are obvious dangers in such an approach. These two systems of law developed in two different situations, under different cultures and in response to different conditions.

On the nature of the customary land title, the Constitutional Court said:

> In *Alexkor*, this Court approved the following passage by the Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria*:
>
> > "Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under

English law. But this tendency has to be held in check closely.

As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment *inter vivos* or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading."

Malinowski, B in *Crime and Custom in Savage Society,* (Routledge & Kegan Paul: London 1926) 576 writes:

When dealing with abstract conceptions, referring to social life, such as law, religion, authority, etc., it is necessary to be extremely careful not to project our own ideas and associations into native life and thought. One must consider how fare our terms –law, legal, criminal and civil law, etc. - are applicable to native conditions. To use these terms in the strict sense in which they ae defined in jurisprudence would be an obvious mistake. To use them loosely and without troubling as their meaning would be essentially unscientific.

In the High Court of Solomon Islands in *Liloand Another vGhomo,* (1980/81] SILR 229Daly CJ said:

[H]ow can one express customary concept in English language? The temptation which we all face, and to which we sometimes given in, is to express these concepts in a similar manner to the nearest equivalent concept in the law received by Solomon Islands from elsewhere, that is the rules of common law and equity. The result is sometimes perfectly satisfactory in that the received legal concept and the Solomon Islands custom concept interact to give the expressions a new meaning which is apt to the Solomon Island context. ... However, [some] concepts of received law have not developed a customary law meaning and the use of those expressions that denote those concepts can produce difficulties of some complexity. This is particularly so when the custom concepts which they are said to represent are themselves undergoing modification to fit them to the requirements of a changing Solomon Island.

Ownership is a complex concept. Corrin, J, 'Customary Land and the Language of the Common Law,' Common Law World Review 37 (2008) 318-319, DOI: 10.1350/clwr.2008.37.4.0176) says:

Advanced by Gluckman as a universal concept of land tenure, the use of the term 'ownership' is perhaps at the root of most misunderstandings relating to customary land. The terms 'customary ownership' and 'landowners' are often employed in written law. Ownership is not a neutral concept, but carries with it

> in the cultural trappings of the common law. It conjures up the picture of a fee simple, involving absolute rights relative to all other rights, which was in pre-colonial days and largely is, irrelevant to customary law. Nor is 'ownership' understood in civil law, suggesting a cluster of rights enforceable against others, equivalent to the differences of interest existing in customary law. Relationships withthe land in custom are intimately related to kinship and the intricacies of customary society. It may be far more accurate to refer to 'rights to use' than to ownership, but even this does not give the full picture. As Hooker puts it, 'We thus have this classic case interaction process – lack of a generalized content in "custom" and the total unsuitability of a standard European concept.'

The court below excludes individual ownership based on section 25 of the Lands Act because customary land is vested in the president and that customary land is communally owned. Communal ownership does not exclude individual ownership. Neither are individual and communal ownership mutually exclusive. Akuffo K, 'The conception of Land ownership in African Customary Law and its Implications on Development," African Journal of International and Comparative Law, 57 writes:

> There are variations in the conception of land under customary law. However, taken as a whole, there isa sharp contrast to be drawn between, say, the conception of land under English law and African ideas ... It is possible to classify land ownership into distinct but interrelated categories, namely, collective ownership, individual ownership and common ownership. It is important to stress the necessary interconnection between these three categories as each is contingent upon the other and are not mutually exclusive. However, this proprietary trinity, as a classification, is distinguishable from Western equivalents in at least one major aspect. Collective ownership of land is the original category from which the others derive. In this sense, it is, in Roman law terms allodial in nature, but not entirely congruent because of its original status and mutuality with other categories.

On communal ownership, Akuffo states;

> Ownership of land under customary law is community or group-based. It is a collective concept:
>
> Ownership of land in the accepted English sense is unknown. Land is held under community ownership, and not, as a rule, by the individual as such. 43
>
> The notion of individual ownership (of land) is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. These two statements are widely thought to express the most fundamental principle of indigenous land rights throughout Africa prior to colonialism. Drawing on studies on Ghana which are recognized to reflect the situation elsewhere in Africa, one can assert that the highest form of ownership, or absolute ownership, vests in the collective or group and an individual's ownership rights within say, the family, clan or village, area in reality, an aggregation of a secure *A.J.I.C.L 67 right of user and beneficial enjoyment of land.

On common ownership, Akuffo states:

> Customary law systems recognize a third category of ownership in land in many parts of Africa. Here, there are no exclusive rights unlike the position in collective ownership where the unit as a whole, holds the exclusive and absolute right of ownership of the land; or in individual ownership, where use and enjoyment of the land and the fruits of labour create exclusive ownership rights in the individual. In the category of common ownership, neither the collective

> nor the individual have any special or privileged claim. All interests rank *pari pasu*. Property in this *A.J.I.C.L. 71 category is generally characterized as 'land subject to common user. Ownership rights in this sense means that the land is 'available to the entire membership of the owing group for various purposes. The land may be used for common purpose such as burial or religious sites, or indeed for private or individual purposes.

Akuffo, however, has a discourse about individual ownership of customary land.

> The nature of African societies before colonialism precluded any conception of the private or individual ownership of land. This is the paramount principle crystallized by the landmark case of *Amodu Tijani v Secretary of State for Southern Nigeria*([1921] 2 A C 399) as indicated earlier – the principle that absolute ownership vested in the collective and not the individual.

Akuffo continues:

> However, if one lifts the juristic veil of collective or 'corporate' personality, there are immediately exposed, the individuals who are entitled to the beneficial enjoyment or the ownership of the land. Thus, by virtue of membership of the owning community, the individual is a co-owner by definition. The more problematic issue though, is the second one relating to the content of the individual's ownership rights. Such a bundle of rights or interests is not adequately represented by the concept of the usufruct because the entitlement of the individual member of, say, the family to the use and beneficial enjoyment of family land is more substantial than the mere use and enjoyment of profits. An individual member of the community has a claim that inheres in the land itself.
>
> In this connection, arguably the most important components of the content or bundle of the individual's ownership rights is under and above, and therefore this deserves some attention. The individual is entitled to the use and beneficial enjoyment of the land within certain limits, to the exclusion of other individuals and to dispose of his property. This right is activated by the exercise, through physical labour, of the individual's community right of ownership. The effect is the creation of individual and exclusive rights over a portion of the community's land. The wealth created through such individual enterprise becomes the creator's property to which he or she has an exclusive individual right. There is clear authority by way of numerous court decisions in West Africa to the effect that this right cannot be determined, or in any other way compromised, without the consent of the individual. It would seem then that the creation of, and respect for, private property was not only recognized under customary law but also encouraged as just desert for personal enterprise.

Authoritative writers are in the same doubt as I am that description of the customary land title as communal comports that there is no individual ownership. Clement Ng'ong'ola in his Statutory *Control of Land and the Administration of Agrarian Policies in Malawi* unpublished PhD thesis, University of London, 1983:

> [I]t is incorrect to ascribe land rights to communities or groups identified as 'tribes' or 'clans'. These are now ubiquitous linguistic and cultural clusters of little relevance to land tenure. The 'village' occupied by persons belonging to different tribes in some cases, is the social and geographical unit within which land rights are exercised. But even here, the village 'community' may enjoy rights of user as a group only in unallocated land or public land. Individuals or families may enjoy exclusive and uninterrupted use of allocated gardens. A sweeping statement that land belongs to the community and never to the individual obscures the varying interests which groups and individuals can enjoy in different land categories.

Ng'ong'ola's last statement subsumes the very critical question in this discourse. Of course, recognition that different individuals can have different interests in land clandestinely hinges on an understanding of those rights based on common law and statutory considerations. It is these considerations on which Silungwe,*Law, Land Reform and Responsibilities,* Pretoria University Law Press, 2015, suggests that there is no customary land title. His conclusion is that customary land title, by metamorphosis is currently statutory premised.Dr. Silungwe, curiously, concludes that the nature of customary land, the statute notwithstanding, leaves all customary land holders as tenants at will.

> In countering the sentimentalist and legal pluralism approaches to the 'customary' space, one of the points worth repeating here is that land relations in the colony and postcolony have been aggressively subsumed under a state legal system. 'Customary' land tenure – even as a colonial construct – is validated under statutory law. I suggest that it is a misnomer to talk of 'customary' land law because there is always a single statutory land law regime. One thing that emerges from *Nireaha Tamaki, InRe Rhodesia, Amodu Tijani* and what I have called the *Mabo* discourse is that the recognition and validation of 'native title' was through the acknowledgement of the radical title of the state sovereign. However, a positive aspect that emerges from the *Mabo* discourse, particularly the South African cases of *Transvaal Agriculture Union* and *Richtersveld* is that state action can serve an 'emancipatory' role in favour of the land deprived. Indeed, the fleeting discussion of 'customary' tenure under the Land Act demonstrates that a significant proportion of the population in Malawi have interests in land akin to tenants at will.

The conclusion that customary land title is statutorily premised depends on a line of authorities, *Nireaha v Baker* 1901 Appeal Cases 561; *In Re Rhodesia* [1919] AC 211; and *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2AC 399: *R V Earle of Crewe exparte Sekigome* [1910] 2 KB 526; *Sobuza II v Miller* [1926] AC 518; and *Nyali v Attorney General* [1955] 1 QB where, interestingly, it was observed that customary land title either never existed or was subsumed by statute or constitutional arrangements. This could not be.

Customary land and customary law, whatever our perception of it, existed before. To suggest this is not being sentimental. It is to suggest a reality based on that, before colonialism (and after colonialism), land was held, occupied or used under some law or arrangements. Annexure of (customary) land by colonial constitutional arrangementscould only premise on some form of land holding. Sovereignty, allegedly introduced by colonization, never affected the rights, however described, of indigenous people who occupied the land. Whatever the constitutional or statutory inroads, there were subsequent developments on existing customary land rights. It must be, therefore that, whatever the statutory and constitutional inroads were, all depends on the history and culture (customary law) of a particular legal system. One, therefore, must, as it must be, study the specific constitutional or legislative arrangements in the context of customary law:

> The power of use and alienation, or other grants and dispositions, is an attribute of ownership. This power is vested in the group leadership in their representative capacity. The various customary law regimes say of the Buganda, Lozi, or Ashanti, have certain recognized rules and procedures through which functionaries may legitimately act. These are, however, so diverse that they defy any attempt to present a general picture. It would even seem doubtful that chiefs or other traditional leaders always exercised land control or dispositive functions in their capacity qua chiefs. Thus, the precise manner of land control and *A.J.I.C.L. 69 administration in traditional communities is dependent on the nature and internal organization of the group (Akuffo K, 'The conception of Land ownership in African Customary Law and its Implications on Development," African Journal of International and Comparative Law, 57).

Authoritative works – a source of law or legal principles – supports ownership – and individual ownership of customary land. This court's decision in *Malemia and another v Tombole* is to the same effect. As the court below observed in *Mamra v Chikudzu (1968-70) 5ALR Malo 183*:"Ownership" has a very wide meaning, ranging

from absolute ownership to something very much less: see Jowitt, *Dictionary of English Law*, at 1283-1285 (1959). The court below in *Mauwa v Chikudzu*(1968-70) ALR Mal. 183 said:

> If the term "ownership" cannot include, in respect of customary land, the rights of use and occupation, then a large number of cases in which the rights are in question will fall within the jurisdiction of a subordinate court despite s.39(2)(a). Since the existence of customary land is no new-fangled concept, one must, I think, give the expression "ownership," in the context of s.39(2)(a) and of the prevailing circumstances of land tenure in Malawi, a liberal interpretation.

On sale of customary land the court below is unanimous that customary land cannot be sold by those to who a chief has allocated the land. In *Temuwa v Gwirani* then said:

> The allocatee has equal right to sub-let the use of the land permanently, temporarily or for a transitory use subject to the consent and authority of the chiefs. In this sense, therefore, customary land cannot be alienated by sale (*Roben v Bande*)

Roben v Banda, however, never decided that customary land could not be sold. Many decisions of the court below, however, express the view. *Kuwali v Kanyashu*relied on the decision the subject of this appeal. In *Leston v Republic* (2008) Criminal Appeal No 7 (MHC) (PR) (unreported) the court below said:

> To begin with, customary land is vested in perpetuity in the President, as the legal fetter, for the people of Malawi under section 25 of the Lands Act. No one individual person has title to it. Therefore, no one can sell it. All individuals on customary land only have right to user, not title to land. The right to user can be transferred, assigned, abandoned, forfeited or surrendered, but, the land cannot be alienated by sale (*Hon. David Fight v Saulosi Kandindo* Civil Cause No 1412 of 2005 (unreported) see also, *Jayshree Patel V Khuze Kapeta and Kaka Holdings Ltd* Civil Cause No. 3277, 2003 (unreported) *and Nicco J.G. Kamanga v. Jossianne le Clerq and Regional Commissioner for Lands* Civil Cause No. 2829 of 2006 (unreported). One Mabvuto therefore had no title or right to sell the customary land. Further he had no right to assign it to the complainant without the consent of the other family members who had assigned him the right to use the land pending re-distribution. In this vein therefore, the complainant could not have obtained title to the land".

I have not read*Faiti v Kandindo* (2005) Civil Cause No 1412 (MHC) (PR) (unreported) and *Kamanga v le Clerq* (2006) Civil Cause No 2829 (MHC) (PR) (unreported). *Patel v Kapeta and another* (2003) Civil Cause No 3277 (MHC) (PR) (unreported), however, relied on the reported cases of *Kambuwa v Mjojo* (1966-68) 4 ALR Mal 95 and *Mauwa v Chikudzu (1968-70) 5ALR Malo 183.* In *Patel v Kapeta and another* the court said;

> The defendants have submitted that customary land cannot be subject of a sale. The cases relied on are those of *Kambuwa v Mjojo*(1966-68) ALR Mal. 95 and *Mauwa v Chikudzu*(1968-70) ALR Mal. 183. It would be pretence and obvious lack of appreciation of reality to accept this submission without some qualifications. The statues of customary land has already been discussed above. Although it is vested in perpetuity in the President, its allocation for use or possession or occupation is done by chiefs under special or general directions of the President through the Minister. It follows from the situation as well as that of the *Kambuwa v Mjojo* that where the development has occurred on customary land, the developer has a right to dispose of that development. The disposal would entail a transfer of the right to use and occupy that customary land but it would not include right of ownership of that land because such right is not

> vested in the user or occupier but in the President. Although it is true that customary land cannot be sold, the incapacity relates to title of ownership only but does not extend to sale of ones right to use occupy and/or where one has invested in some kind of development on the customary land. For instance where one has planted trees or built a cottage on customary land allocated to him/her by the Chief in accordance with customary law, it should be possible for that person to offer for sale his/her trees or cottage.

In *Kambuwa v Mjojo,* the respondent, a brother to the husband of the appellant, a widow, sold land to another. The respondent, in selling land, never consulted the appellant. The assessors advised the judge that, on death of her husband, the appellant was entitled to the land. In allowing the appellant, the court below said;

> It follows that if the respondent had no authority or power to sell the premises, then it was impossible for him to pass any title to Mr. Kalulu; in other words he could not give Mr. Kalulu a title better than that which he possessed; and as we have seen, he has no title either in Africa law and custom or any other; or so I am advised.

Kambuwa v Mjojo, therefore, is not authority for that customary land cannot be sold. The brother of the deceased could not inherit the land, the wife could. The brother had no title to the land, he could not sell the land. The brother, therefore, could not pass title. If anything, the case suggests that the customary land would have been sold if the brother could inherit.

In *Mauwa v Chikudzu*, the question was whether the subordinate court could handle a trespass action wheresection 39 (2) (a) of the Court's Act expressly ousted the jurisdiction of the subordinate court where title to land was involved. The case, therefore, never decided that customary land can be sold. In course of the judgment, having determined that the land could not be clearly stated to be public land, private land or customary land the court said:

> Assuming the land to be customary land, it would seem that neither party could exclude the jurisdiction of a subordinate court by claiming "title" to the land, since if the land is land within the area of a chief no person could be given by the chief anything more than a right to the use and occupation of the land: see the proviso to s.26 of the Land Act (*cap, 57:01).* Whether s.26 is, by the use of the words "administer and control," intended to, and does, empower the Minister go give any sort of title in customary land to a private individual may be a matter for speculation. Any such title would require to be one which did not conflict with s.25(1), by which – "all customary land is . . . declared the lawful and undoubted property of the people of Malawi and is vested in perpetuity in the President for the purpose of this Act

One reason advanced overtly and clandestinely in decisions of the court below is that the vesting of land in the President under section 25 of the Lands Act makes customary land inalienable and, therefore, unsalable. As already seen, this stems from the decision of *St. Catherine's Milling and Lumber Co. v. the Queen*, followed profusely beyond its borders. Section 25 of the Lands Act does not make customary land inalienable. The court in *Canada Pacific Ltd v Paul* explains the reason for the requirement of inalienability of customary land:

> This feature of inalienable was adopted as a protective measure for the Indian population lest they be persuaded into improvident transactions. In *Guerin*, supra, this Court recognized that the crown has a fiduciary obligation to the Indians with respect to the lands it holds for them. On the nature of Indian interest Wilson J. noted at p. 349:
>
> The bands do not have the fee in the lands; their interest is the limited one. But it is an interest which cannot be derogated

> from or interfered with by the Crown's utilization of the land for purposes incompatible with the nature of Indian title unless, of course, the Indians agree.

Equally, section 25 of the Lands Act had as its aim to protect Malawians from disposing of customary land unfairly. Section 25 of the Act also prevented the State from negligently using aligning land to others or other uses inconsistent with the rights of the people of Malawi. Customary land vests in the president who has a fiduciary duty not to use customary land to the detriment of the people of Malawi.

Our Constitution does not, like section 102 of the Samoan Constitution, prohibit alienation of customary land. In Samoa, as represented by our sections 5, 27, 28, 29 and 30 of the Lands Act, knows of three exceptions captured in this passage by Jennifer Corrin, 'Customary Land and the Language of the Common Law, Common Law World Review 37 (2008) 305-333, DOI: 10.1350/clwr.2008.37.4.0176), 314. :

> Alienation or disposal of any interest in customary land, which constitute about 81 percent of all land, is prohibited. Article 102, the only article in the Constitution that requires a referendum in order to be changed, states that it is unlawful to alienate or dispose of an interest in customary land. However, there are three exceptions to this. The first and only direct means of alienation is by compulsory acquisition under the Taking of Lands Act 1964. The second is by grant of a lease or a licence under the Alienation of Customary Land Act 1965. These two methods of alienation are recognized as exceptions by the Constitution. The third possibility is through the concept of *Pulefa'amau* (registration of authority). Section 10 of the Land and Titles Act 1981 permits the court to register pule over customary land in the name of an individual, whereas traditionally it would lie with the aiga and be attached to matai title.

In Malawi the first exception is under section 3 of the Land Acquisition Act. The second is covered by section 5 (1) of the Lands Act:

> The minister may make and execute grants, leases or other dispositions of public or customary land for any such estates, interests or terms, and for such purposes and on such terms and conditions of public or customary as he may think fit.Provided that the Minister shall not make a grant of (a) Customary land to any person for an estate greater than a lease of 99 years (b) any public land or, notwithstanding paragraph (a) any customary land to any person who is not a citizen of Malawi for an estate greater than a lease of 50 years, unless the Minister, in relations to a particular case or class, is satisfied that a greater estate is required for the realization of investment.

The third is covered by section 30 of the Lands Act;

> Nothing in this Act shall be construed as preventing the application of the Customary Land (Development) Act to any customary land and the subsequent registration of such land under the Registered Land Act as private land.

The government has a limited power under section 27 to declare customary land permanently or temporarily customary land as public land. Section 27 (1) of the Lands Act provides:

> Wherever it appears to the Minister that any customary land is needed for a public purpose, that is to say a purpose which is for the benefit, direct or indirect of the community as a whole, or a part of a community, he may declare by notice under his hand and published in the Gazette, that such land is public land, and thereupon such land shall become public land: Provided that this subsection shall not apply to any customary land required for use as a road or for the widening or diversion, but such land shall be acquired for such purpose under or in accordance with the Public Roads Act.

Section 27 (2) of the Lands Act provides:

> Whenever any customary land is required for temporary use for a public purpose, such use not being in the opinion of the Minister likely to necessitate occupation for a period in excess of 7 years, the minister may authorize the temporary use and occupation of the land for such public purpose, and such land shall remain customary land through the period of temporary use and occupation: Provided that, on the expiry of such period, the Minister may authorise such temporary use and occupation for a further period of three years.

Moreover, under Samoan law, customary dispositions, like in our section 25 of the Lands Act, are preserved. Jennifer Corrin, writes in 'Customary Land and the Language of the Common Law, Common Law World Review 37 (2008) 305-333, DOI: 10.1350/clwr.2008.37.4.0176):

> The Act also preserves the system of customary disposition, providing that, subject to other provisions of the Act, 'every transaction or disposition of or affecting interests in customary land shall be made or effected according to the current customary usage applicable to the land concerned'. This position is strengthened by a provision that only Solomon Islanders are permitted to own an interest in customary land. A Solomon Islander is defined as a 'person born in Solomon Islands who has two grand-parents who were members of a group, tribe or line indigenous to Solomon Islands'. Customary land may not be transferred or, unlike Samoa, leased to a non-Solomon Islander unless that person is married to a Solomon Islander or inherits the land and is entitled to an interest in custom. It is not clear whether a licence may be granted to a non-Islander to use the land.

The dispositive power of customary land is implicit in section 26 of the Lands Act and the definition of customary land in section 2 of the Lands Act. The disposition is governed by customary law. Section 29 (2) of the Lands Act bases on this dispositive power of customary land:

> Notwithstanding any other provision in this Act, the Minister may give to any Chief directions relating to the disposition of customary land, or the occupation thereof by any persons or class of persons specified in such directions, and may by such direction restrain any native authority or person from procuring the removal of any such persons or class of persons from customary land.

The word used is 'disposition.' The section does not restrict the word disposition. The disposition can be by grant, sale or demise. The Minister may give directions to a chief on any and any manner of disposition. There is nothing in this section that restricts disposer to the chief. If the comma in the section is disjunctive, therefore, there is no restriction on the nature of a disposition – grant, sale or demise – or who – chief or any person – should dispose. If the comma is not disjunctive, however, the phrases 'by any persons' or 'class of persons' qualify disposition. Consequently, customary land can be disposed by anyone and in any manner – including sale. The section presupposes this dispositive power and empowers the Minister to give any directions if there is any disposition. A chief, therefore, can handle any disposition in any way unless the Minister has given any directions.

The Lands Act neither prescribes nor proscribes any disposition. Consequently, it does not prohibit or authorise sale of customary land. Prohibition of a sale cannot be inferred from section 25 of the Lands Act from that the property belongs to the people of Malawi and that it vests in the President. The vesture just makes the President the ultimate owner or holder. Vesture in the president does not exclude other secondary owners or holders. That customary land is the property of Malawi does not comport that individuals cannot own or hold customary land. Malawian individual ownership adds to property belonging to all Malawians.

Section 28 (1) of the Constitution creates a right for any person to be able to acquire property alone or in association with another. The section recognises individual and collective acquisition. The section sets no limit on what property – including customary law – that can be subject of acquisition. The right to acquisition of property – including customary land – can be limited by law, legislation, common law and customary law. Section 25 of the

Land Act does no restrict individual ownership or acquisition of customary land. It is in the nature of statutes – more especially, those that limit rights, including constitutional rights – that they must be stated with clarity and precision. Rights, not explicit, may be implied. Negation of a right cannot be implied – or at least, not that readily.

Section 2 of the Lands Act, however, defines customary land as land held, used and occupied under customary law. Customary law, is therefore, the determinant of how customary land is held, occupied and used. The decisions of the court below never fully investigated how customary land is held, occupied or used under customary law. This is surprising given that sections 2 and 26 of the Lands Act exult customary law as the legal system underpinning the land. Customary law, certainly ranks lower to statutes. Where, however, there is no statute, customary law is in *pari pasu* with other laws (*Kamphoni v Kamphoni* (2012) Matrimonial Cause No 7 (MHC) (PR) (unreported) *Kishindo v Kishindo; Chakumba v District Commissioner and another* (2013) Civil Appeal No 53 (MSCA) (unreported). In *Pusi v Leni* High Court, unreported, Solomon Islands, www.paclii.org, SBHC 100, Muria, CJ, said:

> [I]t is a fallacy to view a constitutional principle or a statutory principle as better than those principles contained in customary law. In my view, one is not better than the other. It is the circumstances in which the principles are applied that vary and one cannot be really substituted for another.

In *Canada Pacific Ltd v Paul* case Dickson J. elaborated on the nature of Indian title at p. 382.

> It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal usufructuary right. Any apparent inconsistency derives from fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the categorization quite accurate.

The customary land right is a legal right – whose ultimate title is with the President. There are, therefore, intermediary or primordial titles to land. The Court continued:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not strictly speaking amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians.

It is important, therefore, to understand the customary land title from the common law and equity as well as customary law.Customary land title is a proprietary right – not a mere license. It competes on equal footing with other proprietary interests as to disposal – something the court below recognised in *Patel v Kapeta and another:*

> The general position of the law is that interest in land is capable of being disposed of. This interest would include right of ownership or licence to possess and occupy land. The disposal can be outright sale or tenancy for a fixed term. It follows, therefore, that a person who has such a right, subject to the legal requirements, would have a right to enter into a contract in respect of such right.

Section 2 of the Lands Act recognizes a customary law land proprietary interest. Land, now constituting the Malawi territory under section 3 of the Constitution, was in the first place land held by the inhabitants of Malawi under customary law. The British Order in Council, creating these lands as the British Protectorate, was based on that the land on which the protectorate was decreed was customary land – land held, occupied or used under

customary law. The Nyasaland Protectorate Order in Council and the 1966 Constitution of Malawi recognized as much and as such. The Land Act, registration under the various constitutions or constitutional arrangements reiterate this notion. The Land Act, therefore, is not the origin of the proprietary right under customary law in customary land. The Land Act is not the origin of customary land. It is important, therefore, to investigate the nature of customary land proprietary right.

The Canadian Supreme Court confirms that the customary land title is the older title, predating sovereignty and settlement, and the other, fee simple, etc., owe their origin to sovereignty:

> Another dimension aboriginal title is its source. It had originally been thought that the source of aboriginal title in Canada was the Royal Proclamation, 1763: see *St Catherine Milling*. However, it is now clear that although aboriginal title was recognized by the proclamation, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however is relevant in two different ways, both of which illustrate *sui generis*nature of aboriginal title. The first is the physical fact of occupation, is proof of possession in law: see Kent McNeil, Common Law Aboriginal Title (1988), at p.7. Thus in *Guerin*, supra Dickson J. describe aboriginal title, at p. 376, as a "legal right derived from the Indians' historic occupation and their possession of their lands," what makes aboriginal title sui generis is that it arises from possession before assertion of British sovereignty, whereas normal estates like fee simple, arise afterwards: see Kent McNeil, "The meaning of aboriginal title", in Michael Asch, ed Aboriginal and Treaty Rights in Canada (1997),135, at p.144. This idea has been further developed in *Roberts v. Canada* (1989) 1 S. C .R.322 where this court unanimously held at p. 340 that "aboriginal Title," pre-dated colonization by the British and survived British claims of sovereignty" (also see Guerin, at p. 378). What this suggests is a second source for aboriginal tittle – the relationship between common law and pre-existing systems of aboriginal law.

The relationship between the common law and existing customary law is not one of exclusion but of complementarity. The common law understanding of the customary law title is not any less or more pronounced than the customary law. This is because the customary land title is based on another aspect:

> A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is sui generis and distinguishes it from normal property interests.

This is why section 25 of the Lands Act requires that the chief must act in accordance with customary law.

The communal aspect of customary land is that the land belongs to the people of Malawi. This communal aspect of land however does not, as the Lord Chief Justice of the Canadian Supreme Court thinks,comport that customary land title cannot be owned by individuals. The Chief Justice falls short of discussing what nature, if any, interest or title individuals have in this collective continuum. The Chief Justiceobserved:

> Although cases involving aboriginal title have come before this court and Privy Council before, there has been a definitive statement from either court on the content of aboriginal title. In *St Catherine's Milling*, the Privy Council, as a "personal and usufructuary right," but declined to explain what that meant because it was not "necessary to express any opinion upon the point" (at p. 55). Similarly, in *Calder*, *Guerin*, and *Paul*, the issues were the extinguishment of, the fiduciary duty arising from the surrender of, and statutory easement over land held pursuant to, aboriginal title, respectively, the content of title was not at issue and was not directly addressed.

The Chief Justice concludes:

> Although the courts have been less than forthcoming, I have arrived at the conclusion that the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title.

The Chief Justice of the Supreme Court of Canadain *Delgamuuk v British Columbia*clarifies communal ownership by suggesting that the scope and extent of the customary land title is ultimately determined by the group – the people who own the land under customary law. Consequently, it is the customary law of this generic group that determines the nature of the customary land title.

The Chief Justice in Justice *Delgamuuk v British Columbia*, correctly, premises possession and occupation of customary land on the title.

> Aboriginal title is a right to the land itself. This land may be used, subject to the inherent limitations of aboriginal title, for a variety of activities ... Those activities are parasitic on the underlying title."

The title, therefore, is the basis of possession and occupation. Occupation and possession are a consequence of customary land title. It must be that it is the title – the customary land title – that engenders the right to occupation or possession. Conversely, occupation and possession are the evidence of title. They are not, therefore, the title themselves so that truly it must be said, as it has always been said, that possession is nearer title.

This position, namely that, although land is held communally, individuals have, by allotment of a parcel of land held communally, right akin to title, is supported by written authors, within and without (Mamdani, M., *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism,*1996, Princeton, New Jersey, Princeton University Press; Nankumba, J., 'Customary Land Tenure and Rural Development: The Case of Lilongwe ADD,' 1986, *University of Malawi Journal of Social Science,* 57; Kamchedzera, G., 'Land Tenure relations, the law and development in Malawi, 1992, in *Malawi at Cross-roads; the Post-colonial Economy,* Harare: SAPES Trust; Okoth-Ogendo, WHO., 'Some issues of Theory in Studies of Tenure Relations in African Agriculture,' 1989, 59 *Africa: Journal of the African International Institute* 6; Cousins B, 2002, 'Legislative Negotiability: Tenure reform in Post-Apartheid South Africa, *Negotiating Property in Africa,* Portsmouth, New Hampshire, Heinamann; Akuffo K, 'The conception of Land ownership in African Customary Law and its Implications on Development," *African Journal of International and Comparative Law*).There is, however, quite some strength in the suggestion by the Chief Justice of the Supreme Court of Canada that it is the community – the people of Malawi communally, through their customary law – that determine the rules. This proposition escalates the importance of customary law in determining the relationship that the people of Malawi have with their customary land. It is the customary law that determines the disposal of customary land among the people of Malawi.

Were it, as it is suggested, that the Land Act itself prohibited sale of land, *cadit questio.* Equally, were it the customary law that sale of land is prohibited, that would reinforce the notion that customary law is fixed in space and time. It is not in the nature of customary law – indeed of any other law – that it is or should be static. Moreover, it is a tenet of our constitutional law and theory that in development of customary law – just as it is with common law – the principles of the constitution must be promoted. This is not only to suggest that customary law should conform tothe constitution, which it must. It is to stress that, in fact, customary law is organic and progressive.

Consequently, if it was thought in yester eons that customary land, by its very nature or understanding of the customary title, is not salable, this is not the case any longer. That allotment of customary land creates an individual right – in itself, if at all, a shift in customary law – has changed the customary law on sale of customary land. In this case, and many like it a Chief, acting as such Chief or through a Village Headman can, where an individual or group has been allotted a parcel of land at customary law, sanctioned, as required under section 29 (2) of the Land Act, allow for disposition of land by sale.

At customary law, customary land is owned or belongs at the same time to a group and/or individuals to who the land is allocated. This general consideration includes the right to dispose the allocated land *donatio inter vivos*or *donatio mortis cause* to family and others and the right to the heirs to inherit the land at intestacy. At customary law, these powers are not understood as akin to a license "from a chief", or tenancy at will from a chief.

They are understood as "ownership" of the land allotted or the land allotted "belongs" to an individual or group allocated the land. It is not accidental or incidental, therefore, that all traditional leaders in their testimony and in their witness statement, state that the land "belongs" to those who it is allocated. It must be, therefore, that, at customary law, those allocated customary land actually own the land. Anyone allocated the land is let in possession, to occupy and use.

Borrowing from English law concepts, possession is nearer title. Those to who possession has been given, have absolute and exclusive rights. The rights are absolute in the sense that they are not subject to be taken away for as long as the person allocated is in possession, use, or occupation. It was never customary law that a chief, once land has been allocated would, in the circumstances described, repossess or relocate the land allotted at customary law. It is not customary law that once allocated, the subject could not dispose of the land to his children, thereby divesting oneself of the possession of land allotted. The possession was exclusive because at customary law the person allocated the land was entitled as of right, to exclude anyone, including a chief, interfering in anyway with the rights conferred by that allocation. This is the scope and profundity of the customary land title. It is not, therefore, surprising that sections 2 (1) and 25 of the Lands Act recognize this customary land title.

Whatever is stated in other constitutions or statutory arrangements, one must essay to interpret and understand our statutory provisions. Whether it is section 2 (1) of the Lands Act which defines customary land or section 26 of the Lands Act about customary land being the undoubted property of the people of Malawi and vesting in the president customary land, what is central is that this is land which is "held, occupied or used" under "customary law". There are therefore three distinct aspects – holding, occupation and use – to customary land.

Holding is more than a license. It connotes a landholding. It connotes an entitlement beyond possession. It connotes possession or ownership (*Kamphoni v Kamphoni; Malemia and another v Tombole*). Conceptually, somebody could be holding the land albeit not in possession. Holding, moreover, is distinct from occupation of the land. Land could be held by one yet occupied by another. Occupation is closer to possession, but is not necessarily possession. One can occupy land while it is in the possession or holding of another. Use is neither holding nor occupation. Land could be used while in possession or holding of another. There is nothing in section 2 (1) of the Lands Act that suggests holding, occupation and use must occur simultaneously. The holding, occupation and use in sections 2(1) and 25 of the Lands Act cannot be referring to the President, in who the land is vested, or the Minister or Chief, who are given the power of management and control of occupation and use. The holders, occupiers and users of customary land are the people who ultimately are the owners in whom property, notwithstanding vesture in the president, reposes. The people of Malawi own the land singly and corporately. They own this land to the exclusion of people who are not people of Malawi or its inhabitants (subject to section 5 (1), sections 25 and 26 of the Lands Act).

Corporate ownership by Malawians is circumscribing and prescribing. It circumscribes those who – together – are the owners of customary land. It is prescriptive – it allows anybody in the group – an individual – to be entitled to an allocation or acquisition of customary land any time anywhere there is customary land. The Land Act does not allot land to individuals, groups, families, etc. All these corporately own customary land. Land, however, can be allocated to an individual or groupings of individuals.

The land held, occupied or used, however, is held, occupied under customary law. At customary law, like in any other body of law, holding, on the one hand, is distinct from occupation and use, on the other hand. Holding goes to a right, entitlement or interest in the land. Occupation and use go to what happens on or with the land. Holding, therefore, refers to the consequences of allotment of land to an individual Malawian or a group of Malawians. It is distinct from occupation and use.

Occupation and use may be evidence of holding. There can be holding of customary land without occupation or use of it. In rustic societies, land allocated for planting crops or construction is held by individuals singly or as a group. Land for animal husbandly, however, may be occupied or used communally without being held in this sense. Critically, there could be land – customary land – that is not held – in that sense – occupied or used. This distinction is important because of the wording of section 26 of the Lands Act.

Section 26 of the Lands Act, therefore, gives the Minister and Chiefs distinct powers. The Minister has got powers to control and manage all customary land – the powers are only of control and management. That control

pervades on land actually held, occupied and used – in the first place – at customary law. Where, therefore, customary land is actually held by an individual or a group, the Minister can control or manage its use and occupation. For example, a Minister may refuse an individual or group of individuals who, in land used by a holder for dwelling purposes, is being used for unlawful purposes. Where, however, no one holds the customary land the Minister can under section 26 of the Lands Act manage and control its use – including directing that it not be held by anyone.

The distinct words used in section 26 are that a chief may 'authorise the use and occupation of customary land." One must start from the premise that the chiefs' powers base on that the land is customary land. That land is land which – in the first place - is held, occupied and used under customary law. That land may either already have been allocated to a landholder or is unallocated to a landholder. The word 'authorise' in section 26 could, therefore, mean that, for land already held, a chief could authorise new uses or occupation. For land not so allocated, a chief could authorise its use and occupation – including allocation to a holder. The exclusion of the word holding in section 26 of the Lands Act– which appears in the definition section of customary land in section 2 with the words occupation and use – is deliberate. This is because holding of customary land is governed by customary law – and at customary land landholding is conferred by a chief, which includes a village headman, when allocating land. Authorizing holding of customary land is excluded from section 26 – a chief can only authorise occupation and use. Holding land is purview of customary law – and at customary law that is only done by a village headman – not even a chief.

Section 26 of the Land Act clearly omits holding of customary land from a chief. The applicable principle is "*expressio unius est exclusio alterius* (*Chakwantha v Prime Insurance* (2010) Civil Cause No 2195 (HC) (PR) (unreported) and later *Sukali v Southern Bottlers and another* (2012) Personal Injury Case No 774 (MHC) (PR) (unreported); and *Malemia and another v Tombole* (2011) Civil Appeal No 26 (MSCA) (unreported)). Where land, under section 2 of the Land Act, could be held, occupied or used under customary law, the exclusion of holding in section 26 of the Land Act can only be that the legislature intended achief to authorise use and occupation of customary land as described. . The Legislature recognized the sanctity of the customary land title and customary law. This court in *Malemia and another v Tombole* said:

> We observe that the proviso in section 26 of the Land Act recognises the customary law with regard to land title. The section gives a Chief the power to authorise the use and occupation of land and not the holding of land which entails ownership as is defined in Collins concise dictionary third edition, the definition read **"To Hold" is to have the ownership or possession of something."**

The chief, however, can authorise the 'use' of customary land. The word 'use' is a broad term and could refers to many uses of land – including selling. Selling cannot, therefore, be excluded from the uses that a customary landholder may deploy and uses that a chief may under section 26 of the Lands Act authorise.

The Legislature also provides ways in which the government,on the one hand, and a customary landholder may affect customary land. As already seen, the Minister could convert customary land into public land. Private land after compulsory acquisition under section 3 of the Lands Acquisition Act and, under section 27 of the Lands Act can reconvert into customary land. Under the Lands Act, however, individuals can convert customary land into private land. Section 2 of the Lands Act defines private land:

> "Private land" means all land which is owned, held, or occupied under a freehold title, leasehold title or a Certificate of Claim or which is registered as private land under the Registered Land Act.

The power in section 5 (1) of the Land Act to a Minister to make and execute leases on customary land enables customary landholders to convert customary land into private land and enable sale of such land by individuals.

The Land Act however, does not provide for disposal of customary land by sale. It is this omission leads some to regard customary incapable of being sold at all by an individual or group of individuals. Justification for the proposition seems base on the principle of tenure under English law – all land vests in the crown. Vesture of land in the crown does not exclude the right of a crown's subject from selling freehold. There is, therefore, no reasons

why, becausesection 25 of the Land Act vesting customary land in the President and section 26 declaring all customary land as property of the people of Malawi, can be basis for prohibiting sale of customary land title. Customary land title is a proprietary right albeit different from freehold – fee simple. It is improper, therefore, to infer non-salability of a customary land title from a statute that *per force* clearly declares such land as held, occupied or used under customary law. The question, therefore, must be whether customary law proscribes or prescribes sale of a customary land?

There was a time when there was plenty of land and the uses of land were limited in scope and numbers. Where there is a lot of land, the land is almost valueless and a market of land would not exist. Equally, where the uses of land are essentially aboriginal – growing few crops and herding – huge land remains unused and unattended. This state of affairs cannot be a pretext for suggesting that at customary law land could not be sold. There was no need to sell the land. Customary law could not have developed to provide for sale of land:

> With specific regard to alienation by sale, whilst customary law systems recognised such transactions, they were not routine in an African environment that was predominantly subsistence (Akuffo, 'The conception of Land ownership in African Customary Law and its implications on development).

Moreover, the proposition that customary land could not be sold is unsupported by history.The customary land title precedes colonization. This is a historical fact. Customary law could be sold (Duly, AWR, "The Lower Shire District: Notes on Land Tenure and Individual Rights, *Nyasaland Journal 1 No 2,* 1948, 11-14; Ibik, JO, *Restatement of African Law,* 4, Malawi II, "The Law of Land, Succession." It is also a historical fact that most colonial settlers bought (customary) land from chiefs in exchange of beads, weapons, etc.:

> Firstly, land has become a commodity capable of alienation by way of sale as noted above, throughout Africa ... Indigenous functionaries, whether family or communal elders or chiefs, were often invested with legal authority to cede or alienate land to foreigners ... (Akuffo, 'The conception of Land ownership in African Customary Law and its implications on development).

Contracts, written or oral, based on these sale arrangements, are matters of adjudication and scholarship ('The conception of Land ownership in African Customary Law and its implications on development; James, R W, *Land Tenure and Policy in Tanzania,* 1971; Woodman G R, 'Land law and the Distribution of Wealth,' in *Essays in Ghanaian Law,* 1971). Customary land was therefore, salable and sold. The pedagogy in the suggestion that land could not be sold at customary law is the proposition that customary law is static. Based on static customary law, it is easy to conclude that there was no sale at customary law of customary land based on that there was no sale of land at customary law in yester years.

The statutory recognition that customary land was land held, occupied or used under customary law suggests that the disposal or allocation of land within the people of Malawi who own property commonly or singly is governed by the sale rules – customary law rules. These rules are internal to customary law and not easily amendable to the external point of view. These internal rules are not static; that will make customary law static. These internal rules are determinant and evolutionary. Consequently, on the static view of customary law, customary land should not and cannot be sold.

Customary law, however is not static on sale of land. As noted, when an opportune time and event arose, chiefs did sell otherwise sacrosanct customary land. The trend of customary law, evidenced by expert witnesses and conveyancepractice is that, at customary law now, customary land can be and is sold. A family can sell part of their land as long as they agree. Moreover an individual allotted the land may, with the consent of the family, sell part or excess land. This trend is not peculiar to Malawi.

Most land in Africa is held under customary law and not the civil or common law tenure. While land was not traditionally sold at customary law, the trend is, under advanced customary law, for selling:

> Thus by 1975, Woodman was able to conclude of the ownership right of a member of a typical community in Ghana, which he called, usufruct in the following terms. The usufruct is ... in practice a valuable right. It has recently

> acquired a clear market value by becoming freely alienable (Akufo, 'The conception of Land ownership in African Customary Law and its implications on development).

The selling of customary land does not make land so sold private land. A land albeit sold, remains customary land and, therefore, remains the property of the people of Malawi and vested in the President. The sale of the land does not alter the essence of the customary land. It can be converted into private land under section 5 (1) of the Lands Act by a grant of a leasehold. It is for this reason that a practice – conveyancing practice – has emerged where there is an intention to, under section 5 of the Lands Act, to obtain a lease on otherwise customary land.

Conveyancing practice, for sale of customary land, where a lease under section 5(1) of the Lands Act is intended or pursued, could only develop one way. The alternative is to require a customary land holder to apply for lease under section 5(1) of the Lands Act before or without selling or agreeing to sell the land. That meansthe customary landholder first converts, because of section 5 (1) of the Lands Act, customary land into a leasehold – private land. The simplest, therefore, is to agree to sell or sell the customary land holding so that the buyer retains the customary land title which, if the buyer wishes, can convertinto private land by grant of leave under section 5 of the Lands Act. A customary landholder may find it tedious, slow and costly to having first to convert customary land into private land under section 5 (1) of the Lands Act. Conveyancing practice cannot compel a customary landholder to first convert a customary landholding to a leasehold.

In pursuing to sell customary land, because of collective, individual ownership and common ownership in customary land, sale, like any other disposal, has to conform to customary law. Where, therefore, under customary law consents are necessary, they should be obtained. At customary law consents for sale of customary land occur at different levels. In certain respects, the consent of a chief is necessary. This does not mean that, because, there is no one above the chief cannot dispose of land not allocated on his own. Where customary land has not been given to a chief, sale can, based on common and collective ownership, be with the consent of all in the village. That consent is not necessary for lands allotted to a chief – land where a chief is a landholder under customary law. Where a village or family want to sell land it is the consent of all that is peremptory. For individuals, a chief's authorization is necessary both at customary law and under section 25 of the Lands Act. The same applies where consultations are necessary (*Malemia and another v Tombole*).

Where there is an agreement to sell an interest in land – customary land holding – the buyer obtains an equitable interest in the land. That equitable interest can only be defeated by the purchaser for value without notice of the equitable interest (*Patel v Gondwe* (2013) Civil Cause No 320 (MHC) (unreported), following in*Jerome v Kelly (Her Majesty's Inspector of Taxes)* [2004] 25; *The Registered Trustees of Mlombwa CCAP v Chauluka* (2011) Civil Cause No 234 (HCM) (PR). The House of Lords cited these remarks in *Lysaght v Edwards* (1876) 2 Ch D 499, 506:

> What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.

The House of Lord considered the statements trusteeship by Lord Cairn in *Shaw v Foster* (1872) LR 5 HL 321, 338 and Lord Justice Cotton in *Rayner v Preston* (1881) 18 Ch D 1, 6. Lord Cairns said:

> [T]hat the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it.

Cotton LJ,said:

> An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser . . .

The modern expression of the rule is the judgment of Mason J in *Chang v Registrar of Titles* (1976) 137 CLR 177, 184 where he said:

> It has long been established that a vendor of real estate under a valid contract of sale is a trustee of the property sold for the purchaser.

The relationship begins at the conclusion of the contract. The House of Lords proceeded as follows:

> However, there has been controversy as to the time when the trust relationship arises and as to the character of that relationship. Lord Eldon considered that a trust arose on execution of the contract (Paine v Meller; Broome v Monck). Plumer M.R. thought that until it is known whether the agreement will be performed the vendor 'is not even in the situation of a constructive trustee; he is only a trustee sub modo, and providing nothing happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay' (Wall v Bright). Lord Hatherley said that the vendor becomes a trustee for the purchaser when the contract is completed, as by payment of the purchase money (Shaw v Foster). Jessel M.R. held that a trust sub modo arises on execution of the contract but that the constructive trust comes into existence when title is made out by the vendor or is accepted by the purchaser (Lysaght v Edwards). Sir George Jessel's view was accepted by the Court of Appeal in Rayner v Preston. It is accepted that the availability of the remedy of specific performance is essential to the existence of the constructive trust which arises from a contract of sale".
>
> These considerations, however, should not be without the importance of the contract. In *Rayner v Preston* Jacobs J said:
>
> > Where there are rights outstanding on both sides, the description of the vendor as a trustee tends to conceal the essentially contractual relationship which, rather than the relationship of trustee and beneficiary, governs the rights and duties of the respective parties.

The House of Lords concluded:

> It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the Court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, such as rescission of the contract (either under a contractual term or on breach). If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full.

> The equitable interest inured to the claimant on the date of the execution of the contract, the date the parties concluded the agreement, not necessarily the date of the payment of the price.

In this case, therefore, the Umugomba family, from whom the appellant bought customary land, did not have a licence in the customary land. The Umugomba family had a proprietary interest in the customary land.The Umugomba family were not tenants at will. Their customary law interest in land is inadequately described as usufruct. The customary land title is sui generis. The use of the word 'held' in section 2 of the Lands Act suggests ownership or possession in customary land. There is nowhere in the Lands Act where there is suggestion that customary land cannot be owned by a community, a family or individual. Section 25 of the Lands Act, that vests customary land, envisages holders, users and occupiers of customary land from the people of Malawi to who customary land is their undoubted property. Section 25 of the Lands Act just makes the president the ultimate owner, not the only owner. Section 25 of the Lands Act is just declaratory of customary land title that existed for the people of Malawi before the British Protectorate. There is nothing in section 25 of the Lands Act to suggest thatbn there cannot be secondary ownership or intermediate title to land. There is no doubt that at customary law land can be owned. The Umagomba family, therefore, had a proprietary interest which it could dispose.

The right to exclusive possession or ownership by a community, family or an individual comports a right to dispose by grant, demise or any other disposal, including a sale. Land ownership at customary law can be communal, individual or common. The manners of ownership is ingrained in the single title and the manners of ownership can coexist and are not mutually exclusive. . In this regard the sale to the appellant had all the essential consents and approvals from family to chiefs. Of course, the contract was reduced to writing. What is critical is that the appellant paid the price and she was let in possession.

When a buyer, on an agreement to sale land, pays (part of) the price and the seller lets the buyer in possession, a buyer acquires an equitable interest in the land although there is no detailed written agreement between the buyer and the seller as can be seen from the Ugandan authorities of (*Samakula and another v Setimba* [2014] UGHCLD 35; HC-land-division-2014-35.doc); *Katarikawe v Katuramu* (1997) HCB 187; *Kadingidi v Alphonse,* (HCCS No 289 of 1986; *Alibhai and others v Karia and another* (SCCA No 53 of 1995). Moreover, when a person buys land which is in possession of the other is not a *bona fide* purchaser without notice (*Desiranta and another v Joseph and another* (HCCS) No 496 of 2005; *UP & TC v Katumba* [1977] IV KALR 103 and *Samakula Setimba,* it was decided that one who purchases land when another is in possession is not a *bona fide* purchaser without notice. A duty, therefore, arises to inquire about the occupiers' interest in the land.

In *Daniels v David* [1803-1813] All E R 432, 43.53, Eldon, LC, said:

> On one point in this cause there is considerable authority for the opinion I hold; that, where there is a tenant in possession under a lease or an agreement, a person purchasing part of the estate must be bound to inquire on what terms that person is in possession. If, for instance, he is occupying tenant under a lease for forty-five years, the purchaser is bound by the fact that he is entitled to that term if he does not choose to inquire into the nature of his possession, the tenant being in no fault but enjoying according to his title. Then if in the instance of such a term the tenant would be entitled against a purchaser, why is not his title good for a greater interest? In *Douglas v.Whitrong* (2), the tenant was not bound to know and did not know, that it was necessary for him to make any communication of the option, which had had by the contract with his landlord to become the purchaser; and *LORD KENYON* held that there was nothing that could affect his conscience in favour of the purchaser, having no communication with him. My opinion, therefore, considering this as depending upon notice, is that this tenant being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity, repelling the claim of a subsequent purchaser who made no inquiry as to the nature of his possession. That was the doctrine, laid down by *Lord ROSSLYN* in *Taylor v Stibbert* (1), to which I referred, and think it right.

This was a case where the first respondent knew that the appellant paid for the land and was in possession. This was not a case where the first respondent did not know that the appellant had an interest and was in possession.

The appeal should, therefore, be allowed. The appellant is entitled to the declaratory orders sought. The first respondent has no better title than the appellant. The appellant is entitled to damages. The Registrar of this Court below will assess the damages. The construction of the structure on the appellant's land was trespass – it matters less that the first respondent built structures on the appellant's land (*Zindawa Randere,* (1987) Civil Cause No 67 (MHC) (PR) (unreported), approved in *Malemia and others v Tombole*. This was trespass, nonetheless.

The appellant is entitled to costs in this court and the court below..

Made this 8th day of February 2017

A K C Nyirenda

CHIEF JUSTICE

D F Mwaungulu.

JUSTICE OF APPEAL

A D Kamanga

JUSTICE OF APPEALGHTT