

IN THE SUPREME COURT OF APPEAL OF MALAWI

MSCA CIVIL APPEAL NUMBER 58 OF 2015

[Being Civil Case Number 586 of 2008 High Court of Malawi Lilongwe District Registry]

BETWEEN:

VILLAGE HEADMAN NASOSA & HIS SUBJECTS

APPELLANT

AND

VILLAGE HEADMAN MPHANDAUYO II[SUING ON HIS OWN BEHALF

AND ON BEHALF OF HIS SUBJECTS]

RESPONDENT

Coram:

THE HON. JUSTICE L P CHIKOPA SC JA

THE HON. JUSTICE F E KAPANDA SC JA

THE HON. JUSTICE A D KAMANGA SC JA

Msuku Mr. of Counsel for the Appellant

G Kadzipatike Mr. of Counsel for the Respondent

Chimtande Mrs. Recording officer

JUDGMENT

Chikopa SC, JA

This matter is about title to or ownership of a piece of land at Mphandauyo II Village, TA Kabudula Lilongwe district. In the Court below the matter was commenced by way of Originating Summons. Before then it had been to various fora before it finally landed in the said Court. It had been to the Ministry Responsible for Land Matters. To the Office of the President and Cabinet. To the Ombudsman's office. To the Legal Aid Bureau. And also the District Commissioner Lilongwe. Actually, and if truth be told this matter could

have been dealt with in a more efficient, effective and less costly fashion if only those that were tasked to look at it had done so in good faith and on sound advice.

The facts will show that the land in dispute was part of land that was demarcated into what was known as 'ndunda' in 1973. The protagonists herein had their own respective 'ndundas' complete with documentation. Problems however arose at the end of the program. Instead of each of the protagonists sticking to their respective 'ndundas' the Respondents i.e. VH Mphandauyo and his subjects thought that the land on which the Appellant had their 'ndunda' belonged to them. The matter, as we have said, went before various fora until it landed before the Ombudsman. In his determination dated March 18th, 2005 he asked the Ministry Responsible for Land Matters to, in conjunction with TA Kabudula, investigate the dispute properly and resolve the matter of ownership of the gardens. And pursuant to section 126(a) of the Constitution and section 8(2)(b) of the Ombudsman Act he directed the Lands Commissioner to review the dispute within three months. He also advised any party not satisfied by the above to seek review of his decision before the High Court pursuant to section 123(2) of the Constitution.

The less than perfect choice of words notwithstanding, it is clear that the Ombudsman directed the Commissioner to resolve the dispute. He, in the last but one paragraph of the Determination, even set out the issues which the Commissioner should take into consideration when doing so. He, i.e. the Ombudsman, would then adopt the said Commissioner's decision in relation to the dispute as his own. The Land Commissioner's decision above would and was part of the Ombudsman's determination of March 18, 2005.

In a letter dated June 12, 2006 the Ministry of Lands acted on the Ombudsman's determination. In a letter written in the vernacular the purport of which is clear the Ministry writing through its Secretary said:

'Unduna wa Zamalo wagamula nkhaniyi monga unalamuliridwa ndi Ofesi ya Ombudsman motere: zomwe zinachitika panthawi ya ndunda zikhale momwe ziliri. Malamulo oyendetsera malo saperekanso mpata osokoneza 'Ndunda' nthawi ikatha yomwe malamulowa amapereka kuti yemwe ali ndi chidandaulo

pa kaundula wa 'Ndunda' akapereke kwa mkulu wa za 'Ndunda'. Chigamulochi chikuganizira za, mwambo wa Chichewa pankhani ya chitemgwa ndiye ndikhulupirira kuti nonse okhudzidwa ndi nkhanayi mukhutitsidwa ndi chigamulochi chifukwa unduna uno suzatsegulanso nkhani imeneyi pokhapokha ngati undunawu utalamulidwa kutero ndi Bwalo Lalikulu Lamirandu m'dziko muno potengera ndi malamulo a dziko lino.'[Sic]

The above decision was not implemented. Instead it made the rounds of offices. To the District Commissioner, to the Legal Aid Bureau, back to the Ombudsman indeed back to the Ministry of Lands where attempts were made to vary it somewhat. Eventually the matter landed in the High Court. It was commenced by Originating Summons. At some point the Court converted it to one as if commenced by writ. At the end of it all the Court found that the land in dispute belonged to the Respondents and ordered the Appellants off the land before the expiry of 14 days from the date of judgment.

Not being satisfied with the decision the Appellants have appealed to this Court. They have filed 8 grounds of appeal, skeleton arguments and case authorities. The Respondents have similarly filed skeleton arguments and case authorities. The matter was finally heard on March 15, 2017.

We will not belabor the issues/matters.

This is a matter which the Ombudsman determined. The law, specifically the Constitution as supplemented by case law, provide for a manner in which all Ombudsman determinations should be handled. In terms of section 126(a) of the Constitution as applied in **The State v Ombudsman ex parte Secretary for Finance & Another** MSCA Civil Appeal No 27 of 2017[unrep] an Ombudsman's determination should either be complied with or taken on review using section 123(2) of the Constitution. Applying the foregoing to the instant case and while accepting that there were at least two parts to the Ombudsman's Determination of March 18, 2005 it was open to our protagonists to either abide by the Determination or to take it on review. It was however not open, in our most considered judgment, for any of our parties to commence an action in the High Court on the same dispute. Or to go forum shopping

with the Determination with a view to varying its purport. It was much ado about nothing.

This matter should not have commenced afresh before the High Court. It should have gone by way of review under section 123(2) of the Constitution. The High Court did not have any mandate to hear and determine the matter in the form it was put before it. The High Court had no jurisdiction. And as was said in **Hetherwick Mbale v Hissam Maganga** the proceedings before it were a nullity. There was nothing to appeal from. There cannot be an appeal before us. This matter remains where it was as 'resolved' by the Ministry of Lands in its letter of June 12, 2006. The appeal is consequently dismissed.

Costs are in the court's discretion. Looking at the parties' economic status, the issues they are fighting over, the time it has taken them to fight and the circumstances surrounding such dispute we are of the view that each party should meet its costs here and below. We so order.

Dated this 17th day of July, 2019.



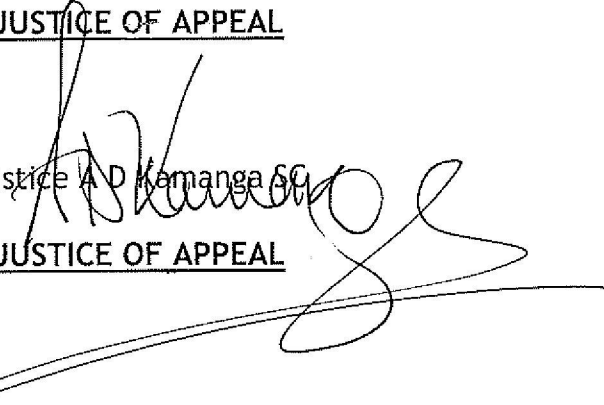
Justice L. P. Chikopa SC

JUSTICE OF APPEAL



Justice F. E. Kapanda SC

JUSTICE OF APPEAL



Justice A. D. Kamanga SC

JUSTICE OF APPEAL