



IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL APPEAL NUMBER 20 OF 2011

BETWEEN

NODIA JOBE.....APPELLANT

-AND-

VILLAGE HEADMAN KWENJE.....RESPONDENT

Coram: Hon Justice C.J.Kachale, PhD

Appellant, Present but not legally represented

Respondent, Absent

Jere (Mrs.), Court Reporter

Kaferaanthu, Court Clerk and Interpreter

JUDGMENT

On 14th January 2011 the first grade magistrate at Mkukula dismissed the appellant's claim for the sum of K136, 000 being money paid in respect of a purported sale of land from the defendant's predecessor in the throne. In essence the court dismissed the action because there was inadequate proof to establish the alleged payment. On 3rd February 2011 the appellant filed a Notice of Appeal (in Chichewa).

In his rather lengthy document the appellant seems to be raising three main issues:

1. The magistrate misdirected himself when he held that there was no proof of the appellant's purchase of the land when at the same time the court also acknowledged that nobody could plant perennial plants of considerable value in land that was merely rented and not bought.
2. The defendant and other chiefs went ahead to harvest his trees on the disputed land contrary to the court order permitting the appellant to actually remove his investments on the land.
3. The open defiance of the defendant and other chiefs towards the police prior to the unauthorized harvest and sale of his trees has robbed the appellant of his assets which he intended to use to fend for his family.

When the appeal was heard on 1st March 2013 the respondent was absent despite ample proof of effective service. The court further heard from the appellant that the respondent continued to cultivate on the land despite the present appeal; the court explained to Mr. Jobe that in the absence of any stay of execution there was nothing to prevent the judgment of 14th January 2011 taking effect.

Court's reasoned determination of the appeal

In considering this appeal my court would first of all like to observe that under our law chiefs are not entitled to sell any land at all. Thus when Justice Mbendera (as he then was) had occasion to consider the nature of title that accrues in customary land in the case **Bareness Msiska and family-v-Traditional Authority Bibi Kuluunda, Civil Cause No. 187 of 2012 (Lilongwe)** (unreported) he stressed that in terms of section 25 of the Land Act (cap 57:01 of the Laws of Malawi) customary land vests in perpetuity in the President; and chiefs (as agents of the minister under section 26 of the Land Act) stand in a position of trust for the people of Malawi so that they could not competently sell the land. On that basis the purported sale of the land in that case was found to be invalid and money received by the chief was ordered to be paid as compensation to the dispossessed applicants. Indeed this position agrees with the conclusions of Twea, J (as he then was) in **Andrew Likhule and another-v-Rep, Criminal Appeal Number 7 of 2008** (unreported) '*...customary land is vested in perpetuity in the President...for the people of Malawi under section 25 of the Land Act. No one individual has title to it. Therefore no one can sell it. All individuals on customary land only have the right to use, not title to the land. The right to use can be transferred, assigned, abandoned, forfeited or surrendered but the land cannot be alienated by sale.*'

Thus any purported sale of land by the respondent or his predecessor would have been void for lack of legal authority. However, having granted the appellant the right to use the land for over ten years the respondent needed to establish a good basis for purporting to dispossess him. In resolving whether such a move was reasonable the level of investment made on the land and the period of uninterrupted use become relevant factors. That was the view Justice Chimasula-Phiri in the case of **The Administrator of The Estate of Dr. Kamuzu Banda-v-Attorney General [2002-2003] MLR 272**. In that case the government declined the application for a lease made by the administrator of Dr. Kamuzu Banda's estate in respect a farm situated in the Lower Shire area on the pretext (among others) that the chiefs who had initially donated the customary land to the former president were desirous of having it back. Upon declining the lease application the government purported to order the surrender of that land. In upholding the administrator's claim to protect his title in the land as a result of the initial gift the court observed that the government could not circumvent the customary procedures for acquiring the land. In this scenario, since the chiefs had donated the land they would have been the right people to reclaim. Even then, the constitution guaranteed protection from such arbitrary deprivation of property, especially bearing in mind how much Dr. Banda had invested in the land over the years.

On the basis of these considerations this court would reverse the decision of the trial magistrate for failing to adequately protect the right of the appellant to use the land. As contended by the appellant he seemed to have missed the legal significance of his own factual conclusions when he recognized that the appellant had made considerable investments on the land for a correspondingly long period of time. Having reached that finding it would have been more just to permit the appellant to continue his use of the land, which had been commenced with permission from the respondent's predecessor.

Conclusion

In closing my court hereby upholds the appeal and reverses the decision of the first grade magistrate dated 14th January 2011. The appellant must be allowed continued use of the land.

Furthermore section 22 of the Courts Act outlines the different courses of action open to this court when dealing with appeals from the subordinate courts. The provision states that:

In a civil appeal the High Court shall have power—

- (a) To dismiss the appeal;*
- (b) to reverse a judgment upon a preliminary point and, on such reversal, to remit the case to the subordinate court against whose judgment the appeal is made, with directions to proceed to determine the case on its merits;*
- (c) to resettle issues and finally to determine a case, notwithstanding that the judgment of the subordinate court against which the appeal is made has proceeded wholly on some ground other than that on which the High Court proceeds;*
- (d) to call additional evidence or to direct the subordinate court against whose judgment the appeal is made, or any other subordinate court, to take additional evidence;*
- (e) To make any amendment or any consequential or incidental order that may be just and proper;*
- (f) To confirm, reverse or vary the judgment against which the appeal is made;*
- (g) To order that a judgment shall be set aside and a new trial be had;*
- (h) To make such order as to costs in the High Court and in the subordinate court as may be just.*

The options on offer are quite broad which suggests that the appellate authority of this court is quite broad in scope and far-reaching in its legal bearing on the appealed decision. Quite clearly the law has created a process designed to offer litigants the most robust response to their dispute and to ensure that they are afforded the best means possible (through such a broad appellate mandate) to ensure a just resolution of the case.

Thus on the basis of section 22 (d) of the Courts Act my court will direct the Chief Resident Magistrate (Centre) to hear evidence about the value of trees and plants destroyed by the respondent and his accomplices since the judgment of 14th January 2011. Once that loss is quantified let the CRM (C) award the same against the respondent in favour of the appellant.

In addition to recovering the land the appellant is further awarded costs of this appeal.

Made at Lilongwe this 30th day of September 2013.

C.J.Kachale, PhD
JUDGE