JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NO. 50 OF 2013
(Being Civil Cause No. 79 of 2013 in the Second Grade Magistrate's Court Sitting at Makande)

BETWEEN

DAYANI TEKWATEKWA ..... APPELLANT

-AND-

FESTONE BUTAO ..... RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Chipeta, of counsel, for the Appellant
Respondent, present and unrepresented
Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

This is an appeal by the Appellant against the decision of the Second Grade Magistrate's Court sitting at Makande (lower court) contained in its judgment dated 15th August 2013.

The Appellant in this matter had taken out summons for trespass against the Respondent over a piece of customary land in Ngabu, Chikhwawa District. After a full trial, the lower court ruled in favour of the Respondent having noted that the Appellant had failed to prove his claim.

The Appellant is dissatisfied with the whole judgement of the lower court. The initial grounds of appeal were filed with the Court on 12th December 2013 but the

same were amended on 17th December 2015. The amended grounds of appeal are reproduced as filed:

> *"1. The learned Magistrate erred in holding that the T/A had not rendered judgment on the land dispute between the Respondent and the Defendant.*
>
> *2. The learned Magistrate erred in holding that the Respondent's claim or right to the land in dispute was more probable that that of the Appellant because the Respondent acquired the land earlier than the Appellant.*
>
> *3. The learned Magistrate erred in law and fact in determining the matter in the Respondent's favour when at the same time he made a finding that both parties were awaiting Traditional Authority M'gabu's decision on the same.*
>
> *4. The Lower court's Judgment was by all accounts against the weight of evidence before it."*

The Appellant seeks two reliefs, namely, an order setting aside the lower court's judgement and granting the Appellant's claim and an order of costs.

It is trite that when hearing an appeal from a subordinate court under section 20(1) Courts Act, this Court proceeds by way of re-hearing of all the evidence that was before the court below, the law applied and the reasoning behind the decision.

The evidence adduced before the lower court can be easily stated. The Appellant called six witnesses, namely the Plaintiff himself (PW1), Batumeo Bauti (PW2), Davie Maluwa (PW3), Eurita Ngirazi (PW4), Fakanimale Vilamao (PW5) and Madalitso Tsatakhwawa (PW6).

PW1 testified that he had asked for a piece of land from the Village Headman Bauti. In 1996, he was given a piece of land that formed a boundary between Bauti Village and Maluwati Village (land in dispute). He immediately started working on the land in dispute and, in 2001, he built a house thereon. He also planted trees along the boundary. In 2006, Village Headman Maluwati claimed that the land in dispute was in his village. The Appellant took the issue to Village Headman Bauti, Senior Group Village Headman Saopa and the Traditional Authority. The Traditional Authority ruled that the land in dispute had been given to the Appellant by Village Headman Bauti but the Respondent disobeyed the Traditional Authority.

PW2 stated that he was the Village Headman Bauti and that he had given land to the Appellant. PW3 stated that he was group village head man. He also testified that the land in question belonged to the Appellant and that the Appellant worked

thereon for about 17 years. He said that the Respondent started working on the land in dispute later on. He concluded by stating that he was unaware that the land in dispute had been given to the Respondent.

The testimony of PW4 was that Village Headman Maluwati had sued the Appellant for cutting down trees in the land in dispute and that the Respondent did not have a farm in the land in question. PW5 testified that the Appellant was the owner of the land in question.

PW6 testified he was a Group Village Headman and advisor to T/A Ngabu. It was also his evidence that (a) in 2006 the Appellant was sued by Village Headman Maluwati and Chizenga for cutting down trees, (b) the Appellant had been working on the land in dispute, having planted trees, maize, cassava and sweet potatoes and (c) T/A Ngabu did not say who between the parties was the owner of the land in dispute but merely told both parties to wait for some time before judgment could be delivered and the Respondent did not wait.

The Respondent called four witnesses, namely, the Respondent himself (DW1), Moses Nkhwazi (DW2), Veronica Maluwati (DW3) and Blackson Mtalika (DW4).

DW1 was the Respondent himself. DW1 stated that the land in dispute was given to him by Village Headman Maluwati in 1984. He further stated that the Appellant complained to the T/A that the Respondent had dispossessed of the land in dispute. DW1 also stated that the Appellant came from Njuzi to settle in 1986. The Appellant built a house and shared a boundary with the DW1. DW1 also stated that the Appellant constructed a kraal near DW1's farm.

DW2 testified that he settled near the Respondent's farm in 2000 and was later asked to take care of the Respondent's livestock. He also testified that the Appellant got his farm land from Village Headman Bauti.

DW3 testified that he was an advisor to the Village Headman Maluwati. He stated that Respondent got the land in dispute in 1984 and was the owner thereof. He further testified that when he settled in the village in 1988, the Appellant was not there and only came to settle there in 2000. He also stated that the Appellant had been sued by Village Headman Maluwati for cutting down trees.

DW4 testified that she was the Village Head. Her evidence was that the Respondent was the first to work on the land in dispute. She denied that the Appellant was given a piece of land for opening a farm.

Time to turn to the applicable law as it stood at the time the matter was before the lower court. Sections 25 and 26 of the Land Act are relevant. Section 25 of the Land Act provides that all customary land is property of the people of Malawi. The section further vests customary land in perpetuity in the President for purposes of the Land Act. Section 26 of the Land Act reads:

> *"The Minister shall subject to this Act and to any other law for the time being in force administer and control all customary land and all minerals in, under or upon any customary land for the use or common benefit direct or indirect of the inhabitants of Malawi:*
>
> *Provided that a chief may subject to the general or special direction of the Minister authorize the use and occupation of any customary land within his area in accordance with customary law."*

The terms "customary land" and "customary law" are defined in section 2 of the Land Act. Customary land means all land which is held, occupied or used under customary law but does not include public land. Customary law is defined as customary law applicable in the area concerned. Based on a reading of the two definitions, one may safely conclude that chiefs have been given the mandate to authorize the use of customary land within their respective areas.

However, it is important to bear in mind that there is nothing like ownership of customary land. Customary land is for communal use and inhabitants of Malawi must use and occupy the said land for their benefit but as directed by their chiefs. Strict legal ownership of customary land is therefore alien under our laws. As was aptly put by Mzikamanda J, as he then was, in **VH Zakeyo Chunga v. Nowell Jere, HC/Mzuzu District Registry Civil Cause No 176 of 2000 (unreported)**:

> *"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."*

Further, in administering the use and occupation of customary land chiefs are required to be guided by the Constitution. In the words of Mzikamanda J, as he then, in **Milton N. Msofi v. V/H Chikutu Banda [2007] MLR 246**:

> *"A chief who administers and controls customary land according to customary law is bound by the Republican Constitution which provides for equal protection to all people of Malawi……*
>
> *Although a chief has power to allocate and reallocate any piece of customary land for use and occupation, such powers must be exercised while respecting the constitutional provisions."*

What emerges is that much as the Appellant would have been entitled under customary law to use and occupy the land in dispute if so authorized by the local chief, the local chief could not deprive the Respondent the right to use and occupy customary land without any justification.

I have critically considered the facts. Each party alleges to have been the first to be allocated the land in dispute. In the end, the lower court's decision had to depend on which story to believe. The story as told by the Respondents was found to be more compelling than that of the Appellant:

> *"A civil cause has to be proved on the balance of probabilities. If it is six of the plaintiff and half a dozen of the defendant, or in other words if the probabilities are equal the party who alleges, the plaintiff, fails to discharge his burden.*
>
> *In this case the probabilities are not even equal, but they tilt in favour of the defendant."*

Having gone through the evidence adduced before the lower court, it is my holding that the decision of the lower court cannot be faulted. As a matter of fact, I am unable to appreciate how the Appellant expected to win this case when one of his key witness, PW6, gave damning evidence against him. PW6 was the most senior chief to testify on behalf of the Appellant and he was categorical in stating that T/A Ngabu did not rule as who between the Appellant and the Respondent was the owner of the land in dispute.

In this regard, Ground of Appeal No.1 to the effect that lower court erred in fact in holding that the T/A had not rendered judgment on the land dispute has to fall by the wayside. This also disposes of Grounds of Appeal No. 2 and No. 4, namely, that the lower Court erred in holding that the Respondent's claim or right to the land was more probable than that of the Appellant and that the judgment of the lower court was by all account against the weight of the evidence before it.

That then leaves us with the Ground of Appeal No.3. Counsel Chipeta argued thus:

> *"On the facts of the present case, if there was pending judgment on the dispute from the chief, as the lower court found, then it is submitted that the lower court's determination*

of the dispute in the Respondent's favour violated section 26 of the Land Act and in that the lower court usurped the powers of the Chief under the Land Act. The court's judgment, as such is illegal and erroneous."

With due respect to Counsel Chipeta, this ground of appeal is misconceived. It is the Appellant who took the matter to the lower court and the lower court simply found that the Appellant had failed to prove his case.

All in all, the Appellant's claim could not be sustained in the court below and it must similarly fail in this Court. I, accordingly, dismiss the appeal with costs.

Pronounced in Court this 1st day of June 2017 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE