



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL REVIEW CAUSE NO. 1 OF 2018**

BETWEEN:

ALEX CHEKANI ZULU PLAINTIFF

-AND-

FRED MBEWE 1ST DEFENDANT

GOLDEN ZULU 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. D. K. Itai, Court Clerk

RULING

Kenyatta Nyirenda, J.

The present matter relates to a case that one Josephy Chirwa commenced on 25th August 2017 against the Defendants before the First Grade Magistrate Court sitting at Mchinji (lower court), being Civil Case No. 210 of 2017. The complaint by Mr. Chirwa was that the Defendants were in illegal possession of Mr. Chirwa's leased land. The Summons was issued under section 36 of the Lands Act.

The Summons was supported by an affidavit sworn by Mr. Chirwa. The affidavit states as follows:

"I am JOSEPHY CHIRWA of Village Headman BOKOLA, T/A Njoka in MCHINJI, and I know GOLDEN ZULU AND FREDRICK MBEWE as the ones who are encroaching my late father's garden.

THAT I am a Malawian National of majority age seized to depone this affidavit.

THAT the matter I depone to in this affidavit have come from my belief and I believe the same to be true.

*THAT the garden in question belonged to me as it is my mother's garden **MARY BOKOLA** and the garden is about 36 acres.*

THAT it was in 2016 to 2017 when the defendants mentioned above in accompany with other 3 damaged the green maize in this garden by slashing all 4 acres when it was about knee high.

*THAT by then 4 acres was rented by **MRS GUZANI AND MRS KANTIMA** and the case of malicious damage was opened against them and were convicted and fined to **K300,000.00**.*

*THAT it was this year again on **20th July, 2017** when the same accused person in the case of malicious damage including the named defendants went to the same garden and uprooted the beacons in the corners since it's a leased land and I have lease documents.*

THAT I went to verify for what they have done and indeed they removed the beacons and I saw that they are clearing the garden as a team so I just returned because I was alone and I was afraid to be attacked.

*THAT the following day on **21st July, 2017** I saw 6 people including the defendants mentioned above, they started stoning me and I run for my dear life but they followed me to my house where they continued stoning me and were also shouting on top of their voice that they fear nobody.*

*THAT I reported the matter to Mchinji Police on **22nd July, 2017** and were summoned but only one **RODRICK LANGA** turned up, and were again summoned but none showed up and the police officers decided to follow them up but all run away.*

THAT its when I just decided to sue the defendants on the issue of encroaching my leased garden.

THAT I am praying to this honourable court of law that the defendants must stop encroaching my leased garden because it belongs to me."

On 27th March 2018, the Plaintiff (Alex Chekani Zulu), a brother to Mr. Chirwa, applied to have him replace Mr. Chirwa as the Plaintiff. In the exercise of its discretion under Order 5, r.3, of the Subordinate Court Rules, the lower Court heard the application on 9th April 2018 and ruled in favour of substituting Mr. Chirwa with the Plaintiff.

Thereafter, the lower court heard and recorded evidence of the parties and their respective witnesses. Having examined the evidence, the lower court formed the view that the dispute centered on the ownership of the land in dispute. In the circumstances, the lower court proceeded to make the following order:

“Being that the evidence so far received is about ownership of the land this court has no jurisdiction to decide on ownership of the land which in addition is a leased land but the High Court. I am therefore not proceeding passing judgement on this matter as it is out of this court’s jurisdiction under s.39 of the Land Act.

I therefore transfer the case to CRM for onward transmission to the High Court for the judge to determine on this matter. Each party is to be working or cultivating where they are until the High Court will decide.”

I have considered this matter. As correctly observed by the lower court, the dispute herein has much more to do with ownership of the land in question than just encroachment as registered on commencement of the case. Further, from the evidence there can be no question that the land in dispute is not customary land.

Section 39 of the Courts Act makes provision regarding the civil jurisdiction of courts of magistrates and the relevant part thereof states:

“(2) Notwithstanding subsection (1), no subordinate court shall have jurisdiction to deal with, try or determine any civil matter –

(a) whenever the title to or ownership of land which is not customary land is in question save as provided by section 156 of the Registered Land Act.”

Section 156 of the Registered Land Act deals with the jurisdiction of courts and it provides as follows:

“Civil suits and proceedings relating to the ownership or the possession of land, or to a lease or charge, registered under this Act, or to any interest in any such land, lease or charge, being an interest which is registered or registerable under this Act, or being an interest which is referred to in section 27, shall, notwithstanding the Courts Act, be tried by the High Court, or, where the value of the subject matter in dispute does not exceed £200, by the High Court or a subordinate court held by a Resident Magistrate.”

The relevant interests referred to in s.27 of the Registered Land Act include (a) leases or agreements for leases for a term not exceeding three years, and periodic tenancies within the meaning of s. 39 of the Registered Land Act and (b) the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where inquiry is made of such person and the rights are not disclosed.

Based on the foregoing, it is clear that the lower Court had no jurisdiction over the dispute. As the lower Court had no jurisdiction, the proceedings before the lower court were a nullity. They never took place. **Village Headman Chakweza v. Village Headman Mponda, MSCA Civil Cause No. 38 of 2006 (unreported)** is authority for the proposition that proceedings conducted before a court which is not competent

by reason of lack of jurisdiction have to be set aside. In the words of the Supreme Court of Appeal at page 2:

“We agree with Mr. Wadi learned Counsel for the Appellant that the moment that the learned Judge came to the conclusion that the Magistrate had no jurisdiction to hear and determine the issue relating to ownership of land his duty was simply to set aside the proceedings in the Magistrate’s Court and any order or judgment made by that Court. We also agree that it was not open to the learned Judge to consider the evidence which was adduced before a tribunal without jurisdiction and proceed to give judgment based on that evidence. The Judge should have treated the proceedings before the Magistrate as non-existent. He could have directed the Respondent to commence fresh proceedings before a tribunal which possesses jurisdiction over land dispute.

We are therefore, unable to support the learned Judge in the course of action he took after it became clear to him that the proceedings before the Magistrate’s Court were a nullity. We are also unable to support his decision which was reached in reliance on the evidence taken during proceedings which turned out to be a nullity.

In the circumstances, we set aside the judgment of the learned Judge in the Court below. We direct that the Respondent is at liberty to commence fresh proceedings in the High Court.”

All in all, it is plainly unquestionable that the subject matter of the proceedings before the lower court related to the ownership or the possession of land or to interest therein. In terms of s. 39 of the Act, such a matter has to be tried by the High Court and not the lower court. In the premises, the proceedings before the lower court were a nullity and of no effect. If the Plaintiff is so minded to do, he should commence his suit in the High Court.

Pronounced in Court this 5th day of December 2018 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE