



**JUDICIARY**

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NUMBER 2261 OF 2007**

**BETWEEN:**

**ESTHER NDALAMA .....PLAINTIFF**

**-AND -**

**CHARLES CHIMWAZA .....DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE E. B. TWEA**

Mr Chayekha, of Counsel for the plaintiff

Mr Hara, of Counsel for the defendant

Mr M. Manda – Official Interpreter

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**R U L I N G**

**Twea, J**

The plaintiff brought this action by way of Originating Summons. He sought the court to determine:

- a) Whether or not customary land can be sold
- b) Whether or not such a sale can disentitle those entitled to the land at custom.

The respondent filed preliminary objections to the mode of commencement and to the suit itself.

It transpired from the arguments and this was disputed: in fact, it was admitted for the plaintiff, that the adjudication before the lower court in respect of the land in issue was null and void.

The issues raised in the preliminary objections are whether the plaintiff could ignore the lower court's order and start the case afresh. The answer is clearly No. When a court makes an order, the order is valid until and unless it is quashed or varied by a competent court in a proper judicial manner: on review, appeal or judicial review.

In this case a decision was made before the lower court. Clearly as an afterthought and possibly with the support of the law, the plaintiff is of the opinion that the lower court lacked jurisdiction. It is not open to the plaintiff to ignore the court order made before the lower court. He is bound by it until or unless it is set aside. The cases cited: *Elizabeth Mission Vs Rose Makwiti Civ. App. 43 of 2004* and *Wyson Mperera Vs Kennedy Chaima Civ. App. 33 of 2007*, are not in favour of the position taken by the plaintiff ignoring a court order. They support the position that an order of the court, however irregular or illegal has to be set aside in a proper judicial manner. It is not open to any of the parties to ignore it on account of irregularity or illegality, until then.

In the present case therefore, the plaintiff wrongly brought these proceedings while the other order, is still standing.

Further, this matter will revolve on what the parties intend to transfer: title or user to the land. Clearly the mode of acquisition and use of the land will be relevant. Such issues cannot be determined by way of affidavit evidence alone. It would be even more difficult where some evidence will depend on rights that vest by way of inheritance under customary law. I would therefore agree that the matter is not a proper one to deal with by way of affidavit evidence.

I therefore uphold the preliminary objections and dismiss the summons with costs.

***Pronounced in Chambers*** this 12<sup>th</sup> day of August, 2008 at Blantyre.

E. B. Twea  
**JUDGE**

