



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL APPEAL CAUSE NUMBER 14 OF 2013**

**BETWEEN:**

**SLYVESTER J.L. NGOMA (As administrator of the**

**Estate of Kaufulu Ngoma-deceased)**

**APPELLANT**

**AND**

**BENSON NGOMA**

**RESPONDENT**

**CORAM: JUSTICE M.A. TEMBO,**

Lemucha, Counsel for the appellant  
Respondent, present and unrepresented  
Chanonga, Official Court Interpreter

**JUDGMENT**

This is this court's judgment following a hearing of the appeal in this matter.

The appellant appeals against the decision of the First-Grade Magistrate Court sitting at Ntchisi by which the lower court found that the appellant had grabbed the land that the respondent's late father left for the respondent and his siblings.

The respondent had commenced civil proceedings against the appellant before the lower court claiming that he was entitled to use of the piece of land in issue, a garden, which his late father had acquired and had been using since 1985 until 2000 when he died. The land is located at Gonondo village.



The appellant was the brother to the respondent's late father. The appellant claimed that this land belonged to his family and not the respondent.

The lower court heard the evidence of both parties and determined the matter in favour of the respondent.

The evidence by the respondent was to the effect that his father and himself farmed the land in dispute from 1985 until the year 2000 when his father died.

The respondent also stated that his late father had actually sent his younger brother who was a teacher at Mpalo school to acquire the land herein. At one time the respondent's father was a member of parliament.

The respondent added that after his father's death the appellant took over the land saying that it was his family land and not land for the respondent and his siblings. He added that his late father told him that the land in dispute was for the respondent and his siblings. He also stated that his late father bought two other pieces of land that he allocated to his two sisters.

There was evidence by the retired Village Headman Gonondo who testified that actually he was approached by the respondent father's brother who was a teacher who asked for a piece of land and was allocated the land in dispute herein.

The retired Village Headman Gonondo was testifying for the respondent but was very categorical that the land in dispute herein was allocated by himself to the respondent father's brother and not to the respondent's father. He added that this brother to the respondent's father was based at Zomba at the time of the lower court hearing and is Mr Sylvester J L Ngoma.

Retired Village Headman Gonondo added that he did not know the respondent's father who was then based at Lilongwe very well and that probably the respondent's father came to the disputed land because it belonged to his relation.

The witnesses for the appellant testified that actually the land in dispute herein did not belong to the respondent's father but to the appellant.

The lower court visited the land in dispute and found that the land was unoccupied. After hearing the parties at the disputed land, the lower court noted that the respondent was very knowledgeable of the land boundaries. It also found that the

appellant was not knowledgeable of the land boundaries or who was occupying this land.

In the foregoing circumstances, the lower court concluded that the respondent's father acquired the land in dispute by adverse possession after being in possession of the same for a period of over 12 years in terms of section 6 of the Limitation Act.

The lower court also observed that the respondent's father was a man of substance who could acquire the land in dispute since he rose to be a member of parliament. Further, that the respondent's late father actually acquired the land in dispute with the assistance of Sylvester Ngoma. And that Sylvester Ngoma had no control over the land as he never came to testify before the lower court and there was no evidence that he farmed the land in dispute in contrast to the respondent's father who farmed the land from 1985 to the year 2000 when he died.

Consequently, the lower court ordered that the appellant return the land to the respondent.

The appellant filed three grounds of appeal against the lower court decision.

The first ground of appeal is that the lower court erred by granting basing its decision on the basis of adverse possession when the same is not applicable to public or customary land.

The second ground of appeal is that the lower court erred in applying the principle of adverse possession when the acts of the respondent's late father were not inconsistent with the appellant's lawful enjoyment of his rights over the land herein.

The third ground of appeal was that the lower court erred when it totally disregarded the appellant's evidence and that its decision was against the weight of the evidence.

This Court wishes to point out that on the hearing of civil appeals from magistrate courts this Court has the following powers as provided in section 22 of the Courts Act

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 appeal is by way of rehearing. That means this Court will subject the evidence before the lower court to a fresh scrutiny. Of course, this Court is always mindful that when sitting as an appellate Court it should never lose sight of the fact that the lower court had the advantage of determining the credibility of the witnesses first hand.

This Court will deal with the three grounds of appeal in turn.

The first ground of appeal is that the lower court erred by making its decision in favour of the respondent its decision on the basis of adverse possession when the same is not applicable to customary land.

Adverse possession arises by reason of limitation of actions for recovery of land as provided in section 6 of the Limitation Act. Section 6 of the Limitation Act provides that no action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

Therefore, where a person occupies and possesses land and uses it inconsistently with the rights of the owner of the said land for a period of 12 years then the person

gets title to the said land and the owner of the land is barred from recovering the said land.

The appellant argues that doctrine of adverse possession does not apply to customary land as the said land vests in the President on behalf of the people of Malawi in terms of section 25 of the Land Act.

The appellant alluded to the definition of customary land as provided in section 2 of the Land Act which defines customary land as land that is held at customary law of a particular area and not being public land.

The appellant contends that section 6 of the Limitation Act essentially only applies to private land and not customary land. This Court agrees that this is the correct position although there appears to be no distinction in section 6 of the Limitation Act between private land and customary land where the Act refers to limitation of an action by a person to recover any land.

A close reading of the Limitation Act as a whole reveals that the Act indeed only applies to private land because it says in section 16 that save as otherwise provided in the Limitation Act, at the expiration of the period prescribed by the Limitation Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.

The title to customary land in Malawi vests in the President on behalf of the people of Malawi as provided in section 25 of the Land Act, as such, adverse possession cannot arise as provided under section 6 of the Limitation Act to extinguish the rights of a holder of customary land.

The lower Court therefore erred in relying on section 6 of the Limitation Act to find that the respondent's father acquired the land herein by adverse possession through continued use of the land for over 12 years as the land was found to be customary land. In fact, if this land was found to be private land the lower court would not have had jurisdiction to deal with the dispute herein as per section 39 (2)(a) of the Courts Act.

The first ground of appeal therefore succeeds.

If anything, the lower court should have checked whether the doctrine of adverse possession exists at customary law of the area in issue herein.

This Court takes this view being mindful that customary land is held under customary law of a particular area. Whether there exists the doctrine of adverse possession at the relevant customary law is a matter of proof as provided under section 64 of the Courts Act which requires proof of customary law except where the same is already proved in a binding decision of the High Court. Section 64 of the Courts Act is clear on the point as it provides as follows

If in any proceeding a matter of customary law is material, such law shall be treated as a question of fact for purposes of proof. In determining such law the court may admit the evidence of experts and persons whom the court considers likely to be well acquainted with such law:

Provided that a court may judicially note any decisions of its own or of any superior court, determining the customary law applicable in a like case.

In the foregoing circumstances, where there is no proof of existence of the doctrine of adverse possession at customary law, the lower court erred in arriving at the decision that the respondent's late father acquired the land in dispute on the basis of the doctrine of adverse possession.

The second ground of appeal is that the lower court erred in applying the principle of adverse possession when the acts of the respondent's late father were not inconsistent with the appellant's lawful enjoyment of his rights over the land herein.

This Court has already found that the doctrine of adverse possession as provided in section 6 of the Limitation Act is not applicable to customary land and that there is no proof that such a doctrine exists under customary law of the area in issue. Consequently, the second ground of appeal falls away automatically as it is premised on the applicability of the doctrine of adverse possession as provided in section 6 of the Limitation Act.

The third ground of appeal was that the lower court erred when it totally disregarded the appellant's evidence and that its decision was against the weight of the evidence.

This last ground of appeal calls for this Court to determine whether the lower court decision is supported by the weight of the evidence in this matter.

The lower court weighed the evidence of the appellant against that of the respondent. The lower court's impression was that the appellant when in the court below appeared clueless as to the boundaries of the land in dispute. This appellant is the one that retired Village Headman Gonondo said was present when the land was being allocated to the brother to the respondent's late father. The fact that the appellant was completely clueless as to the boundaries of the land in dispute is what moved the lower court not to believe his story and that of those who supported his version of events namely village headman Gonondo and all the witnesses of the appellant.

As such the contention by the appellant that there was clear evidence from the appellant's witnesses that the land belongs to Mr S J L Ngoma and not the appellant's father could not be taken as credible when the witness to the land allocation was clueless as to the land boundaries.

The lower court also noted that the person to whom the land in dispute was allegedly allocated by retired Village Headman Gonondo, namely S J L Ngoma, never attended the proceedings.

Further, that there was no evidence that Mr S J L Ngoma ever farmed the land herein.

In fact, the lower court observed that Mr S J L Ngoma never had any control over the land since 1985 up to 2000 when the respondent's father farmed the land until he died. The lower court then concluded that Mr S J L Ngoma actually assisted the respondent's late father in getting the land herein from the Village Headman Gonondo.

In the foregoing circumstances, this Court cannot interfere with the findings of the lower court which turned on an assessment of the credibility of the witnesses in this matter as determined in court and also significantly on a visit to the land in dispute in this matter.

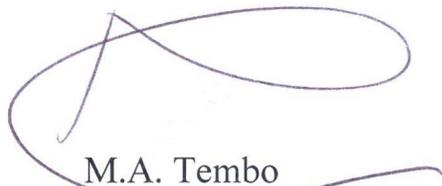
The lower court assessed the appellant and his witnesses and the village headman Gonondo and found their evidence to be unreliable in view of the failure of the appellant to explain the land boundaries. The lower court also found that Mr S J L Ngoma had no control over the land that was farmed for a long time by the respondent's late father. Mr S J L Ngoma never appeared to give a contrary account.

The finding of the lower court was therefore not against the weight of the evidence and is accordingly upheld.

The appellant shall bear costs on this appeal.

Any one dissatisfied by this decision has a right to appeal to the Supreme Court of Appeal.

Made in open court at Blantyre this 16<sup>th</sup> May 2017.



M.A. Tembo  
**JUDGE**