



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NO. 50 OF 2013**

**(Being Civil Cause No. 942 of 2016 in the First Grade Magistrate's Court
Sitting at Blantyre)**

BETWEEN

CHRISTINA NSAMANYADA PLAINTIFF

-AND-

MILLIUM BOASI DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Appellant, present and unrepresented
Respondent, present and unrepresented
Mrs. Jessie Chilimapunga, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

This is an appeal by the Appellant against the decision of the First Grade Magistrate's Court sitting at Blantyre (lower court) contained in its judgment dated 19th September 2016.

The appeal relates to a dispute between the Appellant and the Respondent regarding a piece of land situate in Suwali Village, T/A Somba, Blantyre (land in question). The land in question initially belonged to the Appellant's father. The Respondent is a daughter of Appellant's brother. The case of the Appellant is that the Respondent should have stopped staying on the land in question upon the death of her father. After a full trial, the lower court ruled in favour of the Respondent.

The Appellant is dissatisfied with the whole judgement of the lower court and she filed with the Court the following grounds of appeal:

- “1. *The land in question is for the clan and not the Defendant.*
2. *Although the land had been given to the children of my late brother but my mother is alive and it is wrong to give the land to the Defendant.*
3. *All the children got married, but before their father died he built a house for them at their home village.*
4. *Had it been that the land in question does not belong to my mother the Defendant would not have given one house to my mother after the death of my brother.”*

The Appellant prays that this Court should set aside the lower court’s judgement and order that the land in question belongs to her.

It is trite that when hearing an appeal from a subordinate court under section 20(1)(a) of the 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 stated that her father purchased a piece of land, which includes the land in question. The Appellant and the Respondent’s father grew up on this land. Later on, the Appellant’s father gave the land in question to the Appellant’s brother (that is, the Respondent’s father).

The Appellant testified that her brother built some houses for rent on the land in question to help his parents and relatives. She further told the lower court that her brother also built a house for his wife at her village. It was also her testimony that before her brother died he told them that his wife should go to her home since he had built a house thereat for her and the children. The Appellant stated that she was shocked that upon her brother dying, his wife and the children did not go to their village but decided to continue staying on the land in question. She claimed that it was wrong for her brother’s wife and children to treat the land in question as though it had been bought by her brother.

The Appellant concluded her evidence by stating that that the matter went to the chief and then the T/A and both of them advised the two sides that the land in question belongs to the whole family and that in the spirit of good relationship they should stay at the plot as one family.

The testimony of the Respondent mirrors to a large extent that of the Appellant. She told the lower court that she was born on the land in question and grew up there. She confirmed that her father and the Appellant were brother and sister hence the T/A told them to stay as a family. The Respondent stated that it is her father that built houses on the land in question. She blamed the Appellant for being the architect of the problems in that she wants to inherit her father's property.

The Respondent also told the lower court that she is puzzled as to why the Appellant wants the Respondent and her siblings to vacate the land in question when her father and mother were buried next to each other in the same village. The Respondent stressed that the land in question was her home. The Respondent concluded her testimony by inviting the lower court to note that the Appellant had not been staying in the village but at her husband's home. She only came back to the village after her marriage ended and then she started causing trouble.

The record of the lower court also shows that the lower court paid a visit to the land in question and the Appellant's mother testified during the Court's visit. She stated that when she got married, they decided not to settle at her home village nor her late husband's home village but to buy a piece of land away from their respective homes. She told the lower court that they started building a house and later their son did ask for a portion of land and his father duly gave him. She confirmed that the Respondent's father built his house and also built some rent houses to help his family. The Appellant's mother also testified that her son built a house for his wife at his wife's home but they never went to live there. Finally, she stated that when her son died, his wife and children stayed on the land in question. Thereafter, her son's wife also died and his children do not want to go to their mother's home and as a result her daughter and her daughter's children do not have a place to go.

Having heard the evidence, the lower court proceeded to make the following analysis and determination:

"It is clear from my observation and understanding of the adduced evidence that the complainant and defendant do agree on most of the adduced evidence. It is clear that the defendant's father and the complainant who were brother and sister had no issues when

he was alive as the evidence suggest. It is clear that the squabbles started when the defendants' father died and also the death of the defendant's mother.

It will be important that the court looks into the issue of customary which is in my opinion the basis of this court case. Under the culture of the complainant as she stated the late brother was supposed to stay at his wife's home with his family. This culturally entails that the land at the husbands home belongs to the sisters as that is classified as customary land. These sentiments were corroborated by the chief and the mother to the complainant who gave evidence.

However the most important point to be looked at or not to be missed is that this is not clan land but its land which the father to the defendant and the complainant bought not that he inherited. The second point is that the father settled away from his village and also the village of his wife which already ex-communicated him from the bonds of customary law as far as land inheritance is concerned.

What is more intriguing is that both sides do agree that the land was given to the deceased by his father and he built his home where he stayed with his family and built rent houses and no one stopped him. He died and his wife died and buried in the same village now the Aunt wants the children to move out so she can stay there with her children, what a strange and absurd arrangement.

It is clear from the evidence that due to the defendants father and the complainants father who are also deceased missing from this point this matter comes into dispute as to who owns what, but if the court looks deep in the evidence of both parties and the reason why this land was bought in the first place then we will realize that it was bought to try to find land for his family. It has also been revealed that the complainant was staying with her husband somewhere only to appear after the marriage ended and according to the custom this side she can only claim that land if it was her mothers or inherited land from the clan.

DETERMINATION

Having critically analysed the above evidence it is my determination that ownership of this piece of land under dispute between Christina Msamanyada and Millium Boasi is that the land under dispute is not clan land where issues of inheritance are determined by custom. It is also my determination that the late father of the complainant gave part of his land to his son the father of the defendant and allowed him to leave there and his family and develop the land. This to the understanding of the court was not a coincidence but rather a father giving his son a portion of his estate.

The late father of the complainant did have power to transfer part of his title in land to the son hence the land cannot be wrestled back by the sister using the claim of custom. The defendant with her siblings were born there known that place as home and their mother was buried there which cements the idea that this is their home. It is clear that this action is driven by greed and lack of love as the complainant wants to occupy the land and houses her brother left with her children while driving out her brothers children using customary law. It is my strongest opinion that in a modern and developed world where laws and constitutions govern our way of life some of these so called traditions and customs that are inhuman and violations of human rights ought to be outlawed.

The court also consider the principle of adverse possession which is a very well established determination by the High Court. It is my finding that the land herein in belongs to the defendant and her siblings. The court makes another order that the defendants as they have claimed proceed to help old granny as their father did by allocating one rented house for her up keep. The claim is dismissed the land belongs to the defendant Millium Boasi."

– Emphasis by underlining supplied

In arguing the appeal, both parties more or less re-stated the positions that they took during the trial before the lower court.

As was rightly observed by the lower court, at the heart of the appeal is a clash between customary law and statutory law. It is the case of the Appellant that, in terms of customary law prevailing in Suwali Village, the land in question, belongs to her (see the underlined words in the quoted passage from the judgement of the lower court). It will, however, be recalled that the lower court made two important findings of fact, namely, that the land in question (a) is not clan land and (b) was given by the Respondent's grandfather inter vivos to the Respondent's father who built houses thereon for residential and business purposes. The Appellant did not adduce any evidence or advance any argument during the hearing of the appeal to attack the findings of fact by the lower court.

Having died intestate, the land in question has to be dealt with in terms of the Deceased Estates (Wills, Inheritance and Protection) Act [hereinafter referred to as the "Act"]. Section 17 of the Act sets out principles of distribution of intestate property to immediate family and dependants and it is couched in the following terms:

“(1) Upon intestacy, the persons entitled to inherit the intestate property shall be the members of the immediate family and dependants of the intestate, and their shares shall be ascertained upon the following principles of fair distribution–

- (a) protection shall be provided for members of the immediate family and dependants from hardship so far as the property available for distribution can provide such protection;*
- (b) every spouse of the intestate shall be entitled to retain all the household belongings which belong to his or her household;*
- (c) if any property shall remain after paragraphs (a) and (b) have been complied with, the remaining property shall be divided between the surviving spouse or spouses, the children, and the parents of the intestate;*
- (d) as between the surviving spouse or spouses and the children of the intestate, their shares shall be determined in accordance with all the special circumstances including–*
 - (i) any wishes expressed by the intestate in the presence of reliable witnesses;*
 - (ii) such assistance by way of education or other basic necessities any of the spouses or children may have received from the intestate during his or her lifetime; and*
 - (iii) any contribution made by the spouse or child of the intestate to the value of any business or other property forming part of the estate of the intestate, and in this regard the surviving spouse shall be considered to have contributed to the business unless proof to the contrary is shown by or on behalf of the child,*

but in the absence of special circumstances the spouses and children shall, subject to subsection (3) be entitled to equal shares;

- (e) as among the children of the intestate, the age of each child shall be taken into account with the younger child being entitled to a greater share of the property than the older child unless the interests of the children require otherwise; and*
- (f) in the absence of any spouse or child of the intestate the property described in paragraph (c) shall be distributed between the dependants of the intestate, if more than one, in equal shares.” – Emphasis by underlining supplied*

It is also important to bear in mind the provisions of section 4 of the Act which read as follows:

“Except as provided in this Act, no person shall be entitled under customary law or any other written law to take by inheritance any of the property to which a deceased person was entitled at the date of his or her death.”

In the present case, it is clear that the Respondent’s father was entitled to the land in question at the time of his death. Further, it cannot be doubted that the Respondent and her siblings fall within section 17 of the Act. On the other hand, the Appellant is neither a member of the Respondent’s father immediate family nor a dependant. In the circumstances, the land in question belongs to the Respondent and her siblings.

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

Pronounced in Court this 25th day of May 2018 at Blantyre in the Republic of Malawi.


Kenyatta Nyirenda
JUDGE