



IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
CIVIL DIVISION
CIVIL APPEAL NO. 116 OF 2016

(Being Civil Case No. 440 of 2016 before the Senior Resident Magistrate Court Sitting at
Zomba)

BETWEEN

ETHEL KUWERUZA

APPELLANT

-AND-

ALFRED KAMPAUNDI

RESPONDENT

CORAM: *HON. JUSTICE VIOLET PALIKENA-CHIPAO*
Ching'anda, Counsel for the Appellants
Counsel for the Respondent absent
Respondent absent
Ms.L. Mboga, Court Reporter
Mr. M. Kasoka, Court Clerk and Official Interpreter

Chipao, J

JUDGMENT ON APPEAL

Introduction

1. The Appellant, Ethel Kuweruza commenced an action in the court below for a claim in land. Judgment was given in favour of the Respondent and the Appellant being dissatisfied with the whole judgment has filed this appeal
2. The Appellant acting in person filed four grounds of appeal:
 - (1) That the lower court misdirected itself in law by holding that customary land cannot be a valid gift bequeathed by a will;
 - (2) That the lower court erred in holding that the land is connected to chieftaincy;
 - (3) That the lower court erred in failing to take into account the conditions in section 64 for court to take judicial notice of customary law; and
 - (4) That the lower court erred in not offering remedies for the harassment and the loss of property incurred by the Appellant.
3. In response to the grounds of appeal, the Respondent argued as follows:
 - (1) That the land could not be bequeathed by a will being customary land;
 - (2) That the lower court properly directed itself to the provisions of section 64 of the Courts Act; and
 - (3) That the lower court did not err in not offering remedies for harassment and loss of property incurred by the Appellant because this was not validly pleaded.
4. The Respondent therefore prays that the appeal be dismissed with costs.
5. When the matter was set down for trial, the court observed that the issues raised by the Appellant raised technical legal issues and that there was need for the Appellant to be legally aided in the presentation of her appeal. As such the Court directed that Legal Aid Bureau to provide her with assistance.
6. Chancellor College Law Clinic took over the prosecution of the appeal as Counsel for the Appellant. Upon taking over, the Appellant through Counsel amended the grounds of appeal to the following:
 - (1) The Magistrate erred in law by not directing his mind to the applicable law on validation of a will;
 - (2) The Magistrate erred in law and fact by not sufficiently by not directing his mind to the transmission of customary land law through inheritance;
 - (3) The Magistrate erred in law and fact by not sufficiently directing his mind to the jurisdiction of the lower court in dealing with deceased estate;

- (4) The lower court misdirected itself in law by holding that customary land cannot be a valid gift bequeathed by a will;
 - (5) That the lower court erred in holding that the land is connected to chieftaincy;
 - (6) That the lower court erred in failing to take into account the conditions in section 64 for court to take judicial notice of customary law;
 - (7) That the lower court erred in not offering remedies for the harassment and the loss of property incurred by the Appellant.
 - (8) In the circumstances of the case the decision of the learned Magistrate caused injustice to the Appellants.
7. The Appellant prays that the lower court's decision be quashed with costs to the Appellant.
8. After the hearing of the appeal, the Appellant filed final submissions arguing that there are two main grounds of appeal namely:
- (1) That the Lower Court erred in law in holding that the land in issue is connected to the Chieftaincy of village headman Munlo and that by that reason thereof it belongs to the Respondent; and
 - (2) That the lower court erred in law in not awarding damages to the Appellant for loss of property and for battery.
9. The Appellant argued in the submissions on the authority of section 1(3) of the Wills and Inheritance Act that the one cannot invoke the Wills and Inheritance Act when it comes to inheritance of customary land.
10. The Appellant further argued that her father occupied the land in 1950 but only became a village headman in 1975 as such occupancy and usage of the land preceded the chieftaincy. It was therefore argued that it was not right to consider the land issue as being attached to chieftaincy.
11. It was further argued that under section 26 of the repealed Land Act and the case of *Melvis Chirwa v. Faizor Karim and Dickson Pwelenji* MSCA Civil Appeal No. 1 of 2016, the chiefs have power to authorise the use and occupation of customary land in accordance with customary law but that that authority does not make them user or occupier of the land.
12. The Appellant further argued that the actions of the Respondent in extinguishing the user and the occupation rights of the Appellant, amounts to arbitrary deprivation of the right to property. It was argued on the authority of section 28 of the Constitution and the case of *Kamuzu*

(Administrator of the Deceased Estate) v. Attorney General Civil Cause No 1839A of 1997 [2004] MWCH 3, that interest in customary land is inheritable and can only be forfeited following rules under custom.

13. The Appellant stated she and her relatives were assaulted by a group of individuals who were led by the Respondent and she tendered medical reports in proof of the same. She also stated that in her oral testimony she testified that the Respondent destroyed 4 houses which were erected on the disputed land belonging to the Appellant and her relatives and also took properties belonging to the Appellant being doors and a bed. She argued that the court erred in law in not awarding damages to the Appellant for the loss of the property and for the assault.
14. In conclusion the Appellant prayed for the following reliefs:
 - (1) A declaration that the Appellant has the right to exercise the right of occupancy, use, possession and any other right available to a holder of customary land interest in the area in issue;
 - (2) Permanent injunction restraining the Respondent either by himself or his relatives or agents, or anyone acting under his authority from occupying, using, or possessing the land in issue;
 - (3) Damages for loss of property, assault and battery; and
 - (4) Costs of this action
15. The parties first appeared before Justice Professor Kapindu who was first sized of the matter where upon the Appellant raised a preliminary issue that the matter raises several factual issues which can be determined through oral evidence as per section 22(c), (d) and (g) of the Courts Act and prayed that the Appellant be allowed to produce oral evidence during the hearing of the appeal.
16. The Respondent whilst not opposing the prayer made by the Appellants asked that the evidence be limited to the issues which were before the lower court and that it should not constitute a fresh action before this court. The Respondent also asked that in compliance with of Order 16 of the Courts (High Court) (Civil Procedure) Rules. 2017 (the CPR) and section 64 of the Courts Act (Cap 3:02) of the Laws of Malawi. Appellant do file a proper trial bundle which should include evidence of an expert as is required for proof of customary law. Counsel argued that there is need for evidence of an expert to show what happens to land when a Village headman dies.

17. Counsel for the Appellants in reply said that they would comply with Order 16 of the CPR and section 64 of the Courts Act. The Court allowed the application and directed that the Appellants do comply with the requirements of Order 16 of the Courts (High Court) (Civil Procedure) Rules, 2017 (the CPR) and section 64 of the Courts Act (Cap 3:02) of the Laws of Malawi.
18. On the date scheduled for the hearing of the appeal, the Respondent did not turn up despite being served with the notice of hearing of the appeal.
19. The Appellant on his part did not comply with the directions fully. He only managed to file witness statements for the two witnesses who testified in the trial court. There was also no compliance with section 64 of the Courts Act as there was no evidence of an expert.

The Law and Analysis

20. Powers of this Court on appeal are provided in section 22 of the Courts Act. These are:
 - 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.*

21. It is trite that appeals in the High Court are by way of rehearing. This means that this Court will subject the evidence before the lower court to a fresh scrutiny with the aim of determining whether the lower court arrived at an appropriate decision.

Law Applicable on Validation of a Will

22. The first ground of appeal was that the Magistrate erred in law by not directing his mind to the law applicable on validation of a will. It is noted from the judgement of the lower court that as rightly observed by the Appellant, the Magistrate did not direct his mind to the issue of validity of the will.
23. According to section 6(1) of the Deceased Estates (Wills, Inheritance and Protection) Act, 2011 (DEWIPA): "Every will shall be made in writing and shall be signed by the testator in the presence of at least two competent witnesses who shall also sign the will in the presence of the testator and in the presence of each other as witnesses to the signature of the testator."
24. The Appellant in her evidence tendered a document which she said is a will that was left by her father. According to the Appellant, her father distributed the disputed land to her and her siblings. The purported will was deposited with the District Commissioner, Mulanje in 2006 by Joseph Wahiwa (deceased, father to the Appellant). The purported will was signed by the deceased and one Miziwiki Msotsa. It also has a stamp bearing Senior Chief Mkanda, Chambe Headquarters. Only one person signed as a witness to the purported will of Joseph Wahiwa instead of two witnesses. The purported will falls short of requirements of a valid will as required under section 6 of DEWIPA. The document purporting to be the will of late Joseph Wahiwa is therefore invalid as a will. This Court therefore finds that the deceased died intestate.

Inheritance of Customary Land

25. The second ground of appeal was that the Magistrate erred in law by not directing his mind to transmission of customary land through inheritance. The issue raised in this ground of appeal is the same issue raised in the fourth ground of appeal which is that the Magistrate misdirected himself in law by holding that customary land cannot be bequeathed by a will.
26. From the judgment, according to the Magistrate the issue was whether or not property could be disposed of under a will contrary to what custom says. On that issue, the Magistrate's view was that it was a wrongful exercise of testamentary freedom to dispose of property contrary to what custom demands.

27. The Magistrate did not cite any law in support of his proposition. Be that as it may, section 4 of the Deceased Estate (Wills, Inheritance and Protection) Act provides to the contrary. The section provides as follows:

Except as provided for 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.

28. It is clear from section 4 of DEWIPA that customary law cannot override an Act of Parliament especially where the Act in question specifically state that customary law cannot override it (see **Rhoda Banuel v. Davie Kachikondo and others** Civil Appeal No. 34 of 2016). As such in as far issues of inheritance are concerned, the DEWIPA takes precedence over customary law.

29. Perhaps, the issue that the Magistrate was raising with regard to the will was not property generally but customary land in particular and that customary land cannot be bequeathed by a will contrary to custom. From the issue raised in grounds 2 and 4, the argument is that customary land cannot be transmitted through a will.

30. The Appellant relied on the case of **Kamuzu Banda (Administrator of Deceased Estate v. Attorney General** [2002-2003] MLR 272 where Chimasula J. opined that interest in customary land is inheritable and that once granted, it cannot be arbitrarily extinguished.

31. In some High Court decisions like that of **Kuwali v. Kanyashu Civil Cause No. 109/2010 (MZ) [2011] MWHC 7**, the Court held to the effect that there is nothing like ownership or title to customary land. However, in the case of **Mervis Chirwa v. Faizer Karim & Dickson Pwelenji MSCA Civil Appeal No. 1 of 2016**, the Malawi Supreme Court after analysing many cases on customary land both local and international, held that customary land can be owned by individuals or groups to which the land is allocated to at customary law. This is what the court said on pages 24-25:

"At customary law, customary land is owned or belongs at the same time to a group and/or individuals to who the land is allocated. This general consideration includes the right to dispose the allocated land donatio inter – vivos or donatio mortis causa to family and others and the right to the heirs to inherit the land at intestacy. At customary law, these powers are not understood as akin to a license "from a chief", or tenancy at will from a chief" [Emphasis Added].

They are understood as "ownership" of the land allotted or the land allotted "belongs" to an individual or group allocated the land. It is not accidental or

incidental, therefore, that all traditional leaders in their testimony and in their witness statement, state that the land "belongs" to those who it is allocated. It must be, therefore, that, at customary law, those allocated customary land actually own the land. Anyone allocated the land is let in possession, to occupy and use.

32. Since individuals can own customary land, they can also dispose it by way of sale or a will.

Where there is no will, then heirs of the deceased are entitled to inherit the land at intestacy. But any such disposal must be made within the confines of the customary law governing the land in issue. It was thus held in the case of *Mervis Chirwa v. Faizer Karim & Dickson Pwelenji MSCA Civil Appeal No. 1 of 2016*

In pursuing to sell customary land, because of collective, individual ownership and common ownership in customary land, sale, like any other disposal, has to conform to customary law.

33. It was therefore wrong for the Magistrates to simply disregard the purported Will on the basis that customary land could not be bequeathed in a Will. However, the Will ought to have been disregarded on a different point being that it was not valid having not been executed in accordance with the law.

Connection of the land in issue to chieftaincy

34. The fifth ground of appeal was that the Magistrate erred in holding that the land was connected to the chieftaincy. The Appellant argued that the acquisition, occupation and usage of the land preceded the chieftaincy and that as such it could not be concluded that the land issue is attached to the chieftaincy. The Appellant argued that in the light of section 28 of the Constitution, property rights over customary land assigned or allocated by one chief cannot be arbitrarily extinguished at the succession of another chief. The Appellant also relied on the case of *Kamuzu Banda (Administrator of Deceased Estate v. Attorney General* [2002-2003] MLR 272 in support of the proposition. The Appellant argued that the Respondent's being a chief does not make him user and occupier of customary land under his jurisdiction.

35. From the arguments put forward by the Respondent's case in the trial court, the issue of entitlement of the Respondent as owner of the land is based on a purported custom in the area which is to the effect that the disputed land is owned by a current sitting VH Munlo and passed on to the next VH Munlo and not his children or relations. The Appellants argument on the other hand, relates to powers of a village headman or chief over customary land in his jurisdiction. As was held in the case of *Mervis Chirwa v. Faizer Karim & Dickson Pwelenji*

(above), the power to control allocation and administration of land given to the Minister and the Chiefs does not make them users or occupiers of the land they control and administer. In this regard, once land is allocated to a person under custom law, it becomes property of that person and the Chief cannot simply take it away at his will without proper basis and procedure.

36. The point put forward by the Respondent's side in their evidence in the lower court was that the land was taken away because by custom it was meant to serve the sitting village headman Munlo and was never meant for a particular person. In other words, the respondent was saying that the land is connected to chieftaincy of the area.
37. The record indicates that the trial court in its analysis considered as central to the matter before it, the issue of whether or not the land was connected to chieftaincy. The trial court also found that the land was first occupied by the 1st VH Munlo, then the 2nd VH Munlo who happened to be the Appellants father. The trial court then went on to find in favour of the Respondent and advised the Appellants to come to the High Court if they wanted to challenge the chieftaincy of the Respondent as 3rd VH Munlo.
38. The trial court faulted the Appellant and her witnesses for trying to avoid the issue. This is what the court said on page 7 of its judgment:

Notably the plaintiff says the land is theirs and they inherited the same from their father. She went on to claim that their father in fact left a will indicating that the land was devolved to them. I shall talk about the will later suffice to say that for now there is one issue that needs to be resolved which I noticed that the Plaintiff tactfully tried to evade throughout their testimonies and the issue being whether the land in question is attached to chieftaincy.

39. From the summons on record, the issue before the court was a land dispute. The Appellant in her opening said that the Defendants have chased her away from her land, destroyed their houses and taken property left by their parents. The Appellant and her witness said that the land belonged to their parents and they were using the same whilst their parents were alive and continued to use it upon the death of their father before the Respondents started chasing them. They indicated that their father settled on the land in 1950 and then became VH Munlo in 1975.
40. This Court fails to appreciate the basis of the lower court's conclusion that the Appellants tactfully avoided the issue of whether or not the land is connected to chieftaincy. The Appellants claim to the land was based on inheritance from their father and that is the

evidence they gave and so it cannot be said that they tactfully avoided to address the issue of connected to chieftaincy. That only became an issue because the Respondent raised in defence as a basis for claiming ownership over the land. The trial court's approach to the evidence should have been whether or not the Appellant had established that the land belonged to her father as a holder of the land. The issue of whether or not the land is connected to chieftaincy would have come secondary to determine who should inherit it following the demise of the Appellants father.

41. In order to answer the question of whether the land was connected to chieftaincy of VH Munlo, the lower court indicated that it had to first determine how the Appellants father came to own the land. The lower court's observation was that the Appellant dodged this point and focused on her inheritance from her father without elaborating how her father acquired the land. On the other hand, the trial court observed that the Respondent supported by GVH Kamwendo testified that the land is meant to be used by a sitting VH and passed on to the next VH and that custom demands that chieftaincy follows maternal side. The trial court said that the Respondent and his witnesses explained that the land was occupied by VH Munlo I then passed on to VH Munlo II without any challenges.
42. I have gone through the evidence on record. The Appellant and her witness testified that the land belonged to their father who settled on the land in 1950 and became chief in 1975. According to the Appellant, the children were born and raised on this land and they built houses some of which, were then destroyed in the fracas leading to the matter. The Respondent on the other hand said the land is for chieftaincy. The Respondent in his evidence spoke about the land generally and not specifically the piece of land in dispute. This is what he said:

The place they are talking about is for chieftaincy. We settled on the land in 1952. We did not find anyone on the land. It was Group Village Headman Kamwendo who saw us come. The land belongs to the clan.

The 1st chief was Custom Munlo, the 2nd was Joseph Wahiya and then it was me. I took over the land as the land goes together with chieftaincy....

43. The Respondent's evidence suggests that he was speaking of the whole village land as belonging to the chieftaincy especially with the qualification that the land belongs to the clan. This also becomes clear from the evidence of his first witness Matebule Mateyu who gave the history of the land in terms of when first the Clan settled on the land. His evidence was

that the clan settled on the land in 1952 with Custom Munlo as the person who went to look for land and upon finding the land took with him six families which included the Appellants father. At that time, the clan had no chief but as it grew, they appointed Custom Munlo as the first chief.

44. Apart from giving evidence as to when the clan settled on the land, the rest of the evidence of Matebulo Mateyo is more about the chieftaincy wrangle. Most of his evidence was about how the Appellants family (siblings) were pushing to takeover chieftaincy of their father. He went further to say that the matter went for discussions as far as the Sub Chief and the District Commissioner but they were told they cannot not takeover chieftaincy as per custom.
45. It is clear that the Respondent and his witnesses' approach to the case was that it was an issue of chieftaincy. The Respondent's closing statement was that he wanted to see if the court would rule that '*ana obadwa amatenga ufumu*'.
46. The third witness on the part of the respondent was Patrick John Gama who is also GVH Kamwendo. His evidence was also mostly about the chieftaincy wrangle. He in examination in chief actually said he did not know about the land dispute and that he was surprised to hear that there was a dispute over the land. In cross examination he said the Appellant was diverting from the issue that she brought to court. The Appellant registered a claim over land. She and her witness testified about land. There was no diverting from the issue as the Respondent and his witnesses wants the court to believe.
47. On the land issue, GVH Kamwendo said that he does not understand the land issue because the respondent is the 3rd family to occupy the land. He said children of the first family to occupy the land, were sent away after the death of their father because the land belongs to the chiefs.
48. The clan land would indeed be connected to chieftaincy in the sense of the chief being the one with the power to control and allocate the land as provided in section 26 of the Lands Act. But as was held in the case of *Mervis Chirwa v. Faizer Karim & Dickson Pwelenji MSCA Civil Appeal No. 1 of 2016*, such power does not make the chief owner of the land. As such he cannot arbitrarily take away land from anyone lawfully allocated the same under custom.
49. It is not disputed that the Appellant and her witness did show that the land in issue was occupied by their father and that she and her siblings built on the land. it is also not disputed

that the Appellants father was among the first settlers on the land together with VH Munlo I. The Appellant and her witness testified to the fact that their father settled on the land in 1950. Of course, there is a variation with the Respondent and her witness who said the clan settled on the land in 1952. This variation is not significant as to affect credibility of the witnesses as it is noted from their ages as indicated on the record that all the witnesses who testified on both sides were not yet born at the time of the settlement. This means they relied on information passed on to them which would then explain the variations.

50. Since there is no dispute, that the Appellants father was occupier of the land prior to his death, then question then is how was he allocated the land? Was it allocated to him at the time of settlement or at the time he became village headman. According to the Appellant and her witness, the land in issue is the land their father settled on in 1950 (or 1952). According to the Appellant, her father became village headman in 1975 as second VH Munlo. The Respondent was silent on the time as to when the Appellant's father became village headman Munlo. His witness Matebula Mateyu said that it was in 1967 or thereabouts. The two witnesses on the Respondent's side did not come clear on the transmission of the land from VH Munlo I to VH Munlo II. The Respondent simply said he took over the land because it goes together with chieftaincy.

51. The Respondent and his witnesses suggested that according to the custom of the area, the land that was being occupied by the Appellants' father was meant for use and occupation by a sitting chief of the area. This evidence brought into question the issue of the custom prevailing in the area in as far as land occupied and used by a sitting chief can be transmitted.

52. This takes us to the 6th ground of appeal which is the same as 7th ground. This ground of appeal is to the effect that the court erred in failing to take into account the conditions of section 64 for a court take judicial notice of customary law.

53. Section 64 of the Courts Act 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.

54. According to this section, once a matter of customary law is considered material, then the court must treat it as a question of fact for purposes of proof. For the custom to be proved, the

court may admit evidence of experts or persons whom the court considers likely to be acquainted with such law. From the record, the court did not admit any expert witnesses on the existence of such a custom. The court simply relied on the evidence of the Respondent and his witnesses and more especially, GVH Kamwendo. When the Respondent appeared in court on their first day of trial, he indicated that he would call two witnesses. GVH Kamwendo was called as a defence witness and he testified as such. He did not testify as an expert witness.

55. As the Appellant argued in this appeal, there was an irregularity in the trial court in that the requirements of section 64 of the Courts Act were not met. In short, there was no proof of the custom that the Respondent relied upon as the basis for claiming of ownership of the land in issue from the Appellant. In the absence of proof of such a custom, and in view of the evidence of the Appellant that the land was occupied and used by their father prior to his death, the trial court erred in concluding that the Appellant had failed to prove her case. It appears the court's judgment was clouded with the Respondents sentiments that the matter was a chieftaincy matter and not a land issue. That is why the trial court even went further to advise the Appellant to come to this court to seek a determination of who the right VH Munlo III is.

Jurisdiction of Magistrate Courts in Relation to Deceased Estate

56. In the amended notice of grounds of appeal, the Appellant in ground 3 argued that the Learned Magistrate erred in law by not properly directing his mind to the applicable law on jurisdiction of the lower court in dealing with deceased estate. The civil jurisdiction of Magistrate Courts is provided for under section 39 of the Courts Act. Under this section, Magistrate Courts have jurisdiction over customary land but not over deceased estates.

57. The Appellant was unrepresented in the Lower Court and as such her claim was not properly articulated. Be that as it may, the summons indicates an issue of land dispute. The record indicates that on first appearance, in explaining her case, the Appellant claimed that the Respondent had evicted her from her land. The issue in the Court's view was more to do with ownership of the land and not a dispute over deceased estate to invoke the application of the DEWIPA.

Failure to Offer Remedies for harassment and loss of property.

As already noted above, the Claimant was unrepresented and her claim was not properly articulated. But when she appeared in court on the first day of trial, she appeared to have

amended her claim to include the destruction of houses and property grabbing. She talked about 4 houses which were destroyed. She however did not elaborate what property was grabbed. From her witness what came out was that in the fracas, the property was scattered. Just like the Appellant, the Respondent was unrepresented. His reaction to the issue of damage in his evidence was casual. He may not have appreciated that the claim had been amended to include the issue of property damage and the record does not show that the court brought the addition to his attention. It would therefore be wrong to condemn him without giving him an opportunity to defend himself in as far as the issue of property damage is concerned. In the circumstances, if the Appellant still desires to pursue the issue, he may commence fresh proceedings specifically to do with the issues of damage and loss of property so that the Respondent has an opportunity to defence himself.

Conclusion

- 58.** In view of the foregoing, the Court allows the appeal and orders that the land be restored to the Appellant and her siblings.
- 59.** Each party is to pay his or her own costs.
- 60.** Any party not satisfied with the decision can appeal to the Supreme Court.

Made in Open Court on day of **March**, 2024 at Zomba.


V. Palikena-Chipao

JUDGE