

IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
APPEAL CASE NUMBER 20 OF 2021
BEING CIVIL CASE NUMBER 164 OF 2017
IN THE COURT OF THE THIRD GRADE MAGISTRATE SITTING
AT THAVA

BETWEEN

STEVEN BULA..... APPELLANT

AND

ESMIE SAMSON..... RESPONDENT

BEFORE: Honourable Justice Jack N'riva, Judge
Appellant present in person
Respondent not present
Court Clerk and Official Interpreter Ms D Nkangala

JUDGMENT

This is an appeal against the decision of the Second Grade Magistrate Court at Thava in Thyolo. The respondent did not attend the hearing. The respondent was the plaintiff in the court below. She claimed that the appellant had 'snatched' her land. The court below ruled in her favour. The appellant appealed to this Court against the decision.

The grounds of appeal according to my own translation are

- The land is communal. The Court erred to give judgment giving the land to [the respondent] because her relation married at the appellant's clan.
- The court did not consider the evidence that the land has been being used by one member of the clan, Mr Benson who is now mentally challenged, for 46 years.
- The one who has been using the land is available but is mentally challenged.
- The court referred in its judgment issues that were not given in evidence.
- The court did not visit the land.
- Witnesses were called after the judgment was already delivered.

I found the grounds of appeal wanting. The whole appeal was actually wanting in terms of procedural aspects. I, however, proceeded to hear the appeal taking into account the philosophy that justice should not be sacrificed at the altar of technicalities. More so, I took into account that the appellant was not legally represented.

During the appeal the appellant argued that the land is communal and the owner is available but sick. He argued that *mkamwini* (a man who marries and settles at a matrilineal home) cannot own land. Seemingly, the respondent inherited the land from a man who came to marry in the area, hence the argument.

He argued that the court did not take into account his argument but took its own points (the court's own points) to subvert the course of justice. He said the court failed to differentiate between *mkamwini* and *wamtundu* (a clan member) and went on to give the land to *mkamwini* who had three children.

His further argument was that Group Village Headman Chagunda gave false testimony which was different from that of Traditional Authority Changata. He said the Magistrate left all important points and did not tackle them during the hearing. He said the points were said but not recorded. He said he had

another matter with Group Village Headman Chagunda concerning a graveyard from which the Headman was producing charcoal. He said the court decided the matter corruptly. He further said the court was intimidating him not to appeal against the decision. He further said the court gave two different judgments on the same piece of land. He said the other piece of land was visited and the other one was not. He said for this reason, the owner of the land is Kayenda who has worked on the piece of land for 46 years.

The issue for determination is whether to allow the appeal.

An appeal is an exercise where a person aggrieved by a decision of a court approaches a higher court for the latter to reconsider the lower court's decision. The higher court conducts the appeal by the way of rehearing *i.e.* reviewing the evidence and the court's decision with the aim to determine whether the lower court arrived at a correct decision. An appeal is not a second attempt at one's luck in a claim.

On appeal, the Courts deal with issues that were in the trial court *Mbvundula v Maliro* [1968 - 1970] ALR Mal 146. See also *Produce Marketing Supplies Limited and Global Electrical and Agricultural Company Ltd v Packaging Industry (Malawi) Ltd* 11 MLR 104.

Tambala JA, in *Steve Chingwalu and DHL International Ltd v Redson Chabuka and Hastings Mangirani* [2007] MLR 382 (SCA) at 388, said

The position of the law regarding appeals involving issues of fact is that this court is slow to interfere with findings of fact made by a tribunal properly mandated to make decisions on disputes of facts, unless there exists some misdirection or misreception of evidence or unless the decisions are of such a nature that, having regard to the evidence, no reasonable man could make such decisions: see *Mlamwa v Kamwendo* 2 ALR (M) 565.

The Court went on to say:

Finally, we bear in mind that an appeal to this court is by way of rehearing which basically means that the appellate court considers the whole of the evidence given in the court below and the whole course of the trial; it is as a general rule a rehearing on the documents including the record of the evidence.

In this appeal, the appellant hardly points out how the court below made the decision in error.

On the first ground, that

the land is communal. The Court erred to give judgment giving the land to [the respondent] because her relation married at the appellant's clan.

I find this ground wanting.

The court below heard the evidence and concluded that the land belonged to the plaintiff (the respondent herein). The argument that a *mkamwini* cannot own land is not, in my view, satisfactory. Such an approach would result in discrimination and contrary to the right of any person to own property alone or in conjunction with others.

The other ground was that the court did not consider the evidence that the land has been being used by one member of the clan, Mr Benson who is now mentally challenged, for 46 years. This is not supported by the evidence in the court below.

On the next ground that the court referred in its judgment issues that were not given in evidence, the argument was not supported. On that the court did not visit the land, the appellant did not demonstrate how that affected the judgment. On that witnesses were called after the judgment was already delivered, the appellant gave no argument or evidence to support the assertion.

Coming to the other arguments, the appellant argued that the court did not take into account his argument but took its own points (the court's own points) to subvert the course of justice. The other one was the court failed to differentiate between *mkamwini* and *wamtundu* (a clan member) and went on to give the land to *mkamwini* who had three children. I have already

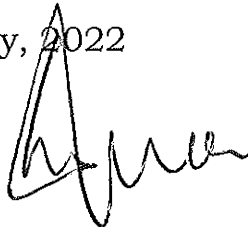
tackled the *mkamwini* issue. On the issue of the court taking into account its own points, the argument lacks support. The same is the case with the argument that Group Village Headman Chagunda gave false testimony which was different from that of Traditional Authority Changata. The argument was that she left all important points and did not tackle them during the hearing. Be that as it may, the court had to take into account the evidence that was tendered. Likewise, the appellant hardly supported the argument that some points were said but not recorded.

The appellant said he said he had another matter with Group Village Headman Chagunda concerning a graveyard from which the Headman was producing charcoal. I fail to appreciate the relevancy this argument. Further, I find the argument that the court decided the matter corruptly to be made without supporting facts. That is quite unfortunate.

In my experience, it is not unusual for unsuccessful parties to make such allegations. Likewise, the appellant hardly supported the assertion that the court was intimidating him not to appeal against the decision. This is also the case with the assertion that the court gave two different judgments on the same piece of land.

In sum, the appeal is unsuccessful and is dismissed.

MADE the 24th day of January, 2022

A handwritten signature in black ink, appearing to be 'J. N'RIVA', written over a horizontal line.

J. N'RIVA
JUDGE