IN THE SUPREME COURT OF APPEAL
AT BLANTYRE

MSCA CIVIL APPEAL NO. 68 OF 2009

(Being High Court Civil Cause No. 3010 of 2008)

BETWEEN:

CHITAKALE PLANTATIONS LIMITED ..... APPELLANT

- AND -

MARY WOODWORTH (Female) ..... 1ST RESPONDENT

- AND -

LISNETI GREMU (Female) ..... 2nd RESPONDENT

CORAM: HON. JUSTICE MSOSA, SC, JA
HON. JUSTICE MTAMBO, SC, JA
HON. JUSTICE TWEA, JA

Kasambara, of Counsel, for the Appellant
Mpaka, of Counsel, for the Respondent
Mwale/Balakasi, Court Officials
Ethel Matunga Chisale (Ndunya) Senior Personal Secretary

JUDGMENT

MTAMBO, SC, JA

The circumstances, in brief, which were before the High Court are these. The Appellant sought the grant of an injunction against the Respondents restraining them from entering upon the property known as Chitakale and Venture Estate more particularly specified in Deed No. 76157 dated August 04,1997. The Appellant was portrayed as a subsidiary company of Mulli Brothers Limited, designated to take over Chitakale Estate. The Estate was, allegedly, taken over on February 07, 2008. Following the handover a dispute arose concerning a certain piece of land which the appellant assumed formed part of the Estate, but which the respondents said did not form part thereof. The appellant, therefore, commenced the action above referred to, arguing that the land in question formed part of the Estate.

The respondents disputed the claim and, in the pleadings, put the appellant to strict proof of the same. They averred that the land has at all material times belonged to them and their families, and that they have used it for many generations, even prior to the coming into being of the appellant or the occupation thereof by its predecessors, they contended. They averred that they used the land to grow agricultural produce and that at the time the appellant entered it there were twelve boxes of honeycombs, many acres of mustard seed, cabbage, cassava, green maize, tomato, sugar cane, rape, cocoa, beans, green paper, carrot, paw paws, pumpkins, onions and bananas. The respondents further averred that the appellant had also erected houses and a bamboo fence on the land, thereby damaged it for farming purposes. They, therefore, made a counterclaim for damages.

After due consideration of the evidence which was before it, the High Court came to the conclusion that the appellant failed to prove that it had ***locus standi*** to commence or to maintain the action against the respondents and that, even if it had ***locus standi***, it (the appellant) failed to satisfy the court that the land in question is, or that it has always been, part of Chitakale Estate. The Court, therefore, dismissed the action.

The Court gave judgment for the respondents on the counterclaim. The appellant has now appealed to this court.

We do not intend to consider the appeal ground by ground but rather in the manner the issues appear to us to have been raised and argued.

Upon reading the record, the grounds of appeal and the skeleton arguments, and upon hearing both learned counsel, it is apparent that the appeal is essentially about maters of fact. And in the written submission, learned counsel for the appellant, quite aptly in our view, introduced his arguments thus:

> •*The matter before your Lordships is a basic one: between the competing claimants, who in law has better claim for trespass to the land in dispute.*
>
> •*To answer this question, my Lords, it has to be determined as to who was in possession of the land in issue.*
>
> •*During trial, the appellant called twelve (12) witnesses whereas the respondent called four (4) witnesses.*
>
> •*Significantly, none of the warring parties produced before the court any title deeds supporting their claim.*
>
> •*It is not surprising therefore that none of the parties pleaded that they were the owners of the land in dispute.*
>
> •*Further, it is common case that the appellant is in possession of the disputed land.*
>
> •*Further still, the appellant is claiming to have got free hold title whereas the respondents are claiming*

lease hold title over the same land. Significantly, they both point to the Government as the donor.

- *It is common case that the appellant's predecessor has been in possession of Chitakale Estate since either 1927 or 1933.*

The appeal was argued around these issues. It seems to us therefore that if this appeal is to succeed, we will have to make decisions on questions of fact contrary to those found in the High Court.

The principles governing the approach of an appellate court to an appeal on fact from a judge alone are well stated in the old English cases of **Coghlan V. Cumberland** [1898], 1 ch. 704 and **The Glennibanta** [1976] 1 P.D. 283, which were cited with approval not alone in **Bryce V. Republic,** 1971 – 72 ALR Mal. 65, but in many other cases. In **Coghlan** case the Court said"

The case was not tried with a jury, and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the

relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen.

And in **The Glennibanta** the court said:

Now we feel, as strong as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony , the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.

We will therefore in reviewing the record of the evidence bear in mind the advantage enjoyed by the High Court in seeing and hearing the witnesses, and being guided by the impression made on it by them. We will not, however, hesitate to draw our own inferences and conclusions, if we should do

so, but only after carefully evaluating the judgment of the Court.

The evidence shows that the dispute concerning the piece of land in issue pre-dates the acquisition of Chitakale Estate by the appellant. There is evidence that the dispute had been the subject of discussion at a number of fora involving the respondents and the appellant's predecessor in possession. One such forum was the office of the District Commissioner, Mulanje. With the aid of surveyors, it was established and resolved at that forum that the land in question did not form part of the Estate. The evidence further shows that the office of the District Commissioner further advised the respondents to take steps to have the land leased to them, which they did; assuredly, it must, at that stage, have appeared to that office that the respondents were better entitled to the land than the appellant. All appears to have been well thereafter until the Estate was purchased by Mulli Brothers when the wrangle resurfaced.

It seems quite clear to us that the possession of the disputed land was, and must have been, in the respondents by this time, who grew thereon various agricultural produce, which included bananas. Besides, the Court's clear finding that the Estate did not include the land in dispute strengthens the conclusion that the appellant could not have been in possession of it, the dispute about the land with the appellant's predecessor having been settled earlier than the acquisition thereof by it (the appellant).

That settles the question of possession. We should now say a quick word regarding the appellant's ***locus standi.*** It is evident that the vendor of the Estate was the Government of the Republic of Malawi. The purchaser was a firm styled Mulli Brothers. The appellant, allegedly, was set up for the purpose of taking over the Estate; this was not proved. The High Court then observed thus:

On examination of exhibit "P 2" the Asset Sale and Purchase Agreement itself, the party appearing as a counterpart of the Malawi Government in it, as has been pointed out by the Defendants, is clearly Mulli Brothers, without any additional qualification to that name, and not the Mulli Brothers Limited the Plaintiff claims to be subsidiary of. In case, therefore, the Purchaser in this Agreement was thus meant to be Mulli Brothers Limited , since the name captured in the exhibit is throughout that of Mulli Brother simpliciter, then I would have expected the Plaintiff to appreciate the need to lead evidence before the Court, explaining why that name of that Purchaser was abbreviated, if at all, by dropping from its end the word Limited, and also explaining, if that was the case, under what authority that might have been done. The Plaintiff, as a matter of fact, did not do any such thing. Thus, in the face of its absolute silence on the matter, which is the equivalent of the absence of any valid and legal explanation on the point, the only reasonable conclusion I must come to is that the Agreement herein was meant to be exactly what it purports to be, i.e. an Agreement between the Malawi Government through the Privatisation Commission on the one hand and the Mulli Brothers mentioned therein on the other hand, and therefore not to be between the Government and Mulli Brothers Limited. The old case of ***Salomon vs Salomon,*** *which the Defendants earlier cited, still being good law since its pronouncement, I cannot otherwise than that the Purchaser Mulli Brothers mentioned in exhibit "P 2" is a group of persons, or an entity, that is distinct and separate from the Mulli Brothers Limited the Plaintiff claims to be a subsidiary of, and to have acted on behalf of.*

Now, assuming the Asset Sale and Purchase Agreement herein is valid, and assuming also that

Chitakale Estate was indeed bought by the Mulli Brothers who are parties to the Agreement, if we go by the assertion that instead it is Mulli Brothers Limited rather than the correct purchasers, that designated the Plaintiff to take over the Estate, then we immediately face the questions at what point and how did Mulli Brothers Limited, as a stranger to the transaction in question, get the authority to meddle into matters it was not concerned with, by even delegating who should receive the purchased Estate. Certainly, in this case the Plaintiff did not lead any evidence as to whether at some point Mulli Brothers either further sold or otherwise assigned Chitakale Estate to Mulli brothers Limited, for it to acquire the mandate to designate the Plaintiff to take over the Estate in question. If, therefore, the Estate was bought by Mulli Brothers as exhibit "P 2" indicates was meant to be the case, then Mulli Brothers Limited could not have had the authority to designate a different Company, like the Plaintiff, to take over the same. In the absence, therefore, of evidence showing that the Plaintiff was designated by the Purchaser named in exhibit "P 2" to take over the Estate, the averment that the Plaintiff is linked to the Asset Sale and Purchase Agreement through Mulli Brothers Limited does not make any legal sense, as both that Company and the Plaintiff itself are clearly third parties to that instrument.

The Court then came to the conclusion:

I must candidly say, therefore, that on a strict understanding of Company Law, in terms of the distinction between natural and juristic persons, and also on a strict understanding of the doctrine of privity in the Law of Contract, the truth of the matter in this case is that the Plaintiff has failed to establish that it has any right to bring this Action. In other words, it has failed to show that it has any

locus standi in this matter. On this technical score, therefore, I am quite entitled to dismiss the Plaintiff's matter herein purely as one lodged in Court by a total stranger.

We are unable to find fault with this analysis of the law and the conclusion the Court came to. Both the analysis of the law and the conclusions are correct.

We now refer to the counterclaim. We bear in mind that a counterclaim is in itself a distinct cause of action with distinct facts on which the action is founded. It is, therefore, an action which may stand regardless of the result of the action commenced in the statement of claim, including the result that the plaintiff lacked ***locus standi*** in the action.

The respondents alleged in the counterclaim that the appellant is a trespasser to their land and claimed damages arising therefrom. And after evaluating all the evidence, the Court said:

*What is puzzling is the fact that notwithstanding the Plaintiff not having **locus standi** in the matter, or its neglect of a conclusion against its predecessor by relevant expert Departments on the ownership of the disputed land, or the fact that it took on the liability of suing on this liability contrary to guidance in the Asset Sale and Purchase Agreement, having decided to challenge the Defendants, the Plaintiff was so emotional in the assertion of the title it was claiming to the land in dispute. Thus, although it was a new comer on the scene, it is clear from testimony given by the Defendants that it felt so righteous in what it chose to do as if to say that it knew better than all its predecessors on the matter. Having refused to confine itself to operating within the arena of the Asset Sale and Purchase Agreement, it further threw all caution to wind when it unilaterally looked*

down on the protestations of the Defendants and brushed them aside. The Plaintiff, it is clear, even accorded itself the arrogance not even to recognize what gave the Defendants the courage to grow some crops on the disputed land. Having taken up this suit, which it could have avoided, it still went ahead to barricade the disputed land from the Defendants with a bamboo fence. It also went ahead to so disregard the Defendants as not even give them opportunity to harvest what they had cultivated or to handover the produce it either itself harvested or destroyed on that land. Besides, it even went ahead and build four permanent residential structures on the land, as if the matter had already been resolved by a judgment in its favour.

In my judgment, this conduct of the Plaintiff over the dispute, which existed before the Plaintiff and its parent Company got associated with Chitakale Estate, if they at all did, was overly confident for a newcomer into the problem. I am convinced that it was also needlessly callous and offensive to the Defendants, who were on the receiving end of the same. I have no doubt on the evidence from the defence side the behaviour the Plaintiff displayed against them was disgraceful and thoroughly demeaning to them. Indeed what it did and the manner in which it did it suggest some highhandedness on its part and basically the taking of the Law into the Plaintiff's own hands in the style it opted to treat the Defendants. Clearly, therefore, the Plaintiff occasioned to the Defendants untold loss and misery. I am accordingly satisfied that the Plaintiff's entry on the land on which the Defendant had crops which entry it managed with strong hand and show of force, in terms of the requirements of the Law on trespass, as ably submitted on by learned Counsel for both sides,

entitled the Defendants to sue for trespass, especially considering that as from 22nd May, 2006 (exhibit "D 2") both the Defendants and the Plaintiff's predecessors were fully made aware that the Defendants had possession and occupation of the land in dispute, and that Chitakale Estate should stop using the land.

The Court therefore was of the view that the counterclaim was made out and, accordingly, entered judgment for the respondents.

We have ourselves subjected the evidence to a careful scruiting and, again, are unable to find fault with the analysis of the law and the conclusion the High Court came to. Both the analysis of the law and conclusion are correct on the evidence which was before the Court.

All in all we dismiss the appeal with costs.

DELIVERED in open Court this 24th day of June 2010 at Blantyre.

Signed: .....
HON. JUSTICE A. S. MSOAS, SC, JA

Signed: .....
HON JUSTICE I. J. MTAMBO, SC, JA

Signed: .....
HON. JUSTICE E. B. TWEA, JA