

**IN THE HIGH COURT OF MALAWI**  
**MZUZU DISTRICT REGISTRTRY**  
**CIVIL APPEAL CAUSE NO 34 OF 2014**

**BETWEEN**

**COLLINS MBUGHI.....**  
**.....APPLICANT**

**-AND-**

**JOVITO GHAMBI.....**  
**RESPONDENT**

**CORAM: HONOURABLE JUSTICE D.T.K. MADISE**

Mr. Mbulo, Counsel for Plaintiff

Mr. D. Shaibu, Counsel for Defendant

Mr. A. Kanyinji, Court Clerk

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**Madise J,**

**JUDGEMENT**

## **1.0 Introduction**

**1.1** The Respondent first appeared before the Ngerenge Magistrate Court having sued the Appellant over a piece of customary land in Karonga. The court at Ngerenge entered judgment against the Appellant on 1<sup>st</sup> August 2014 and ordered the Appellant to vacate the disputed land. On 24th August 2014 the Appellant being unhappy with that decision applied for a stay of execution of judgment pending appeal. The Appellant has filed three grounds of appeal.

## **2.0 The Grounds of Appeal**

- 1) The Magistrate did not direct his mind to the evidence adduced by the Appellant.
- 2) The Magistrate did not allow the Appellant to call traditional leaders as his witnesses.
- 3) The Appellant was duly allocated the land by the traditional leader in the area.

## **3.0 Appeals in this Court**

**3.1** It is settled law in this Republic that appeals in the High Court are by way of rehearing of all the evidence that was presented, the law applied and the procedure followed. The purpose is to ensure that the trial court was within the ambit of the law when arriving at its decision.

## **4.0 The Facts**

**4.1** The Appellant Collins Mbughi told the court below that he was allocated a piece of customary land by Group Village Headman Mwaungulukulu in 2001. Since then he has been using and occupying the piece of land in question. He further built a house and a grocery store on the land.

**4.2** In 2009 the Respondent arrived back in the village and started claiming the land in question. The Appellant is of the view that the

Respondent has violated his constitutional right as he had developed the land in issue.

**4.3** The Appellant summoned Samuel Nthaba who testified that the land in dispute belonged to the Appellant as he has been working on the land since 2001.

**4.4** In response the Respondent stated that he indeed left the village in 2001 and the land became idle. When he heard that the Appellant had occupied the land, he dragged him to the Chiefs. In 2014 after 13 years he decided to take the Appellant to Ngerenge Magistrate Court.

**4.5** The Respondent summoned GVH Mwangulukulu. He stated that the piece of land in dispute was under his jurisdiction and originally belonged to the Respondent's family. However when the Respondent left the village in 2001 the land became idle and he allocated some to the Appellant who has been working on the land since 2001.

## **5.0 The Issues**

There are two issues for determination before me.

- 1) Whether the Appellant was duly allocated the piece of land in question according to customary law.
- 2) Whether he has the right of usage and occupation.

## **6.0 The Law**

**6.1** The burden and standard of proof: In civil matters he who alleges or claims must be the first to prove his case. A positive is easier to prove than a negative. The sued party need not prove anything. The standard required is on a balance of probabilities. The Court must find the evidence of a successful party more probable than not.

**6.2** Title and ownership of customary land

Section 25 of the Land Act is the starting point.

*All customary land is hereby declared to be the lawful and undoubted property of the people of Malawi and is vested in perpetuity in the President for purpose of this Act.*

**6.3** Section 26 of the same Act provides that.

*The Minister shall subject to this Act and to any other law for the time being in force administer and control all customary land and all minerals in, under or upon any customary land for the use or common benefit direct or indirect of the inhabitants of Malawi*

*Provided that a chief may subject to the general or special direction of the Minister authorize the use and occupation of any customary land within his area in accordance with customary law.*

**6.4** Customary land has been defined in Section 2 Land Act as all land which is held, occupied or used under customary law but does not include public land. Customary law is also defined as customary law in the area concerned. It is therefore trite from the reading of the above that chiefs have been given the mandate (general) to authorize the use of customary land within their area.

**6.5** It is important to state right at the outset that there is nothing like ownership of customary land in this Republic. Customary land is for communal use and inhabitants of Malawi must use and occupy the said land for their benefit but as directed by their chiefs. Strict legal ownership of customary land is therefore alien to our Constitution and all laws under it. In more specific terms my senior brother Mzikamanda, J as he was then called in VH Zakeyo Chunga vs. Nowell

Jere, Civil Cause No 176 of 2000, Mzuzu High Court, (unreported) held that:

*In short the law does not provide for individual title or ownership of customary land. The present law envisages communal ownership of customary land. The law would therefore find it strange for any individuals to claim title or ownership of a parcel of customary land.*

## **7.0 The Finding.**

**7.1** The Appellant has stated that he was allocated the piece of land in 2001. The Group village Headman of the area has stated that he gave part of the land now in dispute to the Appellant. The Respondent admitted that he left the area in 2001 and left the piece of land unattended.

**7.2** Now the fact that the Respondent left the area in 2001 does not remove him right of usage and occupation. Why did the GVH give out this land? He has stated that the land was just lying idle when the land in issue was allocated to the Appellant re developed it. He has since build a house, a grocery store and has planted trees and fruits.

**7.3** Where was the Respondent when all this was happening? The fact that he left the area does not mean that he did not leave relatives behind who could have warned him that the Appellant had encroached on his piece of land. It took the Respondent 13 years to seek the aid of the court at Ngerenge.

**7.4** In my considered opinion the Respondent sat on his rights. He allowed the Appellant to develop the land and we cannot allow him to turn around and start claiming usage and occupation of the land just because the Appellant has developed the land in issue.

**7.5** The Respondent's conduct was unreasonable as the Appellant was developing the piece of land in full view of everyone. I have looked at the provisions of the law and the evidence before me and I find that the Appellant was duly allocated this piece of customary land according to law and that he now has permanent rights of usage and occupation.

This appeal must therefore succeed with costs.

I so order.

**Made** in Chambers at Mzuzu in the Republic on 24<sup>th</sup> day of October 2017.

Dingiswayo Madise.

**JUDGE**