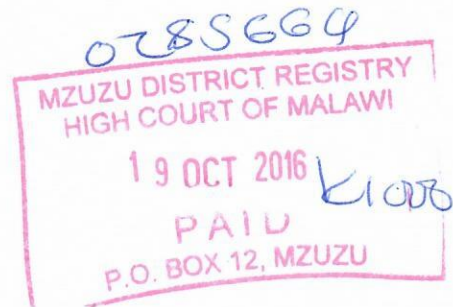




IN THE HIGH COURT OF MALAWI  
MZUZU REGISTRY  
CIVIL DIVISION  
CIVIL CAUSE NO. 248 OF 2013



BETWEEN

LOIS S. MADIKHULA.....1<sup>st</sup> PLAINTIFF  
MACDONALD MADIKHULA.....2<sup>nd</sup> PLAINTIFF

-AND-

MARY GOBA.....1<sup>ST</sup> DEFENDANT  
IDESI GOBA.....2<sup>ND</sup> DEFENDANT

SUPPLEMENTARY SUBMISSION

I. **STATEMENT OF ISSUE BEFORE THE COURT**

- 1.1 The issue is for determination is whether the Plaintiffs or the Defendants are the proper persons with exclusive rights in the land in issue.

II. **STATEMENT OF RELIEF SOUGHT**

2.1 The Defendants seek the following Orders/Reliefs----

- a. Dismissal of the Plaintiffs' claim in their entirety.
- b. A declaration that the Defendants are the rightful persons with exclusive property rights of use and occupation including right of peaceful use and occupation of the land in issue (as demarcated between them by **T/A Kafuzira** in 2009).
- c. An Order of permanent injunction restraining the Plaintiffs and their agents or servants from interfering with the Defendants' constitutional

rights to property in land, including peaceful use and occupation of the land;

- d. An Order that the Plaintiffs pay the Defendants damages for trespass;
- e. An Order that the Plaintiffs pay the Defendants damages for the inconvenience they caused the Defendants regarding the land;
- f. An Order condemning the Plaintiffs in costs of this action;
- g. Any further or other order as the court shall deem fit and just in the circumstances.

### III. STATEMENT OF RELEVANT FACTS

- 3.1 The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' father and husband respectively was allocated the piece of land in question, which was customary land, by **Village Headman Bondo** in 1988. He was using the land for sugarcane growing. See paragraphs 5 and 6 of Affidavit in Opposition to Originating Summons sworn by **Mary Goba**.
- 3.2 The Plaintiffs have known the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and their father and husband respectively since 1990. See paragraph 4 of Affidavit in Support to Originating Summons sworn by **Lois S. Madikhula**.
- 3.3 In 2000, the Plaintiffs bought 12 hectares of land from Village Headman Chikasa which was adjacent to the piece of land belonging to the father to the 1<sup>st</sup> Defendant and husband to the 2<sup>nd</sup> Defendant. See paragraphs 5 and 6 of Affidavit in Support to Originating Summons sworn by **Lois S. Madikhula**.
- 3.4 In 2009, the piece of land that belonged to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' father and husband respectively was demarcated into two parts for the use and occupation of 1<sup>st</sup> and 2<sup>nd</sup> Defendants by **T/A Kafuzira**. See paragraphs 7 of Affidavit in Opposition to Originating Summons sworn by **Mary Goba** and the document thereto marked "**MG1**".
- 3.5 The fact that the piece of land that belonged to the father to the 1<sup>st</sup> Defendant and husband to the 2<sup>nd</sup> Defendant was demarcated into two parts for the use and occupation of 1<sup>st</sup> and 2<sup>nd</sup> Defendants is clearly admitted by the Plaintiffs. See paragraph 7 of Affidavit in Support to Originating Summons sworn by **Lois S. Madikhula**.

- 3.6 The Plaintiffs have not in any way disputed the fact that the Defendants inherited the subject piece of land in 2006 following the death of their father and husband respectively. In fact, the Plaintiffs have admitted that the subject property has belonged to 1<sup>st</sup> and 2<sup>nd</sup> Defendant's father and husband respectively and later to the Defendants jointly before it was demarcated into two parts in 2009.
- 3.7 From the time the Plaintiffs got to know the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and their father and husband respectively in 1990, up to 2010 when they allege that the customary land in **Chikasa** and **Bondo Villages** were leased, their 12 hectares' piece of land was adjacent to the subject land. The Plaintiffs and the Defendants, as successors to their deceased father and husband, were therefore neighbors for about 20 years.
- 3.8 According to the Plaintiffs, the subject land which was customary land was leased to **Dwangwa Cane Growers Trust** after the Government of the Republic of Malawi received funds from the European Union and entered an agreement which required the land to be leased. See paragraphs 8, 9 and 10 of Affidavit in Support to Originating Summons sworn by **Lois S. Madikhula**.
- 3.9 According to the Plaintiffs, 3 hectares of the land they were allocated in quarter 3 of Pivot 8, partly covers the piece of land which the Defendants customarily owned before the Government's acquisition of the land. See paragraph 15 of Affidavit in Support to Originating Summons sworn by **Lois S. Madikhula**.
- 3.10 On 24<sup>th</sup> August, 2016 when the matter came up for hearing, counsel for the Plaintiffs told this Court that the land was leased and that perhaps the Defendants were not informed. The Court ordered the Plaintiffs to produce documentary evidence, if any, within 14 days to prove that the land was leased. No such evidence has been produced into Court despite the fact that such evidence would have been public record and easily accessible from relevant registries if indeed available.
- 3.11 The Plaintiffs assert that the allocation of plots after the land was leased was made without taking into account whether the person was

cultivating a piece of land within which the quarter was demarcated. See paragraphs 18, of Affidavit in Support to Originating Summons sworn by **Lois S. Madikhula**. However, the document exhibited as "**LSM3**" in paragraphs 19 of Affidavit in Support to Originating Summons sworn by **Lois S. Madikhula** under **Schedule 2** refer to a "[p]lot known as MP8/ 25 containing about 2.028 hectares at the date of this agreement occupied by the Licensee".

3.12 Further, the Plaintiffs have neither explained nor suggested that any other person, other than their neighbours, the Defendants, lost their land. In fact, there is nothing from the Plaintiff's evidence on record to even suggest that their 12 hectares' piece of land, or any part of it, was given or allocated to other persons like what happened to their neighbours, the Defendants.

3.13 In addition, the document exhibited as "**LSM3**" in paragraphs 19 of Affidavit in Support to Originating Summons sworn by **Lois S. Madikhula** is not even signed for and on behalf of the Registered Trustees of the **Dwangwa Cane Grower**. It is only witnessed.

#### **IV RELEVANCY AND USEFULNESS OF THE SUPPLEMENTARY ARGUMENTS TO THE COURT**

4.1 The arbitrary acquisition and taking over of the Defendants' land constitutes a violation of their fundamental rights to property, dignity, not to be subjected to inhuman or degrading treatment, equality before law, and life with dignity which are guaranteed by the Constitution and international law.

4.2 The primary issue in this matter is whether the Defendants' customary rights of occupation and use were extinguished and now exclusively vested in the Plaintiffs. In making this assessment, we hope our submissions regarding the constitutionality of the acquisition and taking over of the Defendants' customary land will assist the Court in its interrogation of this matter.

#### **V. ARGUMENTS AND SUBMISSIONS**

**5 The arbitrary acquisition and taking over of the Defendants' customary land violated their rights to property**

- 5.1 Section 28 of the Constitution of the Republic of Malawi provides that every person shall be able to acquire property either alone or in association with others.
- 5.2 An inhabitant of Malawi is entitled under law to use and occupy customary land within an area as authorised by the local chiefs. The local chiefs or indeed anyone administering the use and occupation of customary land must be guided by the Constitution. See the case of **R Kabaghe and 14 Others v The Registered Trustees of the Seventh Day Adventist Church and Another**.<sup>1</sup>
- 5.3 In **R Kabaghe**(Supra)Madisa J., stated in paragraph4.9that:
- "It is therefore against the law to deprive any person the right to use and occupy customary land without any justification. Indefinite individual usage and occupation of customary land is permissible under the laws of inheritance in Malawi."
- 5.4 In relation to women, section 24(1)(a) of the Constitution, grants them the right to acquire and maintain rights in property, independently or in association with others, regardless of their marital status.
- 5.5 These are important constitutional provisions which guarantee ownership of property on the part of women.
- 5.6 The right to property is also guaranteed under international human right treaties binding on Malawi. Under article 14 of the African Charter,<sup>2</sup>"[t]he right to property shall be guaranteed. It may only be encroached upon in the interest of the public need or in the general interest of the community in accordance with the provisions of appropriate law".
- 5.7 In this case, the acquisition and taking over of the Defendants' customary land was neither for a public neednor in the general interest

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<sup>1</sup> Misc. Civil Application No.44 of 2013, Mzuzu District Registry(unreported).

<sup>2</sup> The African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5,21 I.L.M 58(1982), entered into force on October 21, 1982.

of the community. It was purely for a profit motive. It cannot be said that the growing and selling of sugarcane by the Plaintiffs is for a public need or in the general interest of the community. As already argued in the Defendants' submissions, the acquisition and taking over of the Defendants' customary land did not comply with appropriate laws.

5.8 By arbitrarily acquiring and taking over of the Defendants' customary land, their fundamental rights to property as guaranteed by the Constitution and international law were violated.

**6. The arbitrary acquisition and taking over of the Defendants' customary violated their rights to dignity**

6.1 The arbitrarily acquisition and taking over of the Defendants' land constitutes a violation of the Defendants' right to dignity as guaranteed by the Constitution and international human rights treaties to which Malawi is a party. The Constitution specifically states in section 19(1) that "[t]he dignity of all persons shall be inviolable." This right to dignity is also guaranteed under the Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the African Charter, and the Protocol on the Rights of Women to which Malawi is a party.<sup>3</sup>

6.2 The right to dignity is a very important right and is considered as the foundation of many other rights. Thus in the South African case of **S v Makwanyane**,<sup>4</sup> Judge O' Regan stated:

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<sup>3</sup> The first article to the Universal Declaration of Human Rights, G. Ares.217A(III), U.N. GAOR, 3<sup>rd</sup> Sess. 1<sup>st</sup> plen. mtg., U.N. Doc A/810 (Dec. 12 1948). The UDHR sets out "All human being are born free and equal in dignity and rights", a sentiment echoed by the preamble to other human right conventions including the International Covenant of Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 64) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, ratified by Malawi 17 March 1987 [hereinafter CEDAW], International Covenant on Civil and Political Rights, art. 1, G.A. res. 2200A (xxi), U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N. T.S. 171, entered into force 23 Mar. 1976, ratified by Malawi 22 December 1993 [hereinafter ICCPR] preambles. It also features prominently in both the African Charter, art 5 ("Every individual shall have the right to respect of dignity inherent in a human being and to recognition of his legal status."); and Women's Protocol to the African Charter, art 3(1) ("Every women shall have the right to dignity inherent to a human being and to the recognition and protection of her human and legal rights".)

<sup>4</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC)

"Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worth of respect and concern. The right therefore is the foundation of many of the rights that are specifically entrenched in [the Bill of Rights]."<sup>5</sup>

- 6.3 Furthermore, the South African Constitutional Court explicitly connected this right to dignity with housing and property rights in **Sarrahwitz v Martiz N.O. and Another**.<sup>6</sup> The Court held that:

"Generally speaking, it is very difficult for a homeless person to keep her self-worth or dignity intact. She is at the mercy of any landlord, relative or friend who might be providing her with accommodation. And no vulnerable person who has tasted what it means to have a place they can truly call home should be deprived of it without justification."

- 6.4 The Defendants have not been treated with the respect and worth of human beings. The Plaintiffs arbitrarily and illegally took over the only property which was the Defendants' source of income and livelihood. The Plaintiffs who were neighbours to the Defendants for about 20 year knew very well that the Defendants relied on the property to grow and sell sugarcane. They depended on the ability to grow and sell sugarcane to earn a living. The ability to grow sugarcane on the property and sell it to earn a living was intrinsically linked to the Defendants' human dignity. By arbitrarily acquiring and taking over the only property which was their source of income and livelihood, the Plaintiffs forced the Defendants to become landless and destitute, without any source of income.

- 6.5 Under section 16 of the Constitution, "[e]very person has the right to life and shall not be arbitrarily deprived of his or her life".

- 6.6 In the Indian case of **Francis Coralie Mullin v The Administrator, Union Territory of Delhi**,<sup>7</sup> the Supreme Court declared that "[t]he right to life

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<sup>5</sup>*Supra* at par 328.

<sup>6</sup>(CCT93/14) [2015] ZACC 14, para 42.

include the right to live in dignity and all that goes with it namely, the bare necessity of life such as adequate housing, nutrition, clothing and shelter".<sup>8</sup>

6.7 The right to property is the key to the realization of other economic rights<sup>9</sup> essential for survival, such as the right to food, clothing, housing, nutrition, education<sup>10</sup> and the ability to live in dignity.<sup>11</sup>

6.8 As the CEDAW Committee explained, the right to own and manage property "is central to a woman's right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate nutrition for herself and her family".<sup>12</sup>

6.9 The Defendants were displaced from the land they depend on to grow food and sugar cane without any compensation. Without their land, their ability to earn a livelihood and to provide adequate nutrition for themselves and their families were compromised. This was even worse for the 2<sup>nd</sup> Defendant who is so advanced in age. The Defendants lost their human dignity and the bare necessity that goes with it such housing, nutrition and shelter. Besides, the Defendants lost their financial independence.

6.10 The arbitrary taking and displacement of the Defendants from their customary land therefore violated their right to life with dignity.

**7. By arbitrarily acquiring and taking over of the Defendants' customary land their rights to not be subjected to inhuman or degrading treatment was violated**

7.1 The Constitution of Malawi prohibits inhuman and degrading treatment. Section 19(4) of the Constitution states that "No person shall be subject

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<sup>7</sup> (1981) 2 SCR 516.

<sup>8</sup> *Id* P 529 B-F.

<sup>9</sup> Section 29 of the Constitution guarantees the right to economic activities, stating that "[e]very person shall have the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi".

<sup>10</sup> See the ICESCR, (especially articles 11 and 13) for a listing of economic rights. Section 25 of the Constitution also guarantees the right to education.

<sup>11</sup> See section 19 of the Constitution ("The dignity of all persons shall be inviolable.").

<sup>12</sup> CEDAW General Recommendation 19, para 26.

to torture of any kind or to cruel, inhuman or degrading treatment or punishment."

- 7.2 Courts across the region have a broad notion of this right to include more than just a right to be free from torture. The Supreme Court of Zimbabwe held in **Mukoko v Attorney-General**<sup>13</sup> that:

"Degrading treatment is treatment which when applied to or inflicted on a person humiliates or debases him or her showing a lack of respect for or diminishing his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking the person's moral and physical resistance. The relevant notions in the definition of degrading treatment are those of humiliation and debasement. The suffering and humiliation involved must go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate or fair treatment."<sup>14</sup>

- 7.3 Like the Supreme Court of Zimbabwe, the African Commission in **Doebbler v Sudan**<sup>15</sup> also emphasised that inhuman and degrading treatment includes not only actions that cause serious physical or psychological suffering, but that "which humiliates or forces individuals against their will or conscience".<sup>16</sup>

- 7.4 The Defendants were deprived of their customary which is not only their fundamental asset<sup>17</sup> and the basis of sustainable livelihood but also of high social, cultural, political, and spiritual value and a source of social identity. The Defendants were neither consulted before taking their land nor compensated for their loss. The conduct of Plaintiffs, or indeed any other person, entity or authority involved humiliated the Defendants, caused anguish and lowered their respect and worth as human being.

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<sup>13</sup> (36/09) [2012] ZWSC 11.

<sup>14</sup> Citing *Woods v Commissioner of Prisons & Anor* 2003(2) ZLR 421(S) at 432C-B.

<sup>15</sup> (2003) AHRLR 153(ACHPR).

<sup>16</sup> *Id* at para. 36.

<sup>17</sup> See the Zimbabwe case *Mazarura v Kativhu* (HC 6416/12) [ZWHHC 287] in which Mwayera J., stated that "[i]t would not be stretching the imagination too far to point out that land is a basic necessity for both human being and animals. It is on land that food and water are derived and shelter constructed".

7.5 The arbitrary taking over and displacement of the poor Defendants from their customary land without providing them with compensation, whether monetary or alternative land, subjected them to a host of negative impacts and risks such as landlessness, homelessness, loss of access to a fundamental asset, loss of income, food insecurity and violence. The lives of the Defendants and their children have become more fragile as a result.

**8. By singling out the Defendants and arbitrarily taking over their customary land, their right to equality before the law was violated**

8.1 Section 20 of the Constitution guarantees "equal and effective protection against discrimination" on the grounds of sex. Under section 24 of the Constitution, "[w]omen have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status", and these protections include the right "to be accorded the same rights as men in civil law" and equal capacity "to acquire and maintain rights in property, independently or in association with others, regardless of their marital status".<sup>18</sup>

8.2 The Constitution specifically prohibits customs and practices depriving women of their property obtained by inheritance and call on Parliament to enact legislation to end such practices. The Constitution provides that:

"Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particular practices such as:

a. **deprivation of property, including property obtained by inheritance**"<sup>19</sup>(emphasis added).

8.3 In paragraph 14 of Affidavit in Opposition to Originating Summons sworn by **Mary Goba**, the deponent states that "... after the one year of experiment and irrigation all the villagers started using their land again but Village Headman Chikasa snatched the land away from my mother and I and connived with the Plaintiff and Plaintiff started claiming

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<sup>18</sup> Constitution, section 24(1)(a)(ii).

<sup>19</sup> *Id* section 24(2)(c).

- 8.6 The decision in **Lt General Geojago Robert ChasweMusengule** was followed in the case of **StevenChangala Kawandami v The Attorney General**,<sup>21</sup> in which the State argued that the allocation of S/D 161 of Farm No. 441a to the Plaintiff was irregular as it was an institutional house for the Office of the President which was not declassified. In rejecting this argument, Justice M.S. Mulenga held as follows:

"It is also apparent that the mere fact that the Plaintiff bought an institutional house which was not on the list of the houses to be sold ...does not make the purchase fraudulent. ... A number of houses which were not on the list and where institutional houses were sold and none of them is being challenged.... **It cannot therefore be allowed to single out and treat the Plaintiff differently when other institutional houses were sold which were not on the list....** No evidence has been produced to show that the others were declassified or the procedure which was followed. As stated in the Musengule case cited above, targeting the Plaintiff alone is discriminatory when the Government sold the house to the Plaintiff with its eyes open and without any duress from the Plaintiff. If the government deliberately breached its own guidelines on the sale of the house to the Plaintiff, it must live with the decision."

- 8.7 By targeting and grabbing only the Defendants' property, their constitutional rights to "equal and effective protection against discrimination" have been violated on the grounds of sex. Further, their rights, as women to "have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status", and their right "to be accorded the same rights as men in civil law" and equal capacity "to acquire and maintain rights in property, independently or in association with others, regardless of their marital status" have been violated. Besides, the Defendants' constitutional right to not be deprived of property obtained by inheritance have been violated.

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<sup>21</sup>(2008) HP /092(Unreported) delivered on 7<sup>th</sup> August 2014.

8.8 Ruling that the Plaintiffs' action violated the Defendants' right to equality will be upholding Malawi's commitments to protect women's right to equality underbinding regional and international treaties.<sup>22</sup>The ICCPR Article 26 provides that "all persons are equal before the law and entitled without any discrimination to the equal protection of the law...[and] the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination."<sup>23</sup>Article 3 imposes upon State parties the requirement to "undertake to ensure the equal right of men and women to the enjoyment of all" the rights set forth in the ICCPR.<sup>24</sup> CEDAW also guarantees the right of all women to "equality with men before the law."<sup>25</sup>The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) also provides that "[w]omen and men are equal before the law and shall have the right to equal protection and benefit of the law."<sup>26</sup>

8.9 Besides, the Plaintiff's arbitrary and illegal taking over of the Defendants customary land amounts to indirect discrimination against them on the basis of their gender. There has been clarification by courts about this type of indirect discrimination. In the case of ***R (on the application of Dalai and another) v Secretary of State for the Home Department***,<sup>27</sup> Silber J stated:

"The difference between direct and indirect discrimination is that indirect discrimination results from a rule or practice applied equally to all individuals without differentiation but which has a

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<sup>22</sup>See Banjul Charter art. 2 (requiring that all individuals are entitled to enjoy the rights guaranteed in the Charter without distinctions based on sex), art. 3(1) ("Every individual shall be equal before the law."), art. 18(3) (requiring States to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman...as stipulated in international declarations and conventions."); ICCPR, *supra* note 2, art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.")

<sup>23</sup>ICCPR, art. 26

<sup>24</sup>*Id.* art. 3.

<sup>25</sup>CEDAW, art. 15(1).

<sup>26</sup>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter, the Protocol), art. 8, OAU Doc. CAB/LEG/66.6, 1 Afr. Hum. Rts. L.J. 40(2000), *entered into force* 25 Nov. 2005, *ratified by Swaziland* 5 Oct. 2012 ("Women and men are equal before the law and shall have the right to equal protection and benefit of the law.") [hereafter Maputo Protocol].

<sup>27</sup>(2006) EWHC 823(Admin).

proportionate and unjustified adverse impact on a member of a particular group or minority."<sup>28</sup>

8.10 This Court ought to take judicial notice, that women in this country suffer the most of arbitrary and illegal taking over of their land. As the **UN Committee on Economic Social and Cultural Rights** sated, women, in all groups, are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.<sup>29</sup> It is women who have to look after their families without shelter, food and crop-growing areas.<sup>30</sup>

8.11 To make matters worse, once women lose their rights to customary land in Malawi, it is extremely difficult for them to acquire alternative land because: 1) they may not be allocated land under customary law, and 2) they cannot afford purchasing statutory/ leasehold land or housing due to lack of income. Because women suffer disproportionately when rendered homeless or landless as compared to men, who do not look after children and can either migrate into urban areas or might be easily given land by other headmen or chiefs, the taking over and displacement of the two poor and vulnerable women, the Defendants, from their inherited customary land amounts to indirect discrimination against them on the grounds of sex, gender and status.

**9. This Court should discourage the Plaintiffs' conduct by awarding substantial damages to the Defendants**

9.1 Evidence on record clearly indicates that the Plaintiffs and the Defendants were neighbors for a long period of time. The Plaintiffs occupied and used 12 hectares of land while the Defendants occupied and used only 2 hectares of land. As neighbours, the Plaintiffs new or ought to have known that the 2 hectares that their neighbours, the

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<sup>28</sup> *IdP* 638.

<sup>29</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22.

<sup>30</sup> Women in Human Settlements Development- Getting the Issues Right (UNCHS/HABITAT; 1995). Available at <http://collections.infocollections.org/ukedu/en/d/Jh1559e/9.html#jh1559e.9>.

Defendants occupied, was the only source of livelihood for themselves and their families.

9.2 However, and so unfortunately, the Plaintiffs totally disregarded the Defendants' property rights. The Plaintiffs took over the Defendants' only source of livelihood, casting them into landlessness and destitution. By grabbing their only source of livelihood, the Plaintiffs did not care whether the Defendants survived or not. The Plaintiffs acted unfairly toward the Defendants and their conduct ought to be discouraged by an award of substantial damages.

9.3 In a trespass to property case of **Plenty v Dillon**,<sup>31</sup> the High Court of Australia advised that:

"If the occupier of property has a right not to be unlawfully invaded...the "right must be supported by an effective sanction otherwise the term will be just meaningless rhetoric.... If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official. The appellant is entitled to have his right of property vindicated by a substantial award of damages."

9.4 Equally in this case, the Defendants' right to occupation and use of their inherited customary land must be supported by effective sanctions otherwise the rights to property and to have the same not arbitrarily deprived of or invaded will become meaningless rhetoric.

9.5 The Defendants have not produced evidence to establish that the land in issue was leased. Even assuming that it was leased without the Defendants' knowledge, a sense of injustice is likely to be generated by the unlawful acquisition of customary land by the Government without consulting those with occupation and user right and providing them with compensation. This is even worse with the scarcity of land in Malawi and the demand for customary land.

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<sup>31</sup>(1991) 171 CLR 635.

9.6 The Plaintiffs' conduct must be discouraged by an award of substantial damages in favour of the Defendants. The Plaintiff should not be allowed to avoid liability by contending that the property was leased. Besides, no evidence has been produced from either the Government or from the lessee to suggest that the Defendants' customary land was indeed leased. This is a simple case of the powerful and rich taking advantage of poor and vulnerable women. The leasing issue has just been used to legitimise the Plaintiffs' unfair conduct towards their neighbors, the Defendants.

9.7 This Court should send a message that the Plaintiffs, and any other perpetrator, would perfectly understand; that taking over customary land of the poor and vulnerable women will not be tolerated in Malawi which guarantees fundamental human rights to all, including the right to property.

#### **10. This Court has a duty to develop the law to bring it in line with the Constitution and international law**

10.1 Under section 10(2) of the Constitution, this Court has the duty develop the common law and customary law with due regard to the principles and provisions of the Constitution. Further, in interpreting the Constitution under section 11(2)(c), this Court is required, where applicable, to have regard to current norms of public international law and comparable foreign case law. The various international human rights instruments and comparable foreign cases cited should aid the Court in the interpretation of the various rights invoked in this in this matter.

10.2 In the case of *Kishindo v Kishindo*,<sup>32</sup> the High Court of Malawi emphasised that:

"Certainly, if the Supreme Court of Appeal was, when *Kayambo v Kayambo* was decided, using our Constitution, in developing the Common law they developed, would have developed it differently. The duty to develop the Common law falls on our shoulders today because us, unlike the Supreme Court when *Kayambo v Kayambo*

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<sup>32</sup>*Kishindo v Kishindo*[2014] MWHC 2.

was decided, have not only to develop the Common law... but, in the words of the Constitution, develop the Common law (and customary law) by regarding the principles and provisions of the Constitution. These foreign case law, under section 11(2)(c) of the Constitution, should aid the interpretation of section 24(1)(b)(i) of the Constitution, which provides for a fairness principle."

## CONCLUSION

11. The Plaintiffs' conduct amounts to arbitrarily and illegal taking of the Defendants' customary land. It amounts to a violation of the Defendants' fundamental rights to property, dignity, not to be subjected to inhuman or degrading treatment, to equality before the law, and life with dignity as guaranteed by the Constitution and international law. This Court should discourage the Plaintiffs' conduct by an award of substantial damages in favour of the Defendants.

Dated this 19<sup>th</sup> day of October 2016



CHRAM ASSOCIATES