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MZUZU DISTRICT REGISTRY
HIGH COURT OF MALAWI
13 MAR 2017
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P.O. BOX 12, MZUZU

IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CIVIL DIVISION

CIVIL CAUSE NUMBER 2 OF 2017

BETWEEN:

SYLVIA MADIKHULA.....PLAINTIFF

AND

IDESI GOBA.....DEFENDANT

THE DEFENDANT'S FINAL SUBMISSION

Dated this 10TH Day of MARCH 2017

CHRAM ASSOCIATES

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This Document was prepared and filed by Messrs **CHRAM** Associates whose address for service of documents is off Kafolo Filling Station, Plot No. KT/10, Opposite Kings Private Clinic, Post Office Box 239, Mzuzu Fax no 01310848

Content

Attached list of Case Authorities

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1.0 INTRODUCTION

1.1. This is a final submission according to what transpired in Court when the case came for hearing on 06th March, 2017.

2.0 BRIEF FACTS

2.1 It should be noted on the onset that the Plaintiff herein is a biological daughter to Lois S. Madikhula, who was a Plaintiff in a prior case against the same Defendant herein and her daughter, Mary Goba, in relation to the same land as the present, as is evident from the Affidavit of Lois S. Madikhula exhibited by the Defendant as **IG1**, specifically at **paragraph 14.**

2.2 That case ended in favour of the Defendant herein and her daughter.

2.3 The parent to the Plaintiff herein actually does admit that the Defendant customarily owned the land before the Government acquired it, according to paragraph 15 of the said Affidavit of Lois Madikhula.

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2.4 According to the Affidavit of Lois S. Madikhula who is the parent to the Plaintiff herein, they bought the present land in the year 2000 from VH Chikasa, according to paragraph 5 of that Affidavit.

2.5 The Defendant's husband was allocated the piece of land in question, which was customary land, by Village Headman Bondo in 1988. He was using the said land for commercial sugarcane growing.

2.6 When the Defendant husband was dying in 2006, Mary Goba, the Defendant's daughter was living in Chikwawa. However, after her father's death, she went back to Nkhotakota to continue using her father's land together with the 2nd Defendant.

2.7 Abruptly, the land in issue was taken away from the Defendant and given to the Plaintiff. The Defendant was not even consulted that the land was being allocated to another.

2.8 After several unsuccessful attempts to have the issue resolved amicably, the Defendant's daughter instituted a civil action against Village Headman Chikasa in the Second Grade Magistrate Court sitting at Nkhungwa, as civil cause No. 151 of 2012.

2.9 The said court ruled in favour of Mary Goba and ordered Village Headman Chikasa to give back the land to the Defendant's daughter and to pay K19, 200.00. The decision of the said court has never been challenged, by way of appeal, anywhere. Neither has this decision been stayed.

2.10 The Plaintiff's parents, however, proceeded to commence a fresh action against the Defendant in this court in which they obtained an injunction against the Defendant in 2013. She argues that the land in question is subject to a lease obtained by Dwangwa Cane Growers Trust (hereinafter referred to as "The Trust") from the Government of Malawi, and that the said Trust gave the Plaintiff a licence to use it.

2.11 That case before Justice Madise ended in favour of the Defendant herein and her daughter. But the same has not been appealed or stayed, and the Plaintiff has brought yet another fresh action.

2.12 Due to the actions of the Plaintiff, the Defendant has been rendered landless and hopeless.

3.0 LEGAL ISSUES

3.1 Whether or not the Plaintiff lacks locus standi to commence these proceedings?

3.2 Whether or not the Defendant had proprietary rights in the said piece of land?

3.3 Whether or not, if the Defendant had proprietary rights in the land, their proprietary rights were terminated by the purported Government's acquisition of the land and subsequent leasing of the land to the Trust?

3.4 Whether or not the fact that the Defendant is a woman renders her incapable of holding a piece of customary land in question?

3.5 Whether or not the Plaintiff trespassed on the Defendant' land, and should therefore compensate the Defendant for the said trespass?

3.6 Whether or not the Plaintiff's action is frivolous, vexatious and an abuse of the Court process?

4.0 THE RELEVANT LAW

4.1 Locus Standi

4.1.1 A licensee of a property, as opposed to a lessee, does not obtain any proprietary rights by entering the property of the licensor. In the words of **Vaugh CJ** in **Thomas v Sorrel (1673) Vaugh 330 or 124 ER 1098**:

"A dispensation or a licence properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which, without it, had been unlawful."

4.1.2 This means that if one enters certain premises or holds certain premises based on a license, he gets no proprietary rights over the premises. The license only makes lawful his holding or entry

of the premises without which the entry or holding would have been unlawful.

4.1.3 The fact that the licensee does not obtain proprietary right over land which he enters by the authority of the license is that the licensee lacks the legal mandate or *locus standi* to take an action against third parties. In the case of **Hill v Tupper (1863) 2 Hand C 121 or 159 ER 51**, the Basingstoke Canal Co gave Mr. Hill an exclusive contractual license to hire out boats on a canal. The defendant, Mr. Tupper, put rival boats on the canal. The Plaintiff sued to stop the defendant from operating. **Pollock CB**, with whom **Bramwell B** concurred, held that the Plaintiff did not have an easement but only a license to use the land, as such he could not sustain the claim against the defendant as he had no proprietary right in the canal. If Mr. Hill wanted to stop Mr. Tupper from operating, his only remedy was to force the Canal Company, Basingstoke, to assert its proprietary rights against Mr. Tupper.

4.1.4 Thus, a licensee does not have the power to commence an action against a third party on the property of the licensor. If the licensee is affected, his or her only remedy is to force the licensor assert its proprietary rights against the third party.

4.2 Rights in customary land and whether it can be sold

4.2.1 **Section 25 of the Land Act** states that:

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 the purposes of this Act.

4.2.2 **Section 26 of the Land Act** then states 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 directions of the Minister, authorize the use and occupation of any customary land within his area, in accordance with customary law

4.2.3 This means that a chief has got the power to authorize usage and occupation of a piece of customary land to a family or individual in line with customary law of the area.

4.2.4 In the case of **Mtsuko v Jere, Civil Appeal No.8 of 2011**, **Justice Kachale** stated that where an individual or a family has been assigned a piece of customary land and they have used that parcel of land for a considerable time, it would be contrary to justice to arbitrary deprive the occupiers of that land.

4.2.5 In fact, the right to usage and occupation of customary land which the occupier of the land acquires upon being allocated a piece of customary land is protected by **section 28 of the Constitution** which guarantees the right to property. This was stated by **Chimasula Phiri J**, as he then was, in the case of **Kamuzu (Administrator of Deceased Estate) v Attorney General Civil Cause No. 1839 (A) of 1997 or [2002-2003] MLR 272(HC).**

4.2.6 Thus, much as customary land is vested in the President, once an individual has been allocated a piece of land by the chief, such individual acquires the rights to use and occupy such land and those rights are protected by the Constitution.

4.2.7 The rights of usage and occupation of customary land can be passed on to the heirs. In the case of **kuwali v Kanyashu, Civil Cause No. 109 of 2010**, at **page 10** of his judgment, **Justice Madise** stated as follows:

"Customary land belongs to individual families who as a collective make up a village under a chief. Those families can also pass on usage and occupancy to their heirs or indeed any other person."

4.2.8 On whether customary land can be sold, the case of **Kuwali v Kanyashu (supra)** is also to the effect customary land cannot be sold because no one has individual ownership to it and thus, no one can validly pass title in customary land by way of sale.

4.2.9 Justice Chikopa in the case of **Mervis Chirwa v Faizal Karim and Pwelenje Civil Cause No. 9 of 2009 (HC, Mzuzu Registry, Unreported)**, stated as follows:

"The question being 'could the Defendant have sold the said land to the Plaintiff?' The answer is in the negative. They had no title or rights of ownership in the land being customary land. The Umagombas could not have had at the material time any title or right of ownership to pass on to the Plaintiff indeed the first Defendant. In other words, they could not have validly sold the land.

"... The Plaintiff cannot in our judgement validly claim ownership of the land in issue by contending that she bought the same from the Umagombas simply had no land to sale. The Plaintiff could not therefore have bought any land from them."

4.3 Government's acquisition of customary land

4.3.1 **Section 27 of the Land Act** deals with acquisition of customary land by the Government. The section is a bit lengthy and is framed as follows:

(1) Wherever it appears to the Minister that any customary land is needed for a public purpose, that is to say a purpose which is for the benefit, direct or indirect, of the community as a whole, or a part of the community, he may declare, by notice under his hand and published in the Gazette, that such land is public land, and thereupon such land shall become public land:

(2) Whenever any customary land is required for temporary use for a public purpose, such use not being in the opinion of the Minister likely to necessitate occupation for a period in excess of 7 years, the Minister may authorize the temporary use and occupation of the land for such public purpose, and such land shall remain customary land throughout the period of temporary use and occupation:

Provided that, on the expiry of such a period, the Minister may authorize such temporary use and occupation for a further period of three years.

4.3.2 **Section 28 of the Land Act** then deals with damages for disturbance, loss or damage. It states as follows:

Any person who, by reason of—

(b) any declaration made under section 27 (1) that any such land is public land; or

(c) the temporary use and occupation of customary land under section 27 (2),

suffers any disturbance of, or loss or damage to any interest which he may have or, immediately prior to the happening of any of the events above mentioned in this section, may have had in such land, shall be paid such compensation for such disturbance, loss or damage as shall be reasonable.

4.3.3 This law is similar to **sections 17** and **18** of the new **Land Act** of 2016.

4.3.4 In the case of **Kamuzu (Administrator of Deceased Estate) v Attorney General (supra)** the Government wanted to take away a piece of customary land from Dr Kamuzu Banda allegedly for the purpose beneficial to part of the community. The Minister, however, neither made a declaration nor did he publish a notice in the Gazette. In holding that the action of the Government to evict Dr. Kamuzu Banda from the land without proper notice and due compensation was illegal and an infringement of his constitutional right to property, **Chimasula Phiri J** stated as follows:

"If President Banda's land is to be taken away he is entitled to adequate notice and appropriate compensation, he is entitled to no less."

4.3.5 This means that although customary land is vested in the President under ***section 25*** of the ***Land Act***, it can only be legally taken away from an individual by the Government, if the user or occupier such land has been given adequate notice, such as through a declaration by the Minister and a notice in the Gazette, and the Government has provided the occupier of such land with appropriate compensation for the loss, damage and disturbance suffered as a result of such acquisition. Taking away customary land from the occupier without due notice and compensation by the Government is a violation of the occupier's right to property as guaranteed under **section 28 of the Constitution** and therefore illegal.

4.3.6 This position also finds support from the case of **Village Headwoman Mangwere v Traditional Authority Bibi Kuluunda and others, Civil Cause No. 111 of 2012**, where **Justice Kachale** stated as follows:

"With regards to most of the lease application documents produced by either sides to this dispute my court echoes the concern of Mbendera, J in the Bareness Msiska case (above) at the involvement of government officials in customary land transactions that do not fully comply with the legal stipulations for consultation with local chiefs as well as identification and computation of compensation (where necessary) for affected persons."

(Underlining is ours).

4.3.7 This means that where necessary, customary land transactions need to comply with the legal stipulations of computation of compensation for the affected persons. One such circumstance in which legal stipulations need to be complied with and compensation computed is where the Government acquires, permanently, a piece of customary land for public

purpose under **section 27(1) of the Land Act**. Another is where the Government acquires a piece of customary land temporarily under **section 27(2) of the Land Act.**

4.4 **Rights of women to hold customary land**

4.4.1 The Constitution guarantees rights to women to hold property. **Section 24** of the Constitution in particular states that:

(1) Women 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 which includes the right—

(a) to be accorded the same rights as men in civil law, including equal capacity to acquire and maintain rights in property, independently or in association with others, regardless of their marital status.

(2) 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, particularly practices such as deprivation of property, including property obtained by inheritance. (Underlining is ours).

4.4.2 From the above section, it means that if a woman acquires property through inheritance, her rights in such property must be respected regardless of her gender or marital status. Her rights in the property acquired through inheritance should not be arbitrary taken away because of her gender or marital status. Arbitrary depriving a woman the right to property on the basis of her gender or marital status is discriminatory and therefore unlawful.

4.4.3 This court has in the past shown willingness to protect the rights of women in customary land, which they have inherited from either the husband or father. In the case of **Ben Mhango -v-**

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4.4.3 This court has in the past shown willingness to protect the rights of women in customary land, which they have inherited from either the husband or father. In the case of **Ben Mhango -v-**

Rita Nyausisya, Civil Appeal Case No. 91 of 2011, Mzuzu District Registry (unreported), the respondent was married to the appellant's brother. Together they had children and peacefully used a piece of customary land. After the death of her husband, the appellant took away the piece of customary land which the respondent and her deceased husband were using. The respondent then commenced an action in the magistrate court seeking the appellant to give her back the land. The lower court ruled in her favour. Being dissatisfied with the decision of the lower court, the appellant appealed. He argued that the respondent had left the village, that is she had remarried and her daughter was married too hence they were not entitled to the use of the land. In his ruling, **Justice Madise** held that where a wife was lawfully married to the deceased husband, then after such husband's death the woman is still entitled to the use of the customary land at her deceased husband's village by virtue of being the wife of the deceased husband and through her children with the deceased husband who are the rightful heirs to the land as customary land is inheritable from the parent to the children and to the grandchildren.

4.4.4 Further, in the case of **Elias Kanjuchi –v- Zefa Moses, Civil Appeal No. 61 of 2012, High Court, Principal Registry (unreported),** the respondent's father married the appellant's sister under customary law and lived at his wife's village. The village headman, together with his father-in-law, gave him a piece of land with trees and some buildings on it. He peacefully occupied and used the land during the course of marriage with the appellant's sister. When the marriage was dissolved, he took away all his property and left the village. The respondent went with him. Later, the respondent returned

to the land after her marriage had come to an end and her father had died. The appellant refused her to use the land. In holding that the land belonged to the respondent and her siblings and ordering the appellant to allow the respondent use the land, **Justice Chirwa** stated that where a person is allocated a piece of customary land by a chief, whether in his village of origin or not, then, unless the authority allocating the land expressly states otherwise, the person acquires the rights of usage and occupation of the land together with anything on it for himself, his dependants and descendants such that the land cannot be taken away from his descendants upon such person leaving the village and going to another village.

4.4.5 This means that if customary land is allocated to an individual, that individual acquires such piece of customary land for himself, his descendants and his dependants. Upon his death or leaving the village, his dependants or descendants inherit the rights to usage and occupation of the said land, regardless of the gender or marital status of such dependants or descendants. The fact that the dependants or descendants moved away to another village at some point does not automatically lead to the taking away of their inherited right of usage or occupation of a piece of customary land.

4.5 Trespass to Land

4.5.1 **Justice Nyirenda** in the case of **Tikafika Estate Limited & Kachale (female) v Ashani [1998] MLR 424 (HC), at page 427,** defined trespass to land as follow:

"Trespass to land is constituted by unjustifiable interference with the possession of land. Clark and Lindsell (16ed 1989) defines trespass as "unjustifiable intrusion by one person upon the land in possession of another". Mistake is no defence to trespass. It will not avail the defendant, as contended in the present case, that he thought he was on his own land.

The entrant cannot even say he did not know that he is trespassing: see Winfield and Jolowicz on Tort (12ed 1984 at 359)."

4.5.2 In the case of **Tea Brokers (Central Africa) Ltd v Bhagat [1994] MLR 339 (HC) Mwaungulu J**, as he then was, stated that trespass is an unjustifiable interference with possession of land and every invasion on private property, however minute, is a trespass. An action in trespass will lie for injury to that right although no appreciable damage has been caused.

4.5.3 Thus any unjustifiable interference with the lawful possession of land, however minute, amounts to trespass to land. Mistake is no defence to such trespass and that an action for trespass is sustainable although the property owner has suffered no appreciable damage.

4.5.4 In the case of **Owen and another v Reo Motors (Britain) Ltd (1934) 151 LTR 274. At 277, Lord Scrutton** said:

"I have no doubt myself that a judge or jury may give punitive damages in view of the nature of the trespass, and that they may do so in trespass to goods or land."

4.5.5 The case of **Owen and another v Reo Motors (supra)** was quoted with approval in the case of **Hara v Malawi Housing Corporation [1993] 16(2) MLR 527** where the court awarded damages for trespass. The damages so awarded are awarded as general damages.

4.6 Frivolous, vexatious, and abuse of Court process

4.6.1 It is trite that the Court has the power to dismiss an action for abuse of court process. As was accepted in the case of ***George Yianakis t/a GPY Investments v Inde Bank Civil Cause No. 57 of 2016 (High Court, Principal Registry) (Unreported)***, this power is derived from practice note ***18/19/18*** of the ***Rules of the Supreme Court*** and also the inherent jurisdiction of the Court.

4.6.2 The term '*abuse of court process*' connotes that the process of the court must be used ***bona fide*** and properly, and must not be abused.

4.6.3 Thus, the court will prevent the improper use of its machinery, and will in a proper case summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. See ***Castro V Murray [1875] 10 Ex 213*** per the dictum of Bowen LJ at 63.

4.6.4. The categories of conduct rendering a claim frivolous, vexatious or an abuse of the process of the court are not closed but depend on all the relevant circumstances and for this purpose consideration of public policy and the interests of justice may be material (***George Yianakis t/a GPY Investments v Inde Bank (supra)***).

5.0 EVIDENCE

5.1 Licence

5.1.1 The Plaintiff states that the Land herein was licenced to her by the Trust, and in paragraph 8 of the Affidavit of the Plaintiff she has exhibited the said licence agreement as **SCM1.**

5.1.2 Looking at the document governing the agreement, "SCM 1", it is titled "interim licence agreement". **Clause 4 of the document** is titled "Licence to occupy". Its wording is as follows:

The Trust permits the ***licensee*** *to occupy the Holding for the purpose of carrying on the business of sugarcane growing and for no other purpose*

(emphasis is ours)

5.1.3 Several other provisions of the document use either the word license or licensee. For example, **Clause 6.1** uses the word "licensee", **Clause 7.1** refers to "license", **Clause 8.1** refers to "licensee", **Clause 10.1** refers to "licensee", so does **Clauses**

10.2, 11.1, 12, 14, 15, 16, 19, 20, 21, 22, 28, to mention but a few.

5.1.4 There is nowhere in the document that governs the agreement which refers to the agreement as a "sublease". The document is so consistent. It refers to the agreement as a "license" and the party signing as the "licensee".

5.1.5 Further evidence that the agreement was indeed just a license can be seen from **Clause 18** of the agreement which requires the licensee not to use the holding for any other purpose other than the permitted use, and **Clause 24** of the document which governs re-entry even where the licensee is just adjudged bankrupt.

5.1.6 Also important is that the purported interim licence is not stamped with a seal by the Licensor as is required by law for Incorporated Trusts, as it has been done by the Chiefs thereunder (see page 14, last page of the Licence Agreement).

5.1.7 This throws some doubts as to the propriety and validity of the licence document itself.

5.2 <u>Customary Land rights</u>

5.2.1 There is evidence from the Defendant that her husband was allocated a piece of customary land by Group Village Headman Bondo in 1988. After his death she inherited the land which was then demarcated between the two in 2009.

5.2.2. The Plaintiff claims her family has always been in possession of the land, which is not supported by any other evidence apart from her own, while the Defendant's evidence is supported by the affidavits of the Chiefs of the area.

5.2.3 The Plaintiff claims that her father was allocated land comprising 12 hectares by GVH Chikasa (deceased) in the

1990s and not her family had been cultivating the said land until the year 2012 when Dwanga Cane Growers Trust came.

5.2.4 However, the Affidavit of Lois Madikhula (the parent to the Plaintiff) exhibited by the Defendant as **IG1** states that the Plaintiff's parents bought the said land from VH Chikasa in the year 2000.

5.2.5 This conflicts with the deponed statements of the Plaintiff herein who states that the Plaintiff's parents were allocated the said land in the 1990s.

5.2.6 This means that if the said land that was allocated to the Defendant's husband is also the land that. the Plaintiff is claiming, it is the Defendants who has first and priority rights over the same land.

5.2.7 If at all the same was taken away from her, it was done irregularly and no proper customary law procedure was followed; let alone informing the Defendant who has inherited the land from her late husband.

5.3 <u>Government's acquisition of the land and subsequent leasing to the Trust</u>

5.3.1 The Plaintiff states that the Government disposed the villagers of their land and to have land one was supposed to be given a licence first.

5.3.2 The Defendant was not aware of this arrangement. They did not know that the land had been actually dispossessed from her. They have never received notice from the Government that it intends to acquire their land. Neither have they been compensated for their loss, damage or disturbance caused by the acquisition of the land.

5.3.3 The proper procedure was for the Government to give notice to the Defendant that they were acquiring the land and that the villagers will be dispossessed of the same. The villagers

were then supposed to be given adequate compensation as required by the law.

5.3.4 However, the Defendant has stated in evidence that this never happened at any material time.

5.3.5 The arrangement was for the Trust to conduct an experiment on the land around the year 2010, and that the land would be surrendered to the villagers after the same was done.

5.4 **Depriving the Defendant the land and proposing that she be chased away.**

5.4.1 The evidence of Group Village Headman Bondo was that Village Headman Chikasa enticed him to be on his side and chase the Defendant from the village so that they should not bother him. This is found in **paragraph 7** of the affidavit in support of opposition to originating summons of **Andrew Chirwa (Group Village Headman Bondo)**. The Plaintiff have not disputed this.

5.4.2 Further, Mary Goba made the story known to the media. She has exhibited a copy of the media in her affidavit, particularly **paragraph 28**. In that exhibit, the Defendant stated that the chief, Village Headman Chikasa, told her that she will not be given the land because she was a foreigner. Presumably, the aspect of being a foreigner emanates from the fact that the Mary Goba was living in chikwawa at the time of her father's death and only relocated back to Nkhotakota after his death so as to continue with her father's business of commercial sugarcane growing.

5.4.3 However, the Plaintiff's parents do not dispute that the Defendant, IDESI Goba and Mary Goba are the wife and daughter of the deceased father who was allocated the piece of customary land in 1988.

5.5 **Trespass**

5.5.1 There is evidence from the Defendant that the land in question was being held and used by the Defendant prior to the Plaintiff's entry on the land in around 2012 based on the purported licensing of the land by the Trust to the Plaintiff.

5.5.2 The Plaintiff also agrees that she entered the piece of land in question in 2012, farmed it and harvested sugarcane on the same. This is evident from the affidavit of **Sylvia Madikhula**.

5.5.3 This means that both parties agree that there was an interference by the Plaintiff with the Defendant' rights of usage of the land in question.

5.6 **Frivolous, vexatious and abuse of Court process**

5.6.1 Plaintiff claims that the land in issue is different from the land which was the subject matter of another case in which the Plaintiff's parents were the Plaintiffs, and that case ended in favour of the Defendant herein and her daughter (Mary Goba).

5.6.2 However, the reality of the matter herein is that the land subject matter of that previous case was comprising of 4 hectares, and after the case ended in favour of the Defendant, half of that land has been surrendered to Mary Goba while the other half has not been surrendered.

5.6.3 Now, it is that other half which the Plaintiff herein is now claiming in the present case (namely, 2 hectares, as referred to in **paragraph 11** of the Plaintiff's affidavit in support of Originating Summons).

5.6.4 Essentially, therefore, the subject matter of the present case is the same as that of the previous case.

5.6.5 The Defendant argued in Court that the proper procedural manner was for the Plaintiff's parents to appeal against the judgement but the same was not done.

5.6.6 Instead, the Plaintiff brought this action regarding the same subject matter.

6.0 ANALYSIS OF THE LAW AND EVIDENCE

6.1 Whether or not the Plaintiff has locus standi?

6.1.1 From the evidence, it has been established that the Plaintiff had a mere contractual license to occupy the land which is the subject of this dispute.

6.1.2 From the authority of **Thomas v Sorrel (supra)**, it means that the Plaintiff acquired no proprietary rights in the land in issue. Consequently, by the authority of **Hill v Tupper (Supra)**, the Plaintiff cannot sustain the claim on the land. The Plaintiff has no locus standi to bring an action against a third party based on the land on which they had no proprietary rights. If anything, it is the Trust, as a lessee of the Government, which can institute an action against the Defendant.

6.1.3 Since the Plaintiff lacks locus standi in the matter, the matter ought to be dismissed.

6.1.4 In case the court views that the Plaintiff has locus standi, the Defendant then proceed to argue the substantive matter as follows:

6.2 Whether or not the Defendant had proprietary rights in the land in question?

6.2.1 The land in question was allocated to the father and husband of the Mary Goba and the Defendant respectively by Group Village Headman Bondo in 1988. By the authority of **Kamuzu (Administrator of Deceased Estate) v Attorney General (supra)**, much as the land was customary land which is by **section 25 of the Land Act** vested in the President, the said father and husband acquired proprietary rights over that land by the allocation made by Group Village Headman Bondo.

6.2.2 The allocation of the land in issue to the said father and husband to the Mary Goba and the Defendant respectively meant that Group Village Headman Bondo had allocated the land to the father and husband and to his family. Having regard to the decision of **Kuwali v Kanyashu (supra),** the father and husband, then, also had the right to pass on usage and occupation of the said piece of customary land to his heirs, in this case the Defendant.

6.2.3 This means that upon the death of the father and husband in 2006, the Defendant inherited the rights of usage and occupation. The inherited rights of usage and occupation of customary land are proprietary rights, and are protected by the **section 28 of the Constitution** as was stated in **Kamuzu (Administrator of Deceased Estate) v Attorney General (supra).**

6.2.4 The Plaintiff claims the land was allocated to her parents in the 1990s, which was already after the same land subject matter of the present case, had already been allocated to the Defendant's husband.

6.2.5 However, the evidence adduced by the Defendant has demonstrated that the Plaintiff's parents actually bought the land from VH Chikasa, and not that it was allocated to them.

6.2.6 However, on the authority of **Kuwali v Kanyashu (supra)** and **Mervis Chirwa v Faizal Karim and Pwelenje (supra),** the purported sale was of no legal and is void ab initio because customary land cannot be sold since no individual person has title to it.

6.2.7 Thus, it is the Defendant who still has use and occupation rights over the said land because it was not taken away from them based on custom, nor were they informed of the same.

6.2.8 If the land was allocated to the Plaintiff's father, which is not correct, the same was done arbitrary and should not be sustained by this competent Court.

6.2.9 Therefore, the Defendant had proprietary rights over the land in question which were acquired upon them inheriting the rights of usage and occupation of the said land from her husband.

6.3 Whether the Defendant' proprietary rights were vitiated by Government's acquisition and subsequent lease to the Trust?

6.3.1 In the case at hand, the Defendant was in usage and occupation of the piece of land in issue prior to the alleged acquisition by Government and issuance of a lease to the Trust.

6.3.2 At no point were the Defendant informed by Government that the land was being acquired by Government and that they were dispossessed thereof.

6.3.3 Neither were they compensated by the loss, damage and disturbance caused by the purported acquisition. By the authority of **Kamuzu (Administrator of Deceased Estate) v Attorney General (supra)**, the Government's act of acquiring the land from the Defendant without giving them notice and proper compensation was a violation of the Defendant' right to property as guaranteed by **section 28 of the Constitution** and therefore illegal.

6.3.4 Since Government illegally acquired the land from the Defendant, it follows that it could not issue a proper lease to the Trust, which licensed the piece of land to the Plaintiff.

6.3.5 This therefore means that the lease over a piece of land in question, which the Government issued to the Trust, the licensor of the Plaintiff, could not trump the proprietary rights

of usage and occupation of the Defendant for the lease emanated from an illegal action by the Government.

6.3.6 Consequently, the Defendant' right of usage and occupation of customary land overrides the rights of the Plaintiff as well as that of the Trust.

6.4 **Whether or not the fact that the Defendant is a woman renders her incapable of holding a piece of customary land in question?**

6.4.1 The land in question was originally customary land, and was allocated to the husband of the Defendant respectively. Upon being allocated to the husband, by the authority of **Elias Kanjuchi –v- Zefa Moses (supra)**, the father and husband acquired the rights of usage and occupation of the land together with anything on it for himself, his dependants and descendants.

6.4.2 Upon his death, by the authority of **Ben Mhango –v- Rita Nyausisya (supra)**, the Defendant being the wife of the deceased husband was still entitled to use and occupy the said piece of land by virtue of being the wife of the deceased husband and through her children with the deceased husband who are the rightful heirs. Thus the Defendant acquired proprietary rights in the land.

6.4.3 Further, upon his death, the piece of customary land passed to the Defendant by virtue of being the wife of the deceased. This is because customary land passes from parent to children and grandchildren as was properly stated in **Ben Mhango v Rita Nyausisya (supra)**. Therefore, the Defendant, upon her husband's death, also automatically inherited the piece of customary land in issue.

6.4.4 The fact that the Defendant is a woman does not disentitle her from holding the land in question for **section 24 of the Constitution** grants her equal protection, and same rights as

any person, including the right to acquire and maintain rights in property, independently or in association with others.

6.4.5 Additionally, the fact that Mary Goba was in chikwawa at the date of her father's death does not disentitle her from inheriting the land. This finds support from the authorities of **Ben Mhango –v- Rita Nyausisya (supra)**, where the court stated that the wife could still use a piece of customary land allocated to her deceased's husband despite the wife having left the village, and of **Elias Kanjuchi –v- Zefa Moses (supra)**, where the court held that the respondent, a daughter to the appellant's sister, was entitled to use a piece of customary land allocated to her deceased's father having only returned to the village after her father's death and after the end of her marriage.

6.4.6 In conclusion therefore, the fact that the Defendant is a woman and that Mary Goba was living in chikwawa at the date of death of her father does not render them incapable of inheriting the rights of usage and occupation of the customary land in question.

6.5 Whether or not the Plaintiff trespassed on the Defendant' land, and should therefore compensate the Defendant for the said trespass?

6.5.1 It has been established that the Defendant was in lawful usage and occupation of the piece of land in issue prior to the Plaintiff's usage of the land for sugarcane growing from around 2012. This means that the Defendant were in possession of the land in issue and had proprietary rights over such land.

6.5.2 By starting to grow sugarcane on the land in issue, the Plaintiff interfered with the Defendant possession and use of the land which they inherited her husband.

6.5.3 The Plaintiff entry of the land in question stems from th alleged license agreement between herself and the Trust However, as it has been argued, the lease which the Trust obtained from Government was illegally granted as the Government did not give the Defendant notice and compensation for the acquisition of the land. This therefore entails that the Trust's lease and the subsequent Plaintiff's license emanated from an illegal act by the Government. Consequently, the Plaintiff's license on the land did not override the Defendant' right of usage and occupancy as inherited from the deceased father and husband.

6.5.4 The consequence of that is that the Plaintiff's interference with possession of the said land by the Defendant was unjustifiable. Such unjustifiable interference with possession of land by the Plaintiff amounts to trespass to land as defined in the case of **Tikafika Estate Limited & Kachale (female) v Ashani (supra).**

6.5.5 It may be argued that the Plaintiff was not aware of the illegality hence she should not be held liable for trespass. However, as the court held in the **Tikafika Estate Limited case (supra)**, mistake is no defence of an action of trespass to land.

6.5.6 Where the court finds that there was trespass to land, the court can award damages in favour of the owner of the land. This is what the court did in the case of **Hara v Malawi Housing Corporation (supra).**

6.5.7 All in all, the Plaintiff's interference with the Defendant's possession of the land in question was unjustifiable thereby amounting to trespass to land. Consequently, the Plaintiff is liable to pay damages to the Defendant for the trespass.

6.6 Whether or not the Plaintiff's action is frivolous, vexatious and an abuse of the Court process

6.6.1 The Plaintiff's parents already brought an action concerning the same land and that case ended in favour of the Defendant and her daughter, Mary Goba.

6.6.2 That judgement by Madise has neither been appealed nor stayed.

6.6.3 The Plaintiff was not added as a party thereto, but she has brought this fresh action again even though that said judgement is still subsisting.

6.6.4 By bringing this yet fresh action, the Plaintiff's conduct is merely an abuse of the Court's system and hence this case should be dismissed out rightly. See **George Yianakis t/a GPY Investments v Inde Bank (supra)**.

6.6.5 Therefore, the Plaintiff's action should be dismissed for being frivolous, vexatious and an abuse of the Court process.

7.0 SUBMISSION

The Defendant humbly submits before this Honourable Court that:

7.1 The Plaintiff was a mere licensee of the land as opposed to a sublessee, and because of that the Plaintiff lack *locus standi* hence the action ought to be dismissed.

7.2 The Plaintiff's action is frivolous and vexatious and ought to be dismissed.

In case the court holds that the Plaintiff have locus standi and the present action is not frivolous, vexatious and an abuse of the Court process, then:

7.3 The Defendant submits that the Defendant had proprietary rights in the said piece of land, and the Government's purported acquisition of the said land and subsequent leasing of the land to the Trust did not nullify the Defendant' right of usage and occupation of the land.

7.4 It is also the submission of the Defendant that the fact that the Defendant is a woman and that Mary Goba was living in Chikwawa at

the date of death of her father does not render them incapable of holding a piece of customary land in question.

7.5 Finally, the Defendant submit that the Plaintiff trespassed on the Defendant' land, and should therefore compensate the Defendant for the said trespass.

8.0 PRAYER

WHEREFORE the Defendant prays before this Honourable Court that the Plaintiff, action be dismissed with costs, and that the Plaintiff should pay damages to the Defendant for trespass.

Dated the.....10th.....**day of**.....March....., **2017**

CHRAM ASSOCIATES

Legal Practitioners on behalf of the Defendant

LIST OF CASE AUTHORITIES

Ben Mhango –v- Rita Nyausisya, Civil Appeal Case No. 91 of 2011, Mzuzu District Registry (unreported)

Castro v Murray [1875] 10 Ex 213

Elias Kanjuchi –v- Zefa Moses, Civil Appeal No. 61 of 2012, High Court, Principal Registry (unreported)

George Yianakis t/a GPY Investment v Inde Bank Civil Cause No. 57 of 2016 (HC, PR).

Hara v Malawi Housing Corporation [1993] 16(2) MLR 527

Hill v Tupper (1863) 2 Hand C 121 or 159 ER 51

Kamuzu (Administrator of Deceased Estate) v Attorney General Civil Cause No. 1839 (A) of 1997 or [2002-2003] MLR 272(HC).

Kuwali v Kanyashu, Civil Cause No. 109 of 2010

Mtsuko v Jere, Civil Appeal No.8 of 2011

Owen and another v Reo Motors (Britain) Ltd (1934) 151 LTR 274

Tea Brokers (Central Africa) Ltd v Bhagat [1994] MLR 339 (HC)

Thomas v Sorrel (1673) Vaugh 330 or 124 ER 1098

Tikafika Estate Limited & Kachale (female) v Ashani [1998] MLR 424 (HC),

Village Headwoman Mangwere v Traditional Authority Bibi Kuluunda and others, Civil Cause No. 111 of 2012