

# **Eliza Misomali and Another v Esther Josephy and Another Land Causes Number 63 and 145 of 2023**

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<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice Allan Hans Muhome
<b>Cause Number:</b>	Land Causes Number 63 and 145 of 2023
<b>Date of Judgment:</b>	August 10, 2025
<b>Bar:</b>	Mr. Macmillan Chakhala, Counsel for the Claimants Mr. Masurool Daudi, Counsel for the Claimants

## **Head Notes**

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**Land Law** - Customary Land – Inheritance – Applicability of customary law to property inheritance where there is no direct heir

**Land Law** - Customary Land – Gifts – Whether a customary gift of land can be lawfully revoked.

**Land Law** - Customary Land – Entitlement to land – Whether prior legal findings by Traditional Authorities and District Commissioner are final.

**Civil Procedure** - Evidence – Burden of proof – Onus is on the party asserting the affirmative to prove their claim.

**Civil Procedure** - Costs – Each party to bear their own costs of the action.

## Summary

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The Claimants appealed to the High Court of Malawi against the decisions of the Traditional Authority and District Commissioner, which had vested ownership of two pieces of land in Mulanje District in the Defendants. The dispute arose over two separate parcels of land. The first parcel was a gift to the Claimants' family member, Lucy Manjomo, from a friend who was part of the Defendants' family clan. Upon Lucy's death without an heir, the First Claimant, Eliza Misomali, inherited the land and occupied it until the Defendants took possession, claiming it was their ancestral property. The First Claimant then retaliated by reclaiming a second piece of land that her grandfather had gifted to the Defendants' clan. The matter was heard by various traditional authorities and the District Commissioner, with conflicting rulings, leading to this action in the High Court.

The Court had to determine the rightful ownership of both pieces of land based on the principles of customary land law, particularly regarding inheritance and the revocability of gifts. The Court found that the First Claimant lawfully inherited the first piece of land from Lucy Manjomo, as Lucy was a duly accepted member of the clan and not a trespasser. Therefore, the Defendants' act of taking possession of that land and evicting the First Claimant was deemed unlawful and unjust. The Court further held that a customary gift of land, once given, cannot be lawfully revoked. While acknowledging the injustice of the Defendants' actions, the Court declared that the First Claimant could not revoke the gift of the second piece of land that her grandfather had given to the Defendants' family. The Court thus declared the First Claimant the rightful owner of the first piece of land and the First Defendant, Evelyn Mandala, the rightful owner of the second piece of land. The Court ordered each party to bear their own costs.

## Legislation Construed

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1. Constitution of Malawi (1994) (s 28)

## Judgment

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1. These are consolidated matters. Essentially, both parties seek a declaration that the opposing parties are not entitled to some two pieces of land situate at Ndala Village, Traditional Authority Chikumbu in Mulanje District. Both set of Claimants contend that they are the rightful owners of the land. They seek damages for loss of property and costs of this action.

2. The 1st Claimant, Eliza Misomali, testified that she is a daughter of Amia John who had a younger sister known as Lucy Manjomo. They were staying on one piece of land. Sometime in the 1930's, Lucy was gifted land (Piece 1) by Mai Maere, her good friend. Lucy had no child and relocated to Piece 1 with the 1st Claimant and stayed thereon till her death in the 80s. The 1st Claimant claims to have inherited the land from Lucy and possessed it until 2019 when the Defendants, who are related to Mai Maere, started claiming the land. The dispute was referred to Village Headman Ndala who ruled in favour of the 1st Claimant per exhibit EM 1. An appeal to Group Village Headman Gulumba was also settled in favour of the 1st Claimant per exhibit EM 2. However, on further appeal to Traditional Authority Chikumbu, it was held that the land belonged to the Defendants, per exhibit EM 3. Before, the 1st Claimant vacated the land, she appealed to the District Commissioner who ruled against her per exhibit EM 5.

3. The Defendants took possession of the land, demolishing a house and leaving the 1st Claimant homeless. She then decided to take back some land (Piece 2) which was gifted to the Defendants by her grandfather. This was sanctioned by Traditional Authority Chikumbu per exhibit EM 6. The Defendants appealed to the District Commissioner who ruled that both Pieces 1 and 2 belonged to the Defendants.

4. In cross-examination, the witness disagreed that Mai Maere was gifted Piece 1 because she married in the Defendant's family. She insisted that she inherited the land upon Lucy's death. She agreed that the reciprocal gifts of land ought not to have been reversed, however it was unfair for the Defendants to be given both pieces of land.

5. Francis Elia who is Eliza Misomali's nephew corroborated her evidence. He agreed that the land they were claiming was a gift to the Namaheya's which was made sometime in 1939. That ordinarily a gift is not supposed to be reclaimed, however, due to the Namaheya's behavior of reclaiming their land, the Claimant's family decided to recall the gift in 2019. That the land reclaimed was being used by Bertha and not Agness, who took their land. That the repossession was done considering that both Bertha and Agness are from the Namaheya's clan.

6. In defence, Evelyn Mandala testified that the disputed land was inherited by her mother but she was working elsewhere. Meanwhile, the land was being utilized by Esther Josephy (also known as Agness Namaheya) until the return of her mother in 2019 who took over usage and bequeathed it to her upon the mother's death in 2023. She referred to the land disputes referred to by Eliza Misomali above and claimed that

the Claimants grabbed her land unlawfully. The repossessed land was different from the piece of land that she inherited from her mother.

7. In cross-examination, the witness agreed that a gift is not meant to be taken away. That her mum was Bertha Josephy a sister to Agness Josephy. She agreed that the disputed land was gifted to the Namaheya clan but disagreed that the current land dispute was for the clan. She alleged that the land was personally gifted to her lineage. That the Namaheya's were using the land between 1935 and 1991 when they were disposed by the Claimants.

8. Agness Namaheya (also known as Esther Josephy) testified that Lucy Manjomo was simply a visitor and so she could not have passed ownership of the land to the 1st Claimant, Eliza Misomali. Her demeanor was not convincing to this Court. That upon eviction in 1991, Eliza Misomali, went ahead and claimed land belonging to Evelyn Mandala. That Evelyn's land is completely different from the land in dispute between herself and Eliza Misomali.

9. In cross-examination, the witness insisted that Lucy Manjomo was a trespasser but was accepted by Mai Maere and the Namaheya clan out of goodwill. That the land was reclaimed by the witness in 1991 when it was being used by Eliza Misomali, who was cutting down trees wantonly.

10. At close of trial, the Court received written submissions from Counsel, for which the Court is grateful. The standard of proof in civil matters is on a balance of probabilities and the burden of proof lies on he who asserts the affirmative, in this

case the Claimant: see Commercial Bank of Malawi v Mhango [2002-2003] MLR 43 (SCA).

11. The right to property is well entrenched under section 28 of the Republican Constitution of Malawi (1994) as discussed by the Supreme Court of Appeal in Attorney General v MCP and Others (The Press Trust Case) SCA [1997] 2 MLR 181.

12. This Court has examined the evidence and establishes that Lucy Manjomo cannot be said to have been a squatter when she was duly accepted into the Namaheya clan. Lucy died childless and Eliza Misomali, the 1st Claimant, continued to stay on Lucy's piece of land. It was therefore unjust that the Defendants, through Agness Namaheya (also known as Esther Josephy), chase Eliza from her duly inherited land in 1991.

13. She had nowhere to go hence she resorted to claim the land that was gifted to the Namaheya's. This Court finds that the decision of the District Commissioner that both pieces of land belong to the Namaheya's was unjust and cannot stand the test of fairness.

14. This Court declares that the 1st Claimant lawfully inherited her piece of land from Lucy Manjomo and so her subsequent eviction was illegal. There is no strong evidence to support the destruction of the house.

15. For the avoidance of doubt, Evelyn Mandala, is hereby declared as owner of the piece of land which she inherited from her mother and the 1st Claimant and her family

cannot revoke that gift. Each party shall bear their own costs.

Made in Open Court this 10th August 2025.