

Registered Trustees of Word Alive Ministries International (Nsanje Congregation) v Violet Mhango and Lyton Matchaya

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Justice M.A. Tembo
Cause Number:	Land Cause Number 75 of 2023
Date of Judgment:	August 29, 2025
Bar:	Ndhlovu, Counsel for the Claimant Dziwani, Counsel for the Defendants

Head Notes

Land Law – Customary Land – Validity of allocation – A chief's valid allocation of customary land cannot be arbitrarily usurped.

Law Of Evidence – Admissibility – Extrinsic evidence to a document – Capacity of signatory – Admissible to clarify in what capacity a person signed a document.

Law Of Evidence – Best evidence rule – Oral testimony versus documentary evidence – Documentary evidence preferred when available.

Law Of Evidence – Adverse Inference – Failure to challenge a criminal allegation of forgery or to call a material witness can lead to an adverse inference.

Law Of Torts – Trespass to land – Damages – Claim for damages for trespass to land
– Court awards damages where claimant proves unlawful interference.

Civil Procedure – Parties – Locus standi – Registered corporate body has the capacity to claim the rights to use and occupy the land.

Law Of Evidence Burden of proof – Civil matters – Burden lies on party asserting the affirmative – Claimant proved their case, counterclaim failed

Summary

The Claimants, Registered Trustees of Word Alive Ministries International, sought a declaration of their rights over a customary land parcel in Nsanje, which they had been occupying since 2008. The Claimants asserted that the land, a former graveyard, was allocated to them by traditional leaders and that they had since developed a prayer house on it. They further claimed that the Defendants, Violet Mhango and Lyton Matchaya, were trespassing on the land by building a fence around it and obstructing their access, claiming inheritance from their late father. The Defendants filed a defence and a counterclaim, arguing that their late father had been allocated the same land by a village headman in 1998, and that they had inherited it. They sought a declaration of their rights, an order for possession, and damages for trespass.

The principal issues before the Court were whether the Claimants were entitled to the declarations and orders they sought and whether the Defendants were entitled to their counterclaim reliefs. The Court applied the standard of proof on a balance of probabilities, with the burden of proof resting on the party making the affirmative assertion. The Court examined witness testimonies and documentary evidence, noting inconsistencies in the Defendants' case. The Court found that the Defendants' father

had been charged with forgery regarding the land and had not challenged the allegations, a fact that raised significant doubt about his claim. The Court found that there was no credible evidence to show that the Defendants' father had been allocated the land before the Claimants. The Court also applied the best evidence rule, preferring the documentary proof of the Claimants' allocation over the Defendants' oral testimony.

The Court held that the Claimants had proved their case in its entirety and that the Defendants' counterclaim failed. The Court granted the Claimants the declarations and reliefs sought, including a declaration that the Defendants' actions were unlawful and constituted trespass. The Court ordered that the costs of the action would be for the Claimants.

Legislation Construed

Statute

Land Act, 1965: Section 26

Chiefs Act (Cap. 22:03 of the Laws of Malawi): Section 2 and Section 9 (1)

Deceased Estates (Wills, Inheritance and Protection) Act 2010: Section 3(1) and Section 17(1)

Lands Acquisition Act (Cap. 58:04 of the Laws of Malawi): Section 3

Customary Land Act: Section 20

Constitution of the Republic of Malawi: Sections 5, Section 28 and Section 44(3)

Judgment

1. This is the decision of this Court following the trial of this matter on the claimants' claim against the defendants for a number of declarations and reliefs concerning a certain piece of land located at Nsanje. The defendants contested the claimant's claim.

2. The claimants stated their claim in their statement of case as follows:

1. The claimants are a body corporate duly registered under the Laws of Malawi and were at all material times the users and occupiers of the property comprised of 1.4634 Hectares situated at Nsanje Boma.

2. The defendants are also Malawians and reside within the district of Nsanje.

3. The claimants state that they were given the right to use and occupy the portion of land in paragraph 1 above which was formerly a land reserved for graveyard on 15th July 2008 by Village Headman Suwali.

4. The claimants state that having been given the right to use the said portion of land, they embarked on a development project in 2011 and built a permanent structure in form of a prayer house for the furtherance of their right to freedom of religion and the

defendants were aware of all these.

5. The claimants state that by virtue of the rights vested in them, they have since commenced a process of obtaining a lease from the Government after a thorough approval from the officer for land matters of Nsanje District.

6. On 14th May 2023, the defendants mobilised building materials and have since started to construct a fence around the claimants' premises and obstructing access of the same claiming that the land in question belongs to their late father.

7. The claimants repeat paragraph 6 above and state that as a result of the defendants' actions, they have suffered loss and damage:

Particulars of loss

- a. Unlawful interference with the right of use and occupation of the land;
- b. Unlawful interference with the free exercise of the right to freedom of religion;
- c. Loss of use of property from the date the encroachment and trespass occurred to the date of the judgment.

8. The claimants repeat paragraph 6 above and state that the actions of the defendants amount to unlawful interference with the quiet use and occupation of land, encroachment and trespass.

WHEREFOR the claimants claim for:

- a) A declaration that the claimants have the rights in use and occupation of the land in question;
- b) A declaration that the claimants are entitled to full and unrestricted access to their property;
- c) A declaration that the actions of the defendants are unlawful and amount to encroachment and trespass;
- d) Damages for trespass from the date the said trespass began to the date of the judgment;
- e) Any other relief that the Court may deem fit and appropriate;

f) Costs of this action.

3. The defendants then stated their defence as follows:

1. Save and except as hereinafter specifically admitted, the defendants deny each and every allegation of fact contained in the claimants' statement of case as if every such allegation of fact was set out seriatim and specially traversed.

2. The defendants refer to paragraph 1 of the claimants' statement of case and plead that:

2.1 They are not aware that the claimants are a body corporate duly registered under the laws of Malawi as alleged in paragraph 1 of the statement of case and puts the claimants to strict proof.

2.2 They admit that the claimants have been using and occupying the alleged property which as pleaded below, used to belong to their late father and which they later inherited following his death in 2017.

3. The defendants refer to the contents of paragraph 3 of the claimants' statement of case and deny the same and further plead that:

3.1 The said land was given to the defendants' late father by Village Headman Suwali in or around 1998. The defendants' father passed away around 2017. Following his death, the defendants inherited the parcel of land in issue.

3.2 T/A Malemia later gave the claimants the same piece of land belonging to the defendants. At the time the said T/A Malemia gave the claimants the land:

3.2.1 The defendants' said father had not abandoned or surrendered the land and did not consent that it be taken away.

3.2.2 Neither T/A Malemia nor the claimants compensated the defendants or their late father.

4. In the circumstances, the defendants deny that claimants have any rights over the land entitling them to occupy or use the same and obtain a lease over the said parcel of land.

5. The defendants refer to paragraph 6 of the claimants statement of case and admit that they indeed mobilized building materials and have been constructing a fence around the land in issue which they genuinely believe to be theirs having inherited the same from their late father who was allocated the land in 1998.

6. In view of the matters pleaded in paragraphs 3, 4 and 5 above, the defendants:

6.1 Deny that the claimants have suffered any loss and damage as pleaded in paragraph 7 of the claimants' statement of case.

6.2 Deny that their actions amount to unlawful interference with quite use and occupation of land, encroachment and trespass as pleaded by the claimants in paragraph 8 of the statement of case.

Counter-Claim

7. The defendants repeat the contents of paragraph 4 and 5 of the Defence.

8. By reason of the matters aforesaid and more particularly pleaded in paragraphs 4 and 5 of the Defence, the defendants counterclaim from the claimants:

8.1 An order declaring that the land in issue was allocated to their late father before T/A Malemia allocated the same parcel of land to the claimants.

8.2 An order declaring that neither T/A Malemia nor any other person could lawfully and effectively allocate the land in issue to another person without following the due process of the law which forbids arbitrary deprivation of property.

8.3 Damages for trespass from the date the trespass begun to the date of judgment.

8.4 An order for possession of land.

8.5 And the defendants pray that the claimants' claim be dismissed with costs.

4. The issue for determination in this matter is whether the claimants are entitled to the declarations and orders sought herein. In addition, whether the defendants are entitled to the reliefs they seek against the claimants.

5. The standard of proof in these civil matters is on a balance of probabilities as rightly noted by the parties in this matter. Moreover, the burden of proof lies on he who asserts the affirmative, in this case the claimants on the their claim and on the defendants on their counter-claim. See *Sivaswamy v Agason Motors Ltd*, [1995] 1 MLR 274, *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.

6. The claimants therefore provided evidence to prove their claim. The defendants did likewise. Both parties then made submissions herein, which are considered after the evidence is outlined.

7. The claimants had three witnesses. The first witness for the claimants was Yolamu Fodya. He stated as follows in his witness statement:

1. I am one of the witnesses of the events that took place for the claimants herein to acquire, occupy and put to use the land in the dispute herein.

2. I recall that it was in or around the year 2007 when the claimants wanted a place to build a church complex that was to include a nursery school and other development activities.

3. As one of the members of World Alive Ministries International, I joined in the search and inquiry of such a land so that in return, we could stop congregating in rented

premises.

4. In our search as part of the team, we went to the authorities of Nsanje District Council who advised to consult the local chiefs as they had at the time land that was idle.

5. Subsequently, Reverend Wells Makwenemba and I went to late Village Headman Suwali regarding the land which we occupy today. At the time, there was no any building structure on the said but there were many indigenous trees that had formed a thick indigenous forest.

6. I recall that Village Headman Suwali was glad with our visit and proceeded to grant us permission to occupy and use the said land for the purposes of our church. The said Village Headman Suwali showed us the boundaries within which we can occupy and the other parts were left as there used to be a graveyard nearby.

7. I recall that Village Headman Suwali in his capacity informed us that he was going to inform the Group Village Headman Magulugulu and who later informed Traditional Authority Malemia as Gogo Chalo.

8. Subsequently, Traditional Authority Malemia and his subordinates granted us the permission to occupy and use the said land in July 2008 as evidenced by the exhibit marked "RWM1" attached to the witness statement of Reverend Wells Makwenemba.

9. As a church, we proceeded to launch our church project after having cleared the land by the help of the hired inmates of Nsanje Prison that were led by the Prison Warden Mr. Twakali.

10. To this day, we are still congregating in the said premises.

THE ISSUES SURROUNDING THE DISPUTE OF LAND IN QUESTION

11. The issues surrounding the claim that the land in question was also allocated to Mr. Matchaya are not new to my knowledge. I recall that at the time the land in question was being cleared, the Late Mr. Matchaya came claiming that the land was

given to him also by the said Village Headman Suwali.

12. As a church, we immediately instructed the hired inmates to stop clearing the land and went to consult again the same Village Headman Suwali who had given us permission that, if, peradventure, he could allocate another piece of land to us.

13. After having consulted Village Headman Suwali, we were told that as much as Mr. Matchaya was cutting trees on the land in question, it was never given to him that is why he proceeded to grant permission to the claimants to occupy it.

14. The late Mr. Matchaya subsequently organized bricks and instructed builders to start digging the foundation.

15. Displeased with the activities of late Mr Matchaya, late Village Headman Suwali, went to report the matter to Traditional Authority Malemia who convened meetings to settle the impasse that was there.

16. Subsequently, we heard that the said late Mr. Matchaya was in police custody on the allegations of criminal activities surrounding his claim for the land in question.

17. We were then informed by Village Headman Suwali to continue with our development plans and we proceeded to build our prayer house in or around 2010.

18. After having built our prayer house as a church, we never heard anything from the said late Mr. Matchaya until his demise over 5 years later.

19. I assert and affirm in my statement that the land in question, being customary land, was and is in the occupation of the claimants herein after having be rightfully granted permission to use the same by Traditional Authority Malemia and his subordinates in the area namely Group Village Headman Magulugulu and Village Head Man Suwali.

8. During trial at the locus in quo, he pointed out the boundaries of the land in dispute herein, which said Village Headman Suwali had showed him. He also pointed out that the bricks and brick wall in the vicinity belong to the defendants.

9. During cross-examination, he stated that he knows the claimants in this matter, namely, Trustees of Word Alive. He indicated that he is a member of the claimants' church but that he is not a trustee. He indicated that he knows Reverend Makwenembe but does not if he is a trustee of the claimants' church.

10. When he was referred to exhibit RWM1, he stated that claimants as Trustees do not appear there as land holders to whom the land was allocated by that document. He explained that exhibit RWM1 shows that the land was allocated to Word Alive International Ministries. He pointed out that there was a dispute between Word Alive and Mr. Matchaya in 2008 when they started working on this land. He explained that Mr. Matchaya came on the claimants' land with his building materials. And he noted that there were the bricks dropped by Mr. Matchaya on the land in dispute.

11. He indicated that he never took part in the lease application process for the land in dispute but that the church leaders did. He also stated that he was not consulted by Nsanje District Commissioner's Lands Office about this land.

12. He then stated that Village Headman Suwali adjudicated over the dispute herein. But he has not said this is his witness statement. He denied saying that Village headman Suwali referred the land dispute herein to T A Malemia.

13. During re-examination, he stated that Mr. Matchaya brought his building materials on the land in dispute after the claimants started clearing the land. And that Mr.

Matchaya claimed that the land herein was his. He elaborated that the claimants stopped working on the land herein and reported the matter to Village Headman Siwali. He indicated that Village Headman Suwali never adjudicated the issue but rather that he said he never allocated the land herein to Mr. Matchaya. He added that Village Headman Suwali said he would meet Mr. Matchaya and later said that the claimants could carry on with their work on the land. He explained that the matter was taken to Police where there were other local authorities who were involved in the land allocation herein. He indicated that he was called before the TA Malemia, Group Village Magulugulu and Village Head Siwali to deal with the matter herein.

14. The second witness was Reverend Wells Makwenemba. He stated as follows in his witness statement:

1. I am an ordained Church Minister under The Registered Trustees of Word Alive Ministries International and I am currently based at Nsanje Congregation.

BACKGROUND

2. I know that the claimants are the designate users and occupiers of the customary land that is found at Nsanje Boma having been given the right to use the same in July 2008 by traditional leaders of the area namely: Village Headman Suwali, Group Village Headman Magulugulu and Traditional Authority Malemia. Copy of the proof of the land allocation by the traditional leaders is attached hereto and is marked and exhibited as "RWM1".

3. ..

4. The said land in question was initially a land that was set aside by the local authorities for a graveyard as it is close to the old Nsanje district hospital. However, due to the construction of a new hospital in the late 1980's, the land in question was

abandoned and left to flourish as a forest with indigenous trees until the time we were allocated the same.

5. Upon being given rights to use the said land, the claimants commenced development works and hired inmates from Nsanje Prison that were led by Mr. Twakali to clear the land.

6. Subsequently on 23 August 2008, the late Mr Matchaya came on the said land claiming that the right to use the said land were given to him by the same Village Headman Suwali while we were clearing the land. We put on hold the clearing of the land activities and reported the matter to said Village Headman Suwali.

7. A dispute arose following the claim by Mr. Matchaya and the matter was later resolved by the Traditional Authority Malemia after consulting Village Headman Suwali, and Group Village Headman Magulugulu in favour of the claimants.

8. I recall that Village headman Suwali and Group Village Headman Magulugulu reported Mr. Matchaya to Nsanje Police on the allegations of forgery and uttering false documents regarding the land in dispute. This led to the arrest of the said late Mr. Matchaya and a criminal offence was opened against him.

9. Following this first resolution of the matter by Traditional Authority Malemia and his subordinates, the claimants commenced development works of building a prayer house and toilets.

10. I repeat paragraph 9 above and state that the claimants started to build the prayer house and completed it while the late Mr. Matchaya who was the father of the defendants herein and the defendants themselves were alive and were seeing this development.

11. Unfortunately between the years of 2017-2018, Mr. Matchaya who was father of the defendants herein passed away.

12. Following the death of Mr. Matchaya, the defendants came forward again claiming that the claimants have grabbed the land that belonged to their father in 2020.

13. The matter was again referred to the Traditional Authority Malemia who stated

that this issue was already resolved in favour of the claimants while the said Village Headman Suwali and Group Village Headman Magulugulu were alive. The said Traditional Authority Malemia further advised the defendants in our hearing that they had a right to take the matter to another tribunal for the redress of their grievances.

CURRENT SITUATION

14. The claimants have proceeded to develop the land having built a permanent structure as a prayer house for the congregation and there are further development projects which they intend to partner with Compassion International Malawi, a locally incorporated non-governmental organization with the purpose of reaching out to vulnerable children in line with the original plan that was there.

15. I state that the current area is very much habitable now as compared to the time we were first given the rights to occupy it as it was just bushy and a haven for criminals.

16. The claimant has taken steps and have followed proper procedures with the authorities at the Nsanje District Council and made applications for lease from the Malawi Government. Copy of the application forms and sketch map are attached hereto marked and exhibited as "RWM2".

COMMISSION OF INQUIRY

17. In February 2022, a commission of inquiry was set up by the Ministry of Local Government to investigate allegations which were leveled against Traditional Authority Malemia.

18. The claimants were never summoned to the said commission of inquiry to give their testimony or answer any questions regarding the acquisition of the land in question.

19. Subsequently, I was summoned by the committee that was set up by the District Council of Nsanje where I was questioned on how the claimants acquired the land in question.

20. I duly gave an explanation as it has been elucidated herein above however and showed them the documentation that we had at the time that authorized the claimants to apply for lease to Malawi Government and we paid the prescribed fees after having satisfied the requirements at district level. Copy of the General Receipt is attached hereto and is marked and exhibited as "RWM 3".

21. Before the determination of the said committee that was set up by the Nsanje District Council, on 14th May 2023, the defendants started building a fence enclosing the claimants' structure claiming that the land in question belongs to their late father.

22. As far as I know regarding what was applicable at the time, the land in question is customary land and the claimants were rightfully given rights in use and occupation of the same by Village Headman Suwali who was and is under Traditional Authority Malemia.

15. During cross-examination, he stated that he knows the claimants. He added that he represents claimants but that he is a trustee of the claimants. He further stated that he is not a witness but a complainant on behalf of Nsanje Church of the claimants.

16. He stated that the land herein was given to Word Alive Ministries International per exhibit RWM 1. And that this is the same as Trustees of Word Alive Ministries. He then indicated that exhibit RMW1 does not allude to the Trustees of Word Alive International.

17. He then indicated that according to exhibit RWM 1 it is T/A Malemia who allocated the land herein. He explained that it is not correct that Village Headman Suwali did not allocate this land per RWM 1. He noted that exhibit RWM 1 does not say Village

Headman Suwali allocated this land to Claimant. He noted further that Village Headman Suwali signed on exhibit RWM1 as a witness. He asserted that T/A Malemia signed exhibit RWM 1. He then stated that the person who signed exhibit RWM1 signed on behalf of T/A Malemia. He explained that Foster Chalie signed on behalf of T/A Malemia. He however said that exhibit RWM1 does not say so.

18. He then elaborated that Foster Chalie is within Nsanje at his house. And that T/A Malemia stayed in Blantyre and that Foster Chalie was then assigned by the T/A to take care of the office of T/A Malemia. He indicated that this was not stated in his witness statement. He explained that exhibit RWM1 does not state in what capacity/position Foster Chalie signed on the same. He reiterated that according to exhibit RWM 1 the land herein was given to Word Alive Ministries International and not Trustees of the same.

19. He reiterated that the dispute herein first arose in 2008 between Mr. Matchaya and the claimants. He reiterated that Mr Matchaya brought some building materials on the land in dispute at some point. And that those were the bricks at the corner of the land herein.

20. He then stated that Village Headman Suwali never adjudicated on this land dispute. He reiterated that when the claimants started clearing the land late Mr. Matchaya came to claim the land. And that they stopped work and reported to Village Headman Suwali. Then Village Headman Suwali said he would speak to Mr Matchaya. He indicated that he was not present when the two spoke. He explained that Village Headman Suwali referred this matter to T/A Malemia and GVH Magulugulu.

21. He indicated that paragraph 7 of his witness statement does not say that late Mr Matchaya was called before T/A Malemia. He also stated that he never asked for a written decision from T/A Malemia on the matter.

22. He stated that there was an inquiry by Ministry of Local Government into the conduct of T/A Malemia. And that one of the issues was about acquisition of the land in dispute herein. He said that he does not know the determination of that inquiry. And that they were never called to the inquiry as a church. He however said he was called to the District Commissioner's Committee. And that this Committee said they would call him later if necessary.

23. He then stated that evidence of chief's consultation is exhibit RWM 1. He indicated that he knows the chief's consultation form on a lease application. He then said that the consultation form may have been misplaced but that he processed this regularly. He conceded that he had not brought the chief's consultation form in evidence.

24. He was not sure about which year in which Village Headman Suwali died. He stated that Village Headman Suwali was not alive at the time when the police arrested Mr Matchaya. He denied making an error in paragraph 8 of his statement in this regard. He indicated that the claimants started lease process the time they were allocated the land herein in 2008.

25. During re-examination, he explained that when Village Headman Suwali died he had already reported the matter herein to Police. He reiterated that the chief's consultation Form is not in evidence but that he followed all the procedures at the District Commissioner and the District Commissioner sent the claimants' papers to the Regional Lands Office.

26. He asserted that he believed the TA records his decision but that as a church they never asked for the written decision herein.

27. Regarding paragraph 7 of his witness statement, he indicated that it is wrong to say that Mr Matchaya was not called before T/A Malemia since both parties had to be heard. He explained that there may have just been an error in his witness statement in not stating that Mr Matchaya was present before the T/A.

28. He explained that according to exhibit RWM 1, given that the land is the Chiefs' hands, Village Headman Suwali gave the claimants the land in liaison with fellow chiefs. He reiterated that Foster Chalie signed on behalf of the T/A and that the claimants relied on the T/A's stamp on exhibit RWM 1 to show that this was signed by the T/A.

29. The third witness was Kelvin Chomanika. And he stated as follows in his witness statement:

1. I am a civil servant currently working a District physical planning officer for Ntchisi District Council.
2. I have also served at Nsanje District Council as the Assistant Lands Officer.
3. I recall that it was in or around 2011 when I was working at Nsanje District Council that the lands office was approached by Reverend Wells Makwenemba of Word Alive Ministries International to give them guidance and help in processing the lease. At the time, the claimants had had already erected a permanent structure as a prayer house on the land in dispute herein.
4. I recall that I was also working with Mr. Gift Mfuné who was my senior. According to our procedure that regulates our work, we engaged in a thorough search to see if there were disputes on the said land. Our findings were to the effect that the land in question is customary land that was initially a land allocated to Nsanje District Hospital. It was allocated to the claimants by the Chief as required of the law since it was customary land. We also found that there were no disputes or any complaint that was laid down or brought to the Council. We further found that there was an initial sketch map that was prepared by late Mr. Gift Thomas who was the Assistant Lands Officer prior to me, but, however, it had some errors. On the guidance of my senior colleague Mr. Mfuné aforementioned herein above, I went to carry out a second survey to reproduce a sketch plan for the proposed processing of lease application. Copy of the said sketch plan is attached hereto and is marked and exhibited as "KC1".
5. As a matter of fact, for the process of lease to go throughout there are requirements that have to be met. Among others, one of the requirement is that there has to be a chief consultation form authorising the allocation of the land in question to the applicant.
6. In this case, the claimants submitted a chief consultation form indicating that the land in question was duly allocated to the claimants with the consent and authorization of all local authorities which included the Traditional Authority Malemia, Group Village Headman Magulugulu and Village Headman Suwali. Copy of the said

chief consultation form indicating that land was allocated the claimants is attached hereto and is marked and exhibited as "KC2".

7. Subsequently, having been satisfied that the claimants had met the conditions for the application of lease, we helped the representative of the claimants to fill the lease application form and the same was further sent for processing at the Regional Office in Blantyre after the payment of lease application fee. Copy of the said bundle is attached hereto and is marked and exhibited as "KC3".

8. I am aware that the said process of lease had been delayed and is yet to be completed on the basis that there was a moratorium by the President that pended all processes that were being made for the purpose of obtaining leasehold interests to all land that was near or around the Nsanje Port Project. The land in question being around or near the Nsanje Port Project was affected by such.

9. According to my knowledge and the fact that there was no dispute at the time nor was there any complaint before the Council at the time, the land in dispute was allocated to the claimants by the Chief as is the case with customary land in the area.

30. During cross-examination, he stated that in 2011 he was studying at Mzuzu University. And that he completed his studies in 2015. He indicated that he came to Nsanje in 2017 and not in 2011. He stated that his boss is now with Ministry of Lands headquarters.

31. He then indicated that his research concerning the status of the land herein was a combination of desk research and field research. And that Reverend Makwenemba never said that there was a dispute over the land.

32. He explained that on lease agreement, he engaged the claimants' representative. He elaborated that he had a duty to correct the map prepared by late Thomas, the Assistant Lands Officer. He stated that when he goes on a land site he calls all neighbours. Further, that he walks around the land. He stated that he did this on the land in dispute herein. And that he produced a map after doing this in this case. He asserted that they do not write a report on site visit. And that he did not write a report herein. He explained that he reported to his boss by advising him of the land coordinates. And that he did a written report of site coordinates. He elaborated that his report was not about disputes on the land. Rather that it was on his technical work to collect coordinates aimed at producing a map. He indicated that disputes are resolved before they do a survey. He added that he was delegated the work herein. And that the land disputes were already tackled by his seniors. He asserted that he could explain on disputes. And he stated that if there is a dispute, a survey does not proceed unless the dispute is resolved.

33. He indicated that he was not aware that Mr Matchaya was arrested in 2011 as he was working in Nsanje in 2015. He indicated that he did not see building materials when he visited the land in dispute herein.

34. There was no re-examination. And this marked the close of the claimants' case.

35. Then the defendants called six witnesses. Their first witness was Violet Matchaya Mhango. And she stated as follows in her witness statement:

1. My name is Violet Mhango of Tsungulo Village, Traditional Authority Malemia in Nsanje District.
2. Unless otherwise stated, all matters of fact stated herein are from my own knowledge.
3. I am the 1st defendant in this matter. I am making this statement on my own behalf and on behalf of my co-defendant as an eye witness on what I personally know on some issues concerning the dispute in this matter.
4. I and the 2nd defendant are children of Late Butwell Matchaya who died in or around 2017.
5. Our late father was allocated the parcel of land which is the subject of controversy in this matter by Village Headman Suwali in 1998. The said land is located within Suwali village at Nsanje Boma. The transaction was witnessed by, amongst others, Mr. Charles Zambezi. It was also evidenced in writing only that the written document was taken away from our late father as explained below.
6. The said land and surrounding area was bushy. There were no buildings near it.
7. Upon being allocated the land my father with the help of myself and my other siblings:
 - 7.1 Started clearing the land. Some prisoners were also engaged to assist in clearing the land and cutting down some trees.
 - 7.2 Collected and brought unto the land bricks, sand and stones.
8. From around 2006 my late father started constructing a building on the land in issue and the one engaged to construct the building was Mr. Lewis Dimingu.
9. At no point in time did:
 - 9.1 My late father sell or surrender or abandon the said parcel of land to Village Headman Suwali or any other person.
 - 9.2 Village Headman Suwali challenge my father's ownership, or usage and possession of the said parcel of land.
 - 9.3 Any authority pay our father any compensation to procedurally compulsorily

acquire the said land from him.

10. The present dispute can be traced to 2008 or thereabout. However, it was only in or around 2011, when the claimants' representatives, without the permission of my father, entered the said parcel of land and started demolishing the foundation of the building my father had constructed thereon. When confronted, the claimants alleged that T/A Malemia allocated the land to them.

11. To silence my late father, the claimants acting in collusion with T/A Malemia caused our late father to be arrested in or around September, 2011 initially on allegation of trespass. He was arrested together with Mr. Charles Zambezi who as mentioned above had witnessed the transaction through which the land in issue was allocated to our father by Village Headman Suwali.

12. He was however charged on allegation of forgery the particulars of the charge being that he had forged a document which showed that Village Headman Suwali allocated the land to him. I have attached hereto a copy of his bail bond and the same is marked VM1.

13. The document referred to above was taken away by the police who have to this date never returned it to him. What happened was that when the claimants and T/A Malemia reported our late father to the police, he was asked to produce documentary evidence showing that he was given land by Village Headman Suwali. The documents were later on confiscated and never returned to him by the police at Nsanje Police Station. He was however never prosecuted for any offence.

14. He was released on court bail and one of the conditions for his release was that he would be re-arrested if he set foot on the land in issue and the claimants used that as an opportunity to fast track development of the land.

15. Taking advantage of the bail condition, the claimant started developing the land in or around 2011.

16. However, during that period I, my father and my other siblings would still go on the land to harvest trees us and our late father had planted and would always challenge

the claimants' occupation of the land.

17. The claimants occupied the land with the full knowledge that it belonged to our late father as they had found a foundation constructed on site, bricks and some building materials. The claimants could have easily enquired to establish who owned the same.

18. In fact the claimants used some of the bricks my father had used in constructing the foundation for his building project to construct a toilet on the said land.

19. Neither T/A Malemia nor any chief had the lawful authority to take away land already allocated to our late father without following the due process of the law.

20. Our late father was never consulted by T/A Malemia before taking the land away from him and giving it to the claimants. He was neither given any compensation.

21. Following the death of my father in 2017, I and my siblings continued to challenge the claimants' occupation and use of the land. We continued working on the land and started to build a fence around the land to assert our rights.

22. The claimants lodged a complaint with the reigning Group Magulugulu. At a meeting convened by GVH Magululuglu, the claimants alleged that they had been given the land by T/A Malemia. Group Magulugulu referred the matter to T/A Malemia without making any determination.

23. T/A Malemia called for a meeting at which he stated that as he had already given the land to the claimants he could not make any contrary decision. He did not give any determination in writing or give us any letter permitting us to take the matter further.

24. In or around 2021 we were part of a group that lodged a complaint with the Office of the President and Cabinet complaining of abuses of power by Senior Chief Malemia. Our complaint related to the conduct by Senior Chief Malemia in taking my father's land and giving the same to the claimants without either my father's consent or offering any compensation to him.

36. At the locus in quo, she confirmed the boundaries of the land in dispute herein as indicated by the claimants' first witness.

37. During cross-examination, she stated that her mother and father originally came from Ntcheu in 1981. They left Ntcheu in 1976. She added that she has relatives in Ntcheu. She stated that her father built a house at Ndenguma Village at Nsanje Trading centre. She added that he was running a grocery business. But that his shop then got burnt down. And that this changed his life. She indicated that however he never acted as if he was mentally disturbed. She stated that she was living with her late father. And that he then started selling firewood, which he cut from the land in dispute and also at another land of his at Chididi turn-off. She indicated that her brother built a house at the said land at Chididi. And that her father built a wooden shop on his land at the market. She stated that the District Council never chased her father away at the wooden shop. She also stated that they had now built a shop on that land which they have let out.

38. She indicated that she has no idea about her father being arrested at Chikwawa for wounding someone or that he had a mental illness. She indicated that her father would hire a tractor or oxcart to get his firewood to a selling point.

39. She asserted that she was not present when the land herein was being allocated to her father. And that she was told about this aspect. She indicated that she was 17 or 18 years old at that time in 1998. She stated that she was born in 1974. And that she did her school at Nsanje MCDE.

40. Regarding paragraph 7.1 of her witness statement, she explained that they hired ten prisoners to assist with the land clearing work herein. And that there was Mr. Potani In-charge then. She explained that they had paid K25, 000. And that this should be between 2001 or 2002. She explained that the prisoners took the firewood from the land. She indicated that she does not know if a General Receipt was issued for the prisoner's engagement.

41. Regarding paragraph 10 of her statement of claim, she indicated that she was there when her father confronted claimants about use of the land herein. She stated that the claimants said that T/A Malemia allocated them the land herein.

42. She also indicated that she was there when the claimants colluded with T/A Malemia to get her late father arrested. She stated that she and others were at the claimants' Church on the land herein then. And that they had come to clear the land herein. She explained that Pastor Makwenemba called T/A Malemia and said that Mr Matchaya's children were causing problems. She says that she then we saw a police vehicle come in. She asserted that she never heard that the Pastor say that late Mr Matchaya should be arrested.

43. Regarding the bail bond for her late father herein, she stated that her late father was charged with forgery of the signature of Village Headman Suwali. She indicated that by that time the then Village Headman Suwali was deceased. She explained that there was then a new Village Headman Suwali. She clarified that the initial Village Headman Suwali was Machael Simbi. She stated that her father was ordered not to come to the land in dispute until trial. And that her father died before his case was

tried.

44. She explained that her father went up to Form IV and got a Malawi School Certificate of Education. She indicated that he father complained to the chiefs about the land herein. But that he never went to the High Court. She also stated that the claimants built the prayer house whilst her father was alive and there was a bail bond that he should not set foot on the land in dispute.

45. She stated that in 2017 she came to claim the land herein. And that she went to the High Court and was told that she needed money but did not have money then. She elaborated that with my father she went to Blantyre at the Ombudsman who said they should get a lawyer who needed money. She said they had no money. She said she saw the claimants build the church on the land in dispute herein.

46. She stated that she took advantage of the Inquiry into T/A Malemia's conduct herein. She then indicated that the District Commissioner gave a determination. And that the determination is with the District Commissioner. She added that the District Commissioner never gave her the final response. She also said that the District Commissioner indicated that T/A Malemia has to right all the wrongs. She stated that they started building the brick wall on the land herein without District Commissioner's determination. She denied taking the law into their own hands. She asserted that the District Commissioner's determination had not changed since. She added that she did not know that they could get the District Commissioner to Court.

47. During re-examination, she stated that when the defendants complained about this land it transpired that when inquiry was done on this land the inquiry said they had to inquire on the T/A side. She stated that she was not there then. She indicated that the finding was that the land herein was allocated without following procedures. She indicated further that a remedy was to be made but nothing was said. She elaborated that the defendants made inquiries and the District Commissioner made a new Committee of ten to look into the issue since there was no response forthcoming from the initial Inquiry.

48. She stated that she noted that the claimants started construction on the land herein and they went back to the criminal court, which said that this matter came from the Police and told the defendants to report to police. She explained that they urged the criminal court to stop the claimants' work until the issue of ownership was resolved. But that the criminal court said it could have stopped the claimants if the case had emanated from the court but that the defendants would have to go get help from the Police. She stated that the defendants went to Police.

49. She asserted that in 2007 her father went to get a letter from the Village Headman Suwali as evidence of the land allocation here.

50. The second witness was Mr Stanfield Ngwali. He stated as follows in his witness statement:

1. ...

2. Unless otherwise stated, all matters of fact stated herein are from my own knowledge.

3. I am making this statement on behalf of the claimants in my capacity as an eye witness to the circumstances leading to the matter herein.

4. I am aged 76 years old. I am a retired magistrate. Before my retirement in 2008 I used to work at Nsanje Magistrate's Court.

5. I am fully conversant with the parcel of land which is the subject of controversy in this matter. It is located near to what used to be the old Nsanje District Hospital.

6. I first came to know of the land in or around February, 2002 when I was given that very same parcel of land by the then reigning Village Headman Suwali (deceased).

7. I started working on the said land. However, I stopped working on the land when I noticed that late Batwell Matchaya was also working on the same land.

8. I complained to Village Headman Suwali. He told me that at one point in time Late Bawell Matchaya had asked him for a parcel of land. He later advised that he had confronted Late Batwell Matchaya and asked him to stop working on the land. He did that in my absence.

9. However, I did not continue working on the land when I noticed that the Village Headman Suwali gave the same parcel of land to me and Late Batwell Matchaya. I sensed that Village Headman Suwali was running away from calling for a dispute resolution meeting where the two of us could confront each other because he knew that he had given the land to the two of us.

10. Late Batwell Matchaya continued working on the said land.

11. When I last visited the land to attend a meeting with T/A Malemia I noted that there were some bricks and an old slab.

51. During cross-examination, he stated that he was arrested on corruption charges at Chikwawa. He indicated that he was allocated this same land herein by Village

Headman Suwali. He explained that when he came on the land herein then, someone told him Mr Matchaya was also clearing the same land. He elaborated that a certain woman alerted him that Mr. Matchaya was also clearing the same land. He indicated that after being told by that lady he went to Village Headman Suwali. He then indicated that in paragraph 8 of his witness statement he is not saying whether Mr Matchaya was allocated the land herein or not. There was no re-examination.

1. My name is Charles Zambezi of Mulongoti Village, Traditional Authority Malemia in Nsanje District.
2. Unless otherwise stated, all matters of fact stated herein are from my own knowledge.
3. I am making this statement on behalf of the defendants in my capacity as an eye witness on what I personally know on some issues concerning the dispute in this matter.
4. I am a small scale farmer. I came to Nsanje on or about 11th January, 1983 to work as Court Messenger at Nsanje Traditional Court.
5. During my stay at Nsanje, I got acquainted to Late Matchaya, the defendants' father. Late Matchaya was a grocer. He became a very close friend of mine.
6. In or around 2007, Late Mr. Matchaya asked me to accompany him to Village Headman Suwali's house to witness the signing of a document evidencing that Village Headman Suwali allocated the land in issue to him.
7. I accompanied him as requested. Apart from me and late Matchaya, also present was Village Headman Suwali and a certain boy who was brought by the Village Headman for purposes of writing the sale agreement.
8. The Village Headman confirmed that he had some time back given late Matchaya a parcel of land and on that day all what was to be done was to prepare and sign a document evidencing that land's allocation to late Matchaya.

9. As Village Headman Suwali could not write, he asked the young man (boy) to write a document evidencing that he had allocated a parcel of land to late Matchaya. I signed as witness for late Matchaya on the said document. Late Matchaya kept one copy and Village Headman Suwali also kept his copy.

10. In so far as I can recollect at the time the document was prepared and signed, late Matchaya had already started developing the land and was using it. He had built a foundation thereon.

11. Late Matchaya took me to the land in issue and showed me its boundaries. This parcel of land is one which is the subject of the present dispute. It was big and the claimants have encroached. 12. In or around 2011 late Matchaya accompanied by some police men came to my house. The police men demanded that I accompany them to the Nsanje Police Station. I complied with their demand.

13. We went to the police station where I found a number of people. Some of the people present at the Police Station at that time who I recognized were Traditional Authority Malemia, Foster Tchale and Meya. The two were associates or counselors of T/A Malemia.

14. I was arrested and detained in a police cell. I was not informed why I was arrested. I did not know the reason leading to my arrest until when I and late Matchaya sat down in the cell in which were incarcerated.

15. When I inquired from late Matchaya, he told me that our arrest was in connection with the land he was given by Village Headman Suwali and whose transaction I had witnessed.

16. It was alleged that the document evidencing the transaction was forged. The police took away the document and never returned it to late Matchaya. This is the document whose preparation and signing I witnessed as stated in paragraph 8 above.

17. I and late Matchaya were later on released on bail. I have attached hereto a copy of my bail bond and the same is marked CZ1. Both of us were never tried of any offence.

18. During all the time we were at the police station and being taken to Court I and late Matchaya were never shown the document showing that the claimants had been allocated the land in issue by T/A Malemia.

19. Prior to late Matchaya's arrest, late Matchaya had been in possession of the land and to the best of my knowledge no other person was at that time challenging his ownership of the land in dispute.

20. He and his family brought onto the land bricks, sand and some stones. He also started construction a shop building on the land

53. During cross-examination, he stated that he was told reasons for arrest whilst he was at the Police. He indicated that he had gone to the Police on another issue. He indicated that he was not arrested on the charge of forgery.

54. Regarding paragraph 6 of his witness statement, he stated that he did not recall the value of the land due to passage of time. He added that he cannot recall what he signed for since it has been a long time since he signed on the document before Village Headman Suwali. He indicated that both he and late Matchaya were charged with forgery. He asserted that he wanted to see the outcome of criminal case before he could complain of unlawful arrest.

55. He reiterated that he was arrested in 2011 herein. And that it has been many years since then to date. He then stated that he cannot say how Village Headman Suwali managed the allocation of the land herein. He indicated that he knows the land involved herein. He indicated that his sight is up to 30 metres. He identified some trees in the vicinity and said some are indigenous and others are not.

56. He then stated that the land herein used to be a bush with a real natural bush. He said he cannot say if some tree were planted or are natural. He indicated that he does not know what T/A Malemia's determination was in the end about the land herein. He indicated further that he never knew that Mr Ngwali was also allocated the land herein too.

57. He elaborated that when he went to the Police he found that late Matchaya was already at the Police. He added that he was present when the Police took the 'forged' document. He could not say what the particulars of the 'forged' document were. He indicated that he did not think of looking for the 'forged' document at the Police in relation to the present case. He added that he would have known if Mr Matchaya was given back his 'forged' document. He indicated that Mr Matchaya was staying in his grocery at the market. And that he would go to report for bail with him.

58. During re-examination he explained that what he could not recollect regarding the contents of the 'forged' document is the sum of money or value of the land herein.

59. The next witness was Lewis Dimingu. He stated as follows in his witness statement:

1. My name is Lewis Dimingu of Thungulo Village, Traditional Authority Malemia in Nsanje District.
2. Unless otherwise stated, all matters of fact stated herein are from my own

knowledge.

3. I am making this statement on behalf of the Defendants in my capacity as an eye witness on what I personally know on some issues concerning the dispute in this matter.

4. I am a Builder by profession.

5. In or around July or August, 2006 I was engaged by Mr. Matchaya that I should construct a building that was to house his shop at Mbunguti which in fact is the land in dispute.

6. When I went to view the site I found that Late Matchaya had already brought some bricks, sand and stones which were to be used for construction of the foundation for the building.

7. I agreed with Late Matchaya that I build a 6 meters by 7 meters shop building at a contract price of K150, 000. 00. The boys that dug trenches for foundation were paid K30, 000. 00.

8. I vividly remember the place where I built the foundation. I can locate it.

9. Late Matchaya's construction project was the first around that whole area which was bushy. When I started working on the land no one came to stop me from proceeding with the work claiming that he or she owned the land.

60. At the trial, he pointed out that he built a foundation that was 16 by 7 metres near the bricks in the same area pointed out by the 1st witness for the defence.

61. During cross-examination, he stated that he did the foundation work in 2006. There was no re-examination.

62. The next witness was Isaac Kaluzi Nyirenda. He stated as follows in his witness statement:

1. My name is Kaluzi Isaac Nyirenda of Magulugulu Village, Traditional Authority Malemia in Nsanje District.

2. Unless otherwise stated, all matters of fact stated herein are from my own knowledge.

3. I am making this statement on behalf of the Defendants in my capacity as an eye witness on what I personally know on some issues concerning the dispute in this matter.

4. I am aged 73 years old. I am a small scale farmer.

5. I have been a secretary for Group Village Headman Magulugulu from 2007 until his death in or around 2017. During that time I became so acquainted with the signatures of the then Group Village Headman Magulugulu and Village Headman Suwali.

6. When I was shown the document marked KLN 1, I noted that what purports to be signatures of Group Village Headman Magululu (F. Thomea) and Village Headman Suwali (M. Simbi) are in so, far as I am concerned and to the best my knowledge not the actual signatures of the two people.

7. The true signatures of the Group Village Headman Magulugulu and Village Headman Suwali are what appears in documents marked KLN 2A and KLN 2B.

8. I repeat the contents of paragraph 7 above and further state that in fact Village Headman Suwali could not write and it was his son who was doing the signing on his behalf.

9. In or around 2008 the dispute on the land in issue was brought to the attention of Group Village Headman Magulugulu. When the parties were asked to produce a document showing who gave them the land in issue, late Matchaya produced a document showing that he had been given a piece of land by Village Headman Suwali

whilst the claimants did not produce any document.

10. That dispute was heard at Group Village Headman Magulugulu's court and I was present and took minutes. Also in attendance was Village Headman Suwali (deceased).

11. It was established as a matter of fact, that the land was owned by late Matchaya and not the claimants.

12. The papers evidencing that late Matchaya was given the land in dispute were confiscated by the police when they arrested Mr. Matchaya in 2011.

63. During cross-examination, he stated that he was adjudicating matters with the GVH Magulugulu as an Induna. He believed Magulugulu became the Senior Group Village Headman in 2011. He indicated that his name was Foster Thomeya.

64. He then stated that he knew Foster Charlie a secretary to the T/A. But that he does not know his signature though. He explained that he served GHV Magulugulu for ten years. And that the GVH could write his own name. But that he does not know the educational level of the GVH.

65. He indicated that he knew Maikolo Simbi, Village Headman Suwali. He added that he was never an Induna of Village Headman Suwali. He explained that Village Headman Siwali's name appears as a witness exhibit RWM 1. He added that Village Headman Suwali did not know how to write anything. And that the one who wrote Maikolo Simbi on exhibit RWM 1 is an educated person.

66. He explained that a representative of Village Headman Suwali wrote this name of Maikolo Simbi on exhibit KIN2B. He then stated that he did not write on KIN2A but that GVH Magulugulu wrote there himself. He added that he was not present though when

KIN2A was written. He explained that he retired at GVH Magulugulu in 2017 after his death.

67. Regarding paragraph 10 of his witness statement, he stated that the events there took place on 8th July. And that this was the first time proceedings went before the GVH Magulugulu. He elaborated that the GVH never gave determination and the issue was referred to the T/A as the issue was big and the T/A was to decide.

68. He indicated that he had witnessed cases where the GVH allocated land (not on buying and selling) within the village but not outside the village.

69. Regarding exhibit RWM1, he stated that he cannot confirm the stamp there as belonging to T/A Malemia. He noted that however the stamp shows Nsanje. He indicated that he knew the names indicated in exhibit RWM1.

70. The last witness of the defendants was Charles Isaac. He stated as follows in his witness statement:

1. My name is Charles Isaac of Hapali Kusali Village, Traditional Authority Malemia in Nsanje District.

2. I am making this statement on behalf of the defendants in my capacity as an eye witness on what I personally know on some issues concerning the dispute in this matter.

3. I am 75 years old and I am now engaged in subsistence farming.

4. Late Matchaya was my friend. In or around 2002 he took me to appreciate a parcel of land located within Suwali Village at Nsanje Boma. This is the land in dispute. He showed me the boundaries of the land in issue.

5. He was busy working on the land and on some occasions I would see prisoners assisting him in clearing the bush. The prisoners were being hired by him.

6. Late Matchaya asked me to assist him in identifying a good builder to build a shop for him. I identified Lewis Dimingu to do the work.

7. I am aware that Lewis Dimingu started working on the land but for one reason or another the project stalled.

8. It was only from around 2008 that I started hearing that there was a dispute between the claimants and late Matchaya. This was long after late Matchaya had been in possession of land and had been working on it.

9. In or around 2011 late Matchaya was arrested and detained at Nsanje Police Station. I visited him regularly. His arrest was related to the land in issue. He was however never prosecuted at all.

71. During cross-examination, he stated that he saw inmates clearing the land in dispute. He added that late Matchaya told him that he had hired these inmates. He indicated that there were so many of the inmates. More than ten inmates. He added that he did not count these inmates. There was no re-examination. This marked the end of the defendants' evidence.

72. The claimants and the defendants then made written submissions to buttress their respective cases as follows.

73. In dealing with the issues for determination in this matter as to who has the right to use the land in dispute herein the claimants submitted the following issues, namely, whether the claimants have the right of use and occupation of the said land. Whether the claimants are entitled to full and unrestricted access to the said land? Whether the defendants' actions are unlawful and amount to encroachment and trespass? Whether the claimants are entitled to the reliefs sought?

74. On whether the claimants have the right of use and occupy the land in question, the claimants noted that section 28 of the Constitution guarantees every person's right to acquire property alone or in association with others. And that the Constitution further provides that no person shall be arbitrarily deprived of property.

75. They then observed that section 26 of the Land Act, 1965 (which was in operation at the material time) provided 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.

76. They submitted that in the case of *The Administrator of The Estate of Dr. Kamuzu Banda v Attorney General* (2002-2003) MLR 272 held that it is clear that the provision

does not aim to protect only those who hold legal and equitable titles to property. And that it is therefore equally protective of any kind of title to property be it legal or equitable. Further, that the Court went further to state that any person holding any of the incidents of property is equally protected by the constitution and that the provision does not dictate where the property should be acquired and so a holder of customary land is within the ambit of its application and protection.

77. The claimants submitted that the foregoing clearly buttresses the point that any person (natural or legal) has the right to acquire any of the incidents of property in customary land, and no person shall arbitrarily deprive them of such property.

78. They then submitted that following these provisions, Justice Chinangwa in the case of *Hussein v Chiwaula* Civil Appeal Cause No. 15 of 2018 (High Court) (unreported) held that the powers to allocate and authorize the usage and occupation of customary land are vested in the chiefs.

79. They then observed that Justice Chimasula Phiri (as then he was) in the case of *The Administrator of the Estate of Dr. Kamuzu Banda v Attorney General* (Supra), relied on the expert witness on the customary law and the findings of one Ibik as recorded in his book *Restatement of African Law*, Vol 4, p 82 and held that under Sena and Mang'anja customary land law, the power to allocate lands rests and is exercisable by the chief. The village headman also has the power of allocation unless expressly withheld from him by the Chief and it is lawful to allocate to any person of whom the chief approved.

80. They observed that similar sentiments were averred by the Supreme Court in the case of Chirwa v Karim & Another, MSCA Civil Appeal No. 1 of 2016 in which the Court stated that:

Section 26 of the Land Act gives the Minister and a Chief different power. The Minister has the power of control and administration. Section 26, however, allocates power to authorize the “use” and “occupation” of customary land to chiefs.

81. They submitted that the gist of all these authorities is that the Chiefs have an authority to grant and allocate legitimate right to use and occupy customary land.

82. They then submitted that the evidence on their part is that they were allocated a piece of land to use the same by the Village headman Suwali, Group Village Headman Magulugulu and was further witnessed by Traditional Authority Malemia as can be noted in exhibit “RWM1” of the second witness for the claimant.

83. They submitted that the evidence further shows that even in the least aspect of it, Village Headman Suwali did not allocate this land in dispute to the late Mr Matchaya who was the father of the defendants. They asserted that it can be noted that the evidence of the second witness for the defendants; Mr Stanfield Ngwali corroborates with the evidence of the claimants while being clearly inconsistent with the contents of paragraph 9 of the witness statement of Violet Mhango who is the first witness for the defendants that is on page 43 of the trial bundle.. they noted that what is very illuminating in the said evidence of Mr Stanfield Ngwali is that he was initially allocated land in dispute herein, and, was told later on that the land belongs to Late Mr Matchaya by a third party. And that , subsequently, he went back to Village Headman

Suwali who informed him, by himself, that he had not allocated land to late Mr Matchaya. They asserted that this clearly shows that Village Headman Suwali did not approve the occupation of the said land by late Mr Matchaya. And that this entails that the occupation of late Matchaya who is the father of the defendants was not authorised by the local authorities. They indicated that for ease of reference, this part of evidence was unearthed in cross -examination and is also contained in paragraphs 7 and 8 of the witness statement of the said Stansfield Ngwali, which is found on page 50 of the trial bundle.

84. The claimants then noted that during trial, there was also issue as to the authenticity of the signatures of the individuals that had signed "RWM1." They noted that Mr Kaluzi Issac Nyirenda who was the fourth witness for the defendants told the court that the signatures on the said document were not the signature of the persons designated. They asserted that however, as it can be noted during cross examination, he admitted that the name of Maikolo Simbi indicated the name of village headman Suwali, the name F Thomea was for Group Village Headman Magulugulu. They added that this witness also admitted that he was not there when exhibit "KLN 2A" was being executed and that the signature on exhibit "KLN2B" was not that of Village Headman Suwali but his personal representative. They submitted that this admission shows that the evidence of the fourth witness of the defendants is grossly tainted with mere assertions without proof of their validity.

85. The claimants then observed that there were questions that were put to the witnesses of the claimants regarding why they did not bring Mr Foster Charlie to testify on its behalf. In this regard, they submitted that it has to be noted that the circumstances that obtain in this matter and as was extracted during the trial are very

peculiar in their own right. They submitted that Mr Foster Charlie was the right hand of Traditional Authority Malemia and was the one who was acting in his absence. They added that Mr Foster Charlie executed "RWM1" on behalf of Traditional Authority Malemia. Further, that Traditional Authority Malemia did not at any point in time question the rights to use the land in question on the part of the claimants. They added that, in fact, Traditional Authority Malemia recognised the rights that the claimants had basing on the execution of "RWM1". The claimants submitted that it is also important to note that the action herein was commenced at the time when there were questions regarding the conduct of the Late Traditional Authority Malemia.

86. The claimants then submitted that, in the alternative, since the question of the authenticity of "RWM1" was raised by the defendants, they could have also brought or summoned Mr Foster Charlie to come before the Court to testify so as to and oppose the position that was advanced by the claimants. They asserted that what is so clear from the foregoing is that Village Headman Suwali, Group Village Headman Magulugulu and Traditional Authority Malemia did not question the rights that the claimant had in occupying and using the land in dispute. They observed that evidence is on record from both parties that the dispute on the said land was taken before Traditional Authority Malemia who found in favour of the claimants herein in 2008 or thereabouts. And that the said determination has not been challenged to this day and the claimants have been developing the land without any impendent nor did late Matchaya take the matter to the District Council for review.

87. The claimants also pointed out that the evidence on record further cements the fact that the defendants herein commenced the construction of a fence on a land that is in occupation in May 2023 without the determination or the authority of the

Committee that was set up by the District Council to hear their grievances. And that this entails that the defendants took matters in their own and did wait for the determination of a tribunal where they lodged a complaint.

88. The claimants observed that it is not in dispute that the land in question is customary land. And that it is not in dispute that the claimants were allocated a portion of the said customary land by the Chiefs within whose jurisdiction the land in question is located; being Traditional Authority Malemia, Group Village Headman Magulugulu, and Village Headman Suwali. Further, that the evidence is on court record that the land officer cleared the claimants to proceed with the process of lease as there was no dispute that was recorded at the District Council level at the time regarding the land in question.

89. Therefore, the claimants submitted that in view of the foregoing and pursuant to section of 26 of the Land Act, 1965 and customary law, Traditional Authority Malemia, Group Village Headman Magulugulu and Village Headman Suwali had the power to authorize and allocate the right to use and occupy the land that is in their area of administration to the claimants. And that the claimants, thus, have the right of use and occupy of the said land to the exclusion of the defendants.

90. The claimants then submitted on whether they are entitled to full and unrestricted access to the land herein. They noted that it was held in the case of *The Administrator of The Estate of Dr. Kamuzu Banda v Attorney General (Supra)* that under customary land law, no land previously allocated, or in actual use or occupation, is capable of re-allocation, unless such land has been either forfeited or surrendered to the Chief.

91. They noted further that the defendants are contending that the portion of land in question was given to their late father by Village Headman Suwali in or around 1989. They then indicated that this Court will note that at time the land in question was allocated to the claimants, there was also one late Mr. Matchaya who later claimed that the land was also allocated to him by Village Headman Suwali when the claimants had started clearing the land for development works. They observed that when the traditional hearing was conducted, it was found that the persons who have the right to use and occupy the said land in question are the claimants. And that, subsequently, the said Mr. Matchaya did not take up the matter to another tribunal to have his grievances addressed. Further, that he did not approach the District Council at the time. And that he allowed the claimants to continue with their development work and built permanent structures that are being used to this day. The claimants submitted that, clearly, it can be said that the late Matchaya had full knowledge as to who had the right to use the said land following the determination of Traditional Authority Malemia when a dispute arose.

92. The claimants submitted further that the land in question was previously reserved for graveyard, and that it was not allocated to any person, let alone the defendants' father. And that the said piece of land remained unoccupied and it was not in actual use by any person.

93. They asserted that there is no evidence that the said customary land was allocated to the defendants' father by Village Headman Suwali, nor is there any evidence that the said land was occupied by him or any other person before it was allocated to the claimants herein. They indicated that, as the trial revealed, the late Matchaya was

arrested for forgery with the second witness for the defendants herein Mr. Charles Zambezi. They expressed utter surprise that, despite that, the said Charles Zambezi is a man who is still able to articulate issues with certainty as was seen during trial; he could not say what was contained in the said document that had led to his arrest. And that he could not remember the consideration that was furnished at the time, if any, for the said land.

94. The claimants further noted that it was revealed during the trial of the issues herein, that there were inconsistencies on the part of the defendants as to where exactly the late Matchaya showed the builder as the place to start building the shop. They added that this was clear, as there was a total discrepancy between the evidence of Violet Mhango and Lewis Dimingu.

95. They then asserted that the evidence of the second witness for the defendants, one Stansfield Ngwali, clearly stated that Village Headman Suwali did not allocate the land in question to the late Matchaya. And that this entails that the occupation of late Matchaya who is the father of the defendants was not authorised by the local authorities. They asserted that this is the basis upon which the Chiefs were lawfully entitled to allocate the land herein to the claimants. They added that since the right to use and occupy the said customary land was not expropriated from anyone by the said Chiefs in accordance with customary law prevailing in the area in question, the claimants are entitled to unrestricted access to the said land.

96. The claimants then submitted on whether the defendants' actions are unlawful and amount to encroachment and trespass. They noted that the Supreme Court of Appeal

in the case of Kutengule & Another v General Farming MSCA Civil Appeal number 55 of 2009 held that trespass to land, by definition, consists of any unjustifiable intrusion by one person upon the land in possession of another; where possession means occupation or physical control. Similarly, that this Court in the case of Ntambalika v Nkunika Civil Cause 2136 of 2009 (High Court) (unreported) stated that trespass to land is regarded as an intentional tort which involves voluntariness of the defendant's act in entering the plaintiff's land. They added that Madise J in the case Muloza (A minor suing through his father and next friend Mr. Peter Muloza) and Gonda (A minor suing through his mother and next friend Mrs Mary Gonda) v Population Services International Personal Injury Cause 339 of 2019 (High Court) (unreported) held that the two distinctive features of the trespass are that they are actionable per se and that the interference with the claimant's interest has to be a "direct" consequence of the defendant's act. This Court quickly notes that this personal injury case does not deal with the matters attributed to it by the claimants. It is a case about assault and battery arising out of circumcision without consent.

97. The claimants then submitted that having already established that they were lawfully allocated the portion of land in question by the rightful authority, it follows that they undisputedly have the possessory right and right of use of the said land. They added that it is in the realization of these rights that they started constructing a prayer house on the customary land that is in question.

98. They then indicated that the dispute as to who had rights to use the land herein erupted in 2008, when the defendants' father came on the said land and alleged that the right to use the land was given to him by Village Headman Suwali. They indicated that the dispute was resolved by the Traditional Authority Malemia after consulting

Village Headman Suwali and Group Village Headman Magulugulu in favour of the claimants. They noted that the defendants, fully knowing that the claimants are in possession of the land, started constructing structures obstructing the claimants from accessing their property. Further, that as it has also been discussed herein above, the evidence of the defendants' witness Stansfield Ngwali shows that Village Headman did not allocate the land in question to defendants' late father. Moreover, that in fact, the evidence has shown that it is only the claimants who had been allocated the said land by the local authorities. They asserted that the occupation of the defendants' late father on the said land was not authorised by the local authorities at the very beginning. Further, that the construction of the fence by the defendants on the said land without waiting for the determination of the Committee that was set up to hear their grievance was also not authorised.

99. The claimants asserted that the defendants' conduct is a deliberate act to interfere with the claimants' free enjoyment of their right of use and occupy the land herein. They added that having considered that the defendants are aware of the resolution that was already made in favour of the claimants by the Chiefs, the conduct of the defendants is an unjustifiable intrusion on the claimants' land. The claimants therefore submitted that the defendants' actions are unlawful and amounts to encroachment and trespass on the claimants' land.

100. The claimants then submitted on whether they are entitled to the reliefs sought. They noted that it was held in *Armstrong v Sheppard & Short Limited* [1959] 2 QB 384 that a claimant in an action for trespass may seek damages or an injunction or both. See *Ntambalika v Nkunika* Civil Cause 2136 of 2009 (High Court) (unreported).

101. They asserted that the evidence has shown that at no point in time did Village Headman Suwali and the Traditional Authority allocate land to the late father of the defendants. And that, as a matter of fact, the evidence of defendants second witness Mr. Stansfield Ngwali has shown that the late father of the defendants was appropriating the said land without the authority of the said local authorities. Further, that the evidence has also revealed that the defendants commenced the construction of the fence at their own volition before the determination of the Committee that was set up hear their grievance in early 2023. Moreover, that throughout the period herein, the evidence has revealed that the actions of the defendants herein have been carried out regularly without being authorised by the responsible authorities. And, ultimately, that the evidence has shown that the claimants took necessary steps and consulted the responsible authorities to be allocated the rights to use and occupy the land in question to the exclusion of others. The claimants, therefore, submitted that it is only just and proper that this Court grants them the reliefs that they are seeking in this Court and that the defendants' counter-claim be dismissed for want of merit. The claimants also sought costs of this action.

102. The defendants made their submissions by first commenting on the claimants' evidence. They then submitted on the following issues, namely, who owns the land in issue? Did T /A Malemia validly and lawfully take the land away from the defendants' father? Who is liable for trespass?

103. Regarding the evidence, the defendants observed that during trial the claimants relied on amongst others RWM 1 ad 2 to prove ownership of the land. That they sought to amplify exhibit RWM 1 with other documents and oral testimony to prove that the land was given to them by Village Headman Suwali. That they did not exhibit any

Chiefs consultation form. And, that they did not call Foster Tchali who signed exhibit RWM 1 as the person who gave land to Word Alive Ministries International (WAMI).

104. The defendants then submitted that the claimants could not introduce oral evidence to contradict exhibit RWM 1. That Foster Tchali is a material witness and by failing to call him an adverse inference be drawn against the claimants. Further, that the Chiefs consultation form is a material piece of evidence and by not exhibiting it, an adverse inference be drawn against the claimants.

105. As regards the submission that the claimants cannot introduce oral evidence to contradict exhibits RWM 1 and RWM 2, the defendants asserted that it is trite that a party cannot introduce parol evidence to contradict a document. See *Kamwendo v Bata Shoe Company Limited* Civil Cause No. 2380 of 2004. They asserted further that the above exhibits respectively show that the land was given to WAMI and not the claimants; that the land was given to WAMI by Foster Tchali and Village Headman Suwali is alleged to have been a witness and that WAMI (not the claimants) applied for a lease. They asserted that oral testimony of the first and second claimants' witness, that the land was given to the claimants by Village Headman Suwali and that the claimants applied for a lease, contradicts the letter of exhibits RWM 1 and RWM 2.

106. The defendants submitted that, in the light of such contradictions, the two pieces of testimony cannot stand side by side and one which is the best than the other, in this case the documents, must be given the way to stand. And, that this is so because the best evidence rule requires a party to an action to produce before the court the best available evidence for purposes of proving relevant facts. See *Phiri v Candlex Limited*

107. As regards the claimants' failure to adduce the Consultation with Chiefs Form and call Foster Tchali as a witness, the defendants submitted that an adverse inference, namely that had the Chief's consultation form been adduced and Foster Tchali called, evidence unfavorable to the claimants would have been made out. The defendants asserted that this submission is based on the following premises. That according to the case of Phiri v Candlex Limited cited above, the claimants were obliged to call the best evidence available before resorting to secondary and oral testimony of their three witnesses. That the Consultation with Chiefs Form (Form 1) is central in all applications for lease over customary land. And that it is required by statute and it amongst others show that both the Chief and Village Headman of the Area do not have any objection to the application for lease. The defendants indicated that, considering that one of the factual issues whether or not Village Headman Suwali allocated land to the claimants, Form 1 was material. They asserted that the Form would have shown whether or not Village Headman Suwali objected to the lease application and if he did the grounds of his objection.

108. The defendants asserted that, secondly, Foster Tchali is central to this matter because he is the one shown in RWM 1 as the one who allotted the land to WAMI. Further, that amongst all persons alleged to have allocated the land to WAMI (that is, T/A Malemia, GHV Magulugulu, VH Suwali and himself) it is only he who is alive and available. Further still, that his evidence would have assisted in resolving the factual issue on whether or not it was Village Headman Suwali who allocated the land to WAMI or the claimants.

109. The defendants then asserted, thirdly, the claimants did not offer any justifiable reasons for not adducing Form 1 or calling Foster Tchali. They observed that, when asked the second witness of the claimants stated that Foster Tchali is available and was at his home and that Form 1 was not exhibited but is available.

110. The defendants indicated that above submission is supported by the decisions of the Court in the case of *Maonga v Blantyre Print and Publishing Company Limited* [1991] 14 MLR 240 Unyolo J (as he then was), held that if a witness who is available is not called, it may be presumed that his evidence would be contrary to the case of the party who failed to call him. Further, in the case of *S (On application of Kezzie Msukwa)* and *Ashok Nair v Director of The Anti-Corruption Bureau* Judicial Review number 54 of 2021 in which the Court observed that the principle stated in *Maonga -v- Blantyre Print and Publishing Company Limited*, is of the essence in cases where the issues to be determined rest on factual issues. And that it is not of much significance where the issues to be determined principally rest on answering legal questions.

111. The defendants then submitted on who owns the land in issue. They asserted that in order to determine this issue, the following sub-issues would have to be determined first: To who was the land allocated? Who allocated the land? Was the land validly and lawfully taken away from the owner? – *Jehovah Witness case v Press Corporation and Another*. *Zambian Case on trespass*. As a matter of concern regarding the submissions by the defendants, there was no citation given of this case alluded to here.

112. Regarding the issue to who was the land allocated, the defendants submitted that there is no better starting point than to appreciate that the claimants have a legal

personality of their own giving them the capacity to acquire and hold property. They indicated that the next point to consider is whether or not the claimants are the same as WAMI, which features highly in the evidence given by the claimants' witnesses. The defendants observed that during trial no evidence was adduced to show that Word Alive Ministries International (WAMI) has any legal personality and it is clothed with capacity to acquire land in that name or that it is the same as the claimants herein. The defendants alluded to the SDA Church Case but no citation was provided at this point. The defendants also asserted that the claimants did not provide evidence that the claimants can acquire property in the name of WAMI.

113. The defendants observed that the claimants relied on exhibit RWM 1 dated 8th July, 2017, RWM 2 and RWM 3 dated 19th April, 2012. They noted RWM 2 consists of letter by WAMI dated 5th February, 2018, letter from Nsanje District Council dated 30th November, 2017, Application for lease dated 7th February, 2018, and Sketch plan dated November, 2011. They submitted that, despite the fact that the above exhibits were issued on different dates, a common thread that runs through them is that they are in the name of Word Alive Ministries International (WAMI) and not Registered Trustees of Word Alive Ministries International, the claimants herein. They observed further that the story told by the said exhibits is simple and straightforward, namely, that WAMI and not Registered Trustees of Word Alive Ministries International was given land. Further, that WAMI and not Registered Trustees of Word Alive Ministries International was applying for a lease.

114. The defendants observed that in paragraph 1 of their statement of case, the claimants have pleaded that they are a body corporate duly registered under the laws. They asserted that since the words "registered" and "trustees" have been used as

part of the claimants' name, it would be reasonable to assume that the claimants are registered under the Trustees Incorporation Act (Cap. 5:03 of the Laws of Malawi) which provides in section 8(1) that the name of every body corporate registered under this Act shall include the words "registered" and "trustees". The asserted that, on the other hand, WAMI which according to the exhibits was given the land and applied for lease does not use the words registered and trustees as part of its name as is required under s.8(1) Trustees Incorporation Act. 115. The defendants then pointed out that it should be borne in mind that no evidence was adduced to show that WAMI is incorporated under any law. What WAMI is under the claimants' trustee deed that is if at all there is any relationship between WAMI and the Registered Trustee of Word Alive Ministries International? And that at the time the land was being given to WAMI, the claimants were known as WAMI and had not yet been incorporated so that reliance be placed on section 11 of the Trustees Incorporation Act which provides that:

After the incorporation of the trustees of any charity under this Act, every donation, gift and disposition of property movable or immovable, theretofore lawfully made (but not actually having taken effect), or thereafter lawfully made by deed, will, or otherwise to or in favour of such charity, or to trustees thereof, or otherwise for the purposes thereof, shall take effect as if the same had been made to or in favour of the incorporated body or otherwise for the like purposes.

116. The defendants surmised that it is possible that in their common parlance, WAMI is used by members of the claimants to refer to the claimants. But they submitted that, however, when it comes to legal matters the two are distinct entities. They asserted that the importance of using legal names was stressed in the case of *Muluzi et al v Malawi Electoral Commission*, again no citation was provided, where it was

stated as follows:

We repeat, therefore, that names used in common parlance, when it comes to legal matters in court, ought to give way to legal names or legally recognized names.

117. The defendants then submitted that, having considered that the claimants are different from WAMI, there is need to answer the issue whether or not the claimants can maintain this action when according to the available evidence the purported ownership of the land in issue is in the name of WAMI. They indicated that a similar issue arose in the case of Registered Trustees of Seventh Day Adventist Church v Makhumula MSCA Civil Appeal 37 of 2015 in which Mzikamanda JA dismissed the appellant's ground of Appeal attacking a holding by the High Court that the appellants could not maintain an action in trespass because ownership of Title Number Blantyre West 396 was with an entity not being the appellant. They elaborated that, in that case, The Registered Trustees of the Seventh Day Adventist Church held themselves out as proprietors of the land alleged to have been trespassed by the respondent. However, the Land Certificate produced to prove proprietorship was in the name of The Seventh Day Adventist Association of Malawi. They noted further that, in dismissing the said ground of appeal, Mzikamanda JA, observed that it is an elementary point of law that the identity of the parties to an action is a crucial matter. And that there must never be any doubt as to who is suing whom and for what. Further, that where an action is taken on behalf of another existing party, it must be demonstrated that instructions were given to commence the action.

118. The defendants submitted that the claimants herein cannot rely on WAMI's purported ownership of the land as evidenced by RWM1 and RWM2 to prove their ownership of the land in the matter herein because according to the said exhibits the land was given WAMI, which is different from the claimant. and further, because no evidence was adduced to show that the land was acquired by WAMI before incorporation so as to trigger the operation of section 11 of the Trustees Incorporation Act.

119. The defendants then submitted that the land in dispute was allocated to the Mr Matchaya. The asserted that their evidence shows that the land was allocated to Mr Matchaya in or around 1998 by Group Village Headman Suwali. They insisted that the totality of Mr Ngwali's evidence is that to the effect that at the time Village Headman Suwali allocated the land to him, it had already been allocated to Mr Matchaya. That, if indeed, the land had not been allocated to Mr Matchaya; Village Headman Suwali should have called for a dispute resolution meeting. And that Mr Ngwali therefore left the land for Mr Matchaya who started developing it. They added that the allocation of the land to Mr Matchaya was evidenced in writing. And that the Charles Zambezi was present when that document was prepared and signed. And that this happened before the subsequent allocation of the land to WAMI. They added that a good reason was given as why that document was not adduced during trial. The defendants then indicated that Charles Zambezi's testimony was corroborated by Isaac Kaluzi Nyirenda who testified that that when a dispute was referred to GVH Magulugulu, Mr Matchaya produced a document showing that he was given the land by Village Headman Suwali and the claimants did not do so. They added that he testified that he was present at that meeting. The defendants asserted that, furthermore, they gave corroborated evidence that Mr Matchaya started constructing on the land without being challenged by Village Headman Suwali or any one before the purported allocation to the

claimants. And that, in fact, the builder showed the Court where the foundation was built.

120. The defendants then submitted on who allocated the land. They stated that this issue is important as it would assist in determining whether the claimants have proved that the land was allocated to them by Village Headman Suwali as per their pleading. And whether a valid allocation was made to WAMI or the claimants on the one hand and Mr Matchaya on the other hand. The defendants submitted that the claimants have failed to prove that the land was allocated to them by Village Headman Suwali as unequivocally pleaded in paragraph 3 of their statement of case. And that the allocation of land to WAMI or the claimants was void ab initio.

121. The defendants reiterated that it is trite that the claimants bear the burden to prove the allegation that the land was given to them by Village Headman Suwali. They observed that, surprisingly, when time came to adduce evidence during trial, the claimants changed tune and gave evidence that the land was given to them by T/A Malemia and his subordinates, namely group Village Headman Magulugulu and Village Headman Suwali. See Paragraph 8 of Yolamu Fodya's witness statement and paragraph 2 of Reverend Makwenembe's witness statements. They added that further to the foregoing, according to exhibit RWM1, being relied upon as evidencing that the claimants was given the land, another man by the name of Foster Tchali is indicated as being the person who allocated the land to WAMI, and not the claimants.

122. The defendants observed that it is not disputed that at all material times T/A Malemia was a chief whilst Suwali and Magulugulu were a village headman and group

village headman respectively. They noted that section 2 of the Chiefs Act (Cap. 22:03 of the Laws of Malawi) provides clarification on who a chief is. And that it states that “Chief means a person holding or acting in the office of Chief under this Act.” they submitted that, in accordance with that definition, Group Village Headmen and Village Headmen are not chiefs. They indicated, however, that Group Village Headmen and Village Headmen assist Chiefs in all functions Chiefs perform, including those under Section 26 of the Land Act since under Section 9 (1) of the Chiefs Act a Chief may appoint such number of Group Village Headman and Village Headman as he may consider necessary to assist his in carrying out his functions. And that prior to the amendment of the Land Act, Chiefs, Group Village Headmen and Village Headmen had power to allocate land.

123. The defendants asserted that it is important to understand that section 26 of the Land Act did not make a chief, a group village headman or village holder, occupier or user of customary land. But that it gave all powers to the Minister and the Chief to simply, authorize the use or occupation of land. And that these authorities had to do that according to customary law and subject to Constitution because section 5 of the Constitution makes any act of government or any law that is inconsistent with the provision of the Constitution invalid, to the extent of such inconsistency.

124. The defendants reproduced the then prevailing said section 26 of the Land Act which provided that a chief may subject to the general or special direction of the Minister authorizing the use and occupation of any customary land within his area in accordance with customary law.

125. The defendants asserted that a quick scrutiny of evidence adduced during trial show that exhibit RWM1 does not mention that VH Suwali allocated or allotted the land to the claimants. Instead, that Michael Simbi, who was the Village Headman Suwali at that time, is identified as a witness. They noted further that T/A Malemia did not sign exhibit RWM 1 and that during cross examination, Reverend Makwenemba stated that T/A Malemia was not present at the time the allocation of the land which was evidenced in writing by exhibit RWM1 was being done. They observed that exhibit RWM 1 shows that the land was given to WAMI and not the claimants by Foster Tchali. And that Foster Tchali was not a chief, as per Reverend Makwenemba during cross-examination and Isaac Kaluzi Nyirenda who in cross examination stated that Foster Tchali was T/A Malemia's Secretary.

126. The defendants submitted that, as Foster Tchali was not a chief, the implication is that statutorily he had no power of his own to give land to either WAMI or the claimants that power being within the preserve of the chief (T/A Malemia) and village headmen (Suwali) or group village headmen (Magulugulu). Further, that T/A Malemia could not lawfully delegate to Foster Tchali the duty to allocate the land as under law T/A Malemia could only delegate that to duly appointed village or group village headmen. They submitted that any purported allocation of land by Foster Tchali as evidenced by exhibit RWM1 was void ab initio.

127. The defendants reiterated that the claimants had the opportunity to bring the best evidence to prove that the land was allocated to them by VH Suwali and in an attempt to do that they relied on exhibit RWM1 which cannot be contradicted by oral testimony of the claimants' witnesses as exhibit RWM1 speaks for itself and no extrinsic evidence should be introduced to bring in new matters especially on who

gave the land to WAMI. They asserted that the claimants' evidence falls short of proving that the land was given to them by Village Headman Suwali in that it shows that the land was given to the claimants by T/A Malemia, GVH Magulugulu and VH Suwali. And that this is not what was pleaded. They added that the evidence clearly points to a trend that whenever it came to dispute settlement between WAMI and Mr Matchaya, Village Headman Suwali shied away from resolving the dispute and opted to escalate the disputes to T/A Malemia. And that this is some smoke, which raises some suspicion as to whether it was him or T/A Malemia who allocated the land to WAMI or the claimants.

128. The defendants then submitted on the issue: Was the land validly and lawfully taken away Mr Matchaya by T/A Malemia? They submitted that at the time of the purported allocation of land to WAMI by T/A Malemia the land belonged to Mr Matchaya. And that Mr Matchaya had property rights in the land. They added that T/A Malemia did not follow the lawful procedure to take away the land from Mr Matchaya before allocating the same to WAMI. And that, as a result, the allocation of the land to WAMI was unconstitutional, unlawful and not valid. They asserted that the chronology of events as per evidence adduced during trial is that Mr Matchaya was allocated the land in 1998 by Group Village Headman Suwali. And that the allocation was later on evidenced in writing in or round 2006. Then, that in 2008 T/A Malemia allocated the land to WAMI. And that at that time Mr Matchaya was using the land and had constructed a foundation thereon. Then that Mr Matchaya challenged the allocation to WAMI when he noted WAMI was clearing the land. And that he was later on arrested on allegations related to the land. They submitted that it is undoubted that Mr Matchaya had acquired property rights in the land.

129. The defendants pointed out that in the case of *Chirwa v Karim and Pwelenji* MSCA Civil Appeal No. 1 of 2016 the Supreme Court of Appeal made the following observations in so far as customary land law is concerned, namely, that the control of the customary land is given to the Ministry and delegated to the Chiefs of the areas although the land is vested in the president. That the land once allocated, the control over it passes to the one allocated who can use the land. Further, that the one who is allocated the land has lawful seisin of that land and can only lose it by forfeiture for misconduct or abandonment at custom. Further, that the word 'seisin' comports that the person allocated the land has both possession and tittle. And that customary law, certainly ranks lower to statutes. But that where, however, there is no statute, customary law is in pari pasu with other laws. *Kamphoni v Kamphoni* Matrimonial Cause Number 7 of 2012 (High Court) (unreported).

130. The defendants submitted that the rights Mr Matchaya acquired in the land are guaranteed in section 28 of the Constitution of the Republic of Malawi, which provides that every person shall be able to acquire property alone or in association with others and that, no person shall be arbitrarily deprived of property. They added that these property rights are limited by section 44 (3) of the same Constitution that empowers government to expropriate such properties for public utility, subject to compensation.

131. They noted that under section 3 of the Lands Acquisition Act (Cap. 58:04 of the Laws of Malawi) it is the Minister who has power to acquire any land either compulsorily or by agreement. Further, that before acquiring the land the Minister is required to serve a notice of the intended acquisition, which must be published in the Gazette. They indicated that the effect of this foregoing provision is that the expropriation of land is permissible only when done by the Minister, for public utility

and only when there has been adequate notification duly gazetted and appropriate compensation, provided that there shall always be a right to appeal to a court of law.

132. The defendants noted that in *Kabaghe and 14 Others v The Registered Trustees of the Seventh Day Adventist Church and Another Misc Civil Application Number 44 of 2013 (High Court)(unreported)* Justice Madise, observed that an inhabitant of Malawi is perfectly entitled under law to use and occupy customary land within an area as authorized by the local chiefs. However, that in administering the use and occupation of customary land chiefs must be guided by the Constitution. Further, that it is therefore against the law to deprive any person the right to use and occupy customary land without any justification. And that indefinite individual usage and occupation of customary land is permissible under the laws of inheritance in Malawi.

133. The defendants then asserted that, the evidenced adduced in this matter shows that Mr Matchaya did not abandon the land. And that he challenged WAMI's acquisition of the land and was ultimately arrested because of the same land. Further, that the land was taken away from Mr Matchaya and given to WAMI by T/A Malemia for purposes of constructing a church. That the land was not taken away from him by way of forfeiture for any misconduct. And that no notice was given to Mr Matchaya and he was not compensated. Further, that WAMI/claimants were at all material times aware of Mr Matchaya's interest and that to silence him T/A Malemia orchestrated his arrested.

134. The defendants submitted that, upon being allocated the land in 1998, Mr Matchaya was entitled to hold the land for as long as he wished. And that no chief or

village headman could take away that land from him. See *Chirwa v Karim and Pwelenji and Kabaghe and 14 Others v The Registered Trustees of the Seventh Day Adventist Church and Another* cited above.

135. The defendants further submitted that, in terms of the Lands Acquisition Act, T/A Malemia had no jurisdiction to take away the land from Mr Matchaya, such jurisdiction being within the preserve of the Minister. And that the powers of the Minister to acquire land are not delegated to chiefs. Further, that it was unlawful for T/A Malemia to take away the land from Mr Matchaya as he had no lawful authority to do so. The purposes of the acquisition was not for public utility. And that he did not follow procedure as provided under the Constitution and Lands Acquisition Act.

136. The defendants asserted that according to the evidence, T/A Malemia was investigated by a Commission of Inquiry that was set up in Nsanje District to look to allegation of various unlawful activities he had committed and one of such allegations related to the land herein. The defendants observed that in the case of *Phiri v Blantyre Print and Publishing Co. Ltd Land Cause No. 93 of 2011*, it was held that no person may benefit from unlawful act. They submitted that the consequence of the unlawful acquisition of the land by T/A Malemia is that it is immoral for the claimants to found this action on an illegality, which they knew or ought to have known. And that the claimants could not acquire any ownership in the land. The defendants further submitted that in view of the foregoing, the land was at all material times owned by the defendants. And that the claimants were never given the land and they could not acquire any property rights over it.

137. The defendants then submitted on, who is liable for trespass. They indicated that since trespass to land involves the slightest intrusion on the property of another, without establishing the right to land, there can be no trespass. See *Chikonde v Kassam* (1981 -83) 10- MLR 234.

138. The defendants asserted that WAMI/the claimants came onto the parcel of the land unlawfully whilst fully aware that hitherto the land was being held, used and occupied by the Mr Matchaya. Further, that the claimants were not authorized by Mr Matchaya to enter the land, to use and occupy it. And that this amounts to trespass and the claimants are liable to pay damages for trespass. But that on the other hand, the defendants, being children of Mr Matchaya, are not liable for trespass as their coming onto the land is tied to their right to inherit the estate left by Mr Matchaya, which includes the land. The indicated that this is in accordance with section 17 (1) of Deceased Estates (Wills, Inheritance and Protection) Act 2010 which provides that upon intestacy the person entitled to, inherit in the intestate property should be the members of the immediate family and the dependent of the intestate. Whereby, section 3 (1) of the said Act defines immediate family as spouse and children.

139. The defendants submitted that their father was at all material times the rightful holder of the land in issue having been allocated the parcel of land by Village Headman Suwali. And that the acts of Foster Tchali in allocating the same parcel of land to the claimants was unlawful and amounted to an arbitrary deprivation of property. Further, that the claimants could not acquire title through a process which fraught with illegality. And that therefore, in the absence of consent from late Matchaya or the defendants, the claimants have been trespassing and are liable to pay the defendants damages for trespass and costs of these proceedings.

140. This Court agrees with both parties that the then prevailing law on customary land herein is as was provided in section 26 of the Land Act which 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. See *Chirwa v Karim and Pwelenji* MSCA Civil Appeal No. 1 of 2016. In contrast, the current prevailing law is as provided in the recent Customary Land Act.

141. This Court also agrees that in so far as the right to use and occupy customary land is concerned, it is a property right guaranteed by the Constitution and that the right cannot be arbitrarily taken away. See section 28 of the Constitution. Further, that trespass to land involves the slightest intrusion on the property of another and that without establishing the right to land, there can be no trespass. See *Chikonde v Kassam* (1981 -83) 10- MLR 234.

142. This Court has carefully considered the submissions by both parties on the facts in this matter on whether the claimants were allocated the customary land herein by Village Headman Suwali. As correctly noted by the defendants, according to exhibit RWM 1, the land herein was allocated to the Word alive Ministries International (WAMI) by Foster Charlie at the office of T/A Malemia. Exhibit RWM1 clearly bears the signature of T/A Malemia's office. In that regard, contrary to the submission by the defendants, this Court accepts the claimants' evidence that Foster Charlie signed the exhibit RWM 1 on behalf of T/A Malemia. There is highly persuasive authority that extrinsic evidence to a document is acceptable regarding the capacity in which a person signed a deed or contract, that is whether the person so signed in person or behalf of another. And that this is a question of fact. See *Hamid v Francis Bradshaw*

Partnership [2013] EWCA Civ 470. This is an exception to the general rule alluded to by the defendants, the parol evidence rule, that extrinsic evidence is not acceptable to contradict the contents of a document which must be left to speak for itself. Therefore, T/a Malemia allocated the land herein to WAMI as per exhibit RWM1. There is no contrary evidence in that regard from the defendants.

143. In the circumstances, this Court is not persuaded that it is necessary for the claimants to have called Mr Foster Charlie to testify or that the failure to call him entails that a negative inference be made as to his evidence being adverse to the claimants' claim herein. There is no such indication in that regard.

144. As correctly noted by the defendants, the claimants' case, as outlined in their statement of case, is that they were allocated rights to use and occupy the land herein by Village Headman Suwali. The claimants however clearly showed that WAMI was allocated this land by Village Headman Suwali and that the exhibit RWM1 is the final formality in the land allocation process by the local authorities, being the Chiefs office, as provided in section 26 of the then Land Act. Village Headman Suwali is the one who showed the land to WAMI personnel at Nsanje.

145. This takes this Court to the issue raised by the defendants that, going by the authority in the case of Registered Trustees of Seventh Day Adventist Church v Makhumula MSCA Civil Appeal 37 of 2015, the claimants being Registered Trustees of WAMI and not WAMI cannot maintain the present action claiming ownership of the customary land herein since the land is actually owned by WAMI which a separate entity and not the claimants. The view of this Court is however that the defendants'

submission cannot hold because the present case is distinguishable from the case of Registered Trustees of Seventh Day Adventist Church v Makhumula MSCA Civil Appeal 37 of 2015.

146. Contrary to the submission by the defendants, the claimants in the present case are not claiming to be owners of the land. They proceed advisedly in that regard herein because customary land by then was vested in the President and could not be owned by the occupier or user. This must be contrasted to the prevailing position that provides for granting of customary estates over customary land, which are of indefinite duration, inheritable and transmittable by will. See section 20 of the Customary Land Act. The case of Registered Trustees of SDA Church v Makhumula relied upon by the defendants to contest the claimants' claim herein is therefore distinguishable as it dealt with private land where the concept of ownership and title applied. This is in contrast to what is applicable in the present case where the customary land scheme applicable then had no such concept of title and ownership but only the right to use and occupy which appears in the claimants' statement of case. It is not surprising that the claimants in their statement of case never alluded to the aspect that they owned the land herein. They asserted that they had rights to use and occupy the land. Clearly, an occupier or user of land, such as the claimants herein, can maintain a case of trespass even if he or she is not an owner of the land in question as indicated in the case of Registered Trustees of Seventh Day Adventist Church v Makhumula MSCA Civil Appeal 37 of 2015. There is no evidence that the claimants are not users and occupiers of the land herein pursuant to the allocation of the land herein to WAMI. As occupiers and users of the land they are entitled to maintain these proceeds against any alleged trespasser. See *Munthali v Mwakasungula* [1991] 14 MLR 298 (HC).

147. Consequently, this Court is persuaded that the claimants are entitled to maintain this case as occupiers and users of the customary land herein, the same having been allocated to WAMI, which despite not being the claimants who are the Registered Trustees of WAMI, clearly appears to have let the claimants occupy and use the customary land herein culminating in the construction of a prayer house on the land.

148. As submitted by the defendants, the question that remains to be determined is whether the defendants have shown that indeed late Matchaya, their father, had been allocated the land in dispute herein for his use and occupation prior to the allocation of the same to WAMI on whose back the claimants hold possession and use the land herein.

149. It is significant to note that Mr Ngwali, the defendants' witness, was clear in his evidence that once he was allocated this same land in dispute herein Village Headman Suwali told him that the defendants' father had previously asked Village Headman Suwali to be allocated the land herein. As observed by the claimants, Mr Ngwali never stated that Village Headman Suwali confirmed that he had allocated the land herein to Mr Matchaya. Thereafter, Mr Matchaya's claim to the land herein led to allegations that Mr Matchaya had forged the document by which it was meant that Village Headman Suwali had allocated the land herein to Mr Matchaya. These allegations that cast doubt on the allocation of the land herein to Mr Matchaya by Village Headman Suwali remain unresolved to date. Mr Matchaya never challenged the allegations of forgery, which were levelled against him by the authorities that allegedly allocated him the land herein. This failure to challenge the allegations has not been satisfactorily explained by the defendants on behalf of Mr Matchaya whom the defendants assert was ordered as part of his bail conditions not to set foot on the land herein. It was

suggested that Mr Matchaya could not act against the claimants because he was not allowed to set foot on the land herein. However, in that regard, challenging the allegations of forgery and vindicating his right to use and occupy the land herein did not require or need that Mr Matchaya set foot on the land.

150. In the immediately foregoing premises, it is doubtful that Mr Matchaya was allocated the rights to use and occupy the land herein by Village Headman Suwali prior to the same land being allocated to WAMI on the back of whom the claimants occupy and use the land herein. This Court is therefore compelled to find that, as submitted by the claimants, there is no credible evidence in this matter showing that Mr Matchaya was ever allocated the land herein prior to the allocation of the same to WAMI on whose back the claimants have occupation and use.

151. In the premises, the claimants have proved their case in its entirety and judgment is entered in their favour. They are granted the reliefs sought. The defendants' counter claim fails.

152. Costs follow the event and shall be for the claimants.

Made in open Court at Blantyre this 29th August 2025.