

WILLARD MWEDZI

versus

KENNETH CHAKAWANDA

HIGH COURT OF ZIMBABWE

MWAYERA & MUZENDA JJ

MUTARE, 12 and 20 May 2021

Civil Appeal

MUZENDA J: This is a civil appeal against the whole judgment of the Magistrate's Court sitting at Mutare on 4 December 2019, where the court dismissed an application for eviction of the respondent from a communal home and farming land situated in Manyanya Village under Chief Marange in Manicaland.

Grounds of appeal

The appellant spelt his grounds of appeal as follows:

1. The learned Magistrate erred and misdirected himself by stating that the appellant who was the applicant, made the application for eviction after the elapse of nineteen years, whereas in his judgment, the learned Magistrate was clear that the appellant's mother died in 2009 and thereafter the appellant instituted proceedings for eviction.
2. The learned Magistrate erred and misdirected himself by failing to take into consideration that the Prescription Act provides for thirty years to retain rights over land and yet the respondent took my property ten years ago.
3. The learned Magistrate erred and misdirected himself by failing to consider that the Appellant attached letters from the traditional leaders who determine matters in communal lands or in rural areas. In fact the court *a quo* was silent about such letters attached to the appellant papers.

4. The learned Magistrate erred and misdirected himself by failing to consider that it is trite that in intestate succession, the surviving spouse and children are the major beneficiaries.

WHEREFORE appellants prays that:

1. The appeal by the appellant be and is hereby upheld.
2. The decision of the court *a quo* for dismissing the application for eviction by the appellant be and is hereby set aside and substituted with one granting the application.

On 23 October 2019 the now appellant applied for eviction of the respondent from a farming land and homestead situated in Manyanya Village under Chief Marange. Respondent is appellant's maternal uncle. Appellant's mother Benhure Chakawanda used to own both the homestead and farmland. She died in 2009 and when she died the respondent took occupation of both the homestead and the land and evicted appellant.

The appellant in his founding affidavit contends that the homestead and land belonged to his late mother and that he and his siblings are the beneficiaries of the property. Appellant had gone to the local traditional leaders who had ruled in his favour and still the respondent does not want to vacate the premises.

In response the respondent stated that the appellant was not staying with his mother at the time of her death. Appellant had his own place of residence which was allocated to him in the 1980s, to applicant's mother when she returned from appellant's father in Dora, Chief Zimunya. Respondent added that before appellant's mother's death, she declared respondent as the heir to the stand in dispute. Respondent also questioned the *locus standi* of appellant to evict him when he is not the executor of his mother's estate. He denied occupying appellant's property and questioned appellant about the eviction.

In his replying affidavit the appellant attached letters from the traditional leaders one from Kraal-head Musiringofa dated 26 November 2019, Village head Violet Mushunje, Kraal-head Manyanya dated 23 November 2019. The third one from Headman Wendumba dated 23 November 2019 in support of the fact that he is the recognised claimant of the stand in dispute.

On the date of hearing, 2 December 2019 both parties opted to abide by papers filed of record. The respondent was given an opportunity to confirm whether the traditional leaders' letters were served on him, he did. Respondent commended on the appellant's replying

affidavit and added that when it was decided that respondent be given the stand, appellant was present.

Court *a quo*'s decision.

On 4 December 2019 the court *a quo* concluded that appellant was instituting the proceedings about 19 years after the death of his mother. He concluded that Communal land is vested in the government through the responsible ministry, it cannot be sold if the appellant was to assert his rights over the property, the court added, he should have done that earlier rather than to wait for almost 19 years. The court went on further to rule that the respondent had resided at the stand for an uninterrupted period of 19 years, he had an improvement lien on the property and has a right of retention which is one of the defences available to defendant in an action of *rei vindicatio*. The court *a quo* dismissed the application. The appellant then appealed against the decision.

WHETHER THE MAGISTRATE ERRED AND MISDIRECTED HIMSELF BY STATING THAT THE APPELLANT MADE AN APPLICATION FOR EVICTION AFTER THE LAPSE OF NINETEEN YEARS?

The facts outlined under the background caption above are clear, presumably there are some that have not been included in the record of proceedings. From the affidavits of the respondent I am unable to deduce where the respondent stated that he had been staying at his aunt's homestead for nineteen (19) years. Appellant's mother died in 2009 that will be ten (10) years counting backwards from 2019. The appellant indicated also that he tried to use traditional leaders to resolve the matter but the respondent could not have none of it. From the four corners of the record I fail to see where nineteen years are calculated from and this ground or defence was never pleaded by the respondent, I entirely agree with the appellant that this conclusion was not based on facts nor pleadings. The first ground of appeal succeeds.

WHETHER THE LEARNED MAGISTRATE MISDIRECTED HIMSELF BY FAILING TO TAKE INTO CONSIDERATION THAT THE PRESCRIPTION ACT PROVIDES FOR THIRTY YEARS TO RETAIN RIGHTS OVER LAND?

This second ground of appeal is directly linked to the first one and the same conclusion was unasked for and not pleaded. The court misdirected itself in dealing with an issue not placed before it for determination. It could have done so *menomotu* in doing so it erred. In any case the period for prescription on land is indeed 30 years. The second ground of appeal is upheld.

WHETHER THE LEARNED MAGISTRATE ERRED AND MISDIRECTED HIMSELF BY FAILING TO CONSIDER LETTERS FROM TRADITIONAL LEADERS?

The judgment of the court *a quo* is definitely silent about the letters attached by the Appellant on pages 19-21 of the record of proceedings. Traditional leaders are privy to the origin and rights of occupation of communal land. Their evidence or opinion is very vital in determining matters or disputes arising thereto. The problem that has become prevalent and pertinent from proceedings from the lower courts is that these letters invariably are written in vernacular and are produced in courts in their primary format untranslated. I have observed that this is the trend even where legal practitioners are appearing. The documents remain so up to the appeal. The record is transcribed, certified and forwarded to the Deputy Registrar of this court with the documents not translated.

Where a legal practitioner is involved in the proceedings, it is the duty of the plaintiff or applicant to have the document written in vernacular translated by a court interpreter, both documents, the vernacular version and the translation have to be produced for record purposes. If the applicant or plaintiff is a self-actor, it shall be the duty of the trial court and ancillary staff that the translation is done and certified into the court's official language, which is English. This will assist a court which is not familiar with that language, all in the interests of justice of the case. In this particular case the three (3) letters were left untranslated. Fortunately we were privy to be able to decipher the import of the letters. We have asked the interpreter to translate the letters and file them of record.

All the three letters unanimously point to the appellant as the legal occupier of the subject stand in dispute. In fact the village heads and the headman refer to the appellant as the owner of both the homestead and the land. The three letters from the traditional leaders could have provided adequately the information necessary for the disposition of the appellant's application, which was for *rei vindicatio* as correctly pointed out by the learned Magistrate. It was the duty of the court *a quo* to resolve ownership of the land in dispute before determining

whether respondent should be evicted or not. The court *a quo* did not address this aspect and by so doing it misdirected itself.

The nature of an *actio rei vindicatio* application was discussed in *Jolly v Ashannon and Another* 1988 (1) ZLR 75 (H) where MALABA J (as he then was) had this to say:

“The principle on which the *actio rei vindicatio* is based is that the owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and the defendant was in possession of it at the commencement of the action. Once ownership has been proved its continuation is presumed. The onus is on the defendant to prove a right of retention. (see also *Chetty v Nandoo* 1974 (3) SA 13 (A) at 20 A-C *Makumborenga v Marini* s130/95 on p12)”

The requirements for an *actio rei vindicatio* are thus that the appellant must allege and prove that he is the owner of the land in dispute or that he is a beneficiary of such and that the respondent is in possession of such property. I am satisfied that the appellant managed to do so in the court *a quo* and the traditional leaders unanimously confirm so, he thus met the requisite grounds for an application for eviction. The third ground of appeal succeeds and is upheld.

WHETHER THE LEARNED MAGISTRATE ERRED AND MISDIRECTED HIMSELF BY FAILING TO CONSIDER THAT IT IS TRITE THAT IN INTESTATE SUCCESSION THE SURVIVING SPOUSE AND CHILDREN ARE THE MAJOR BENEFICIARIES

The fourth ground of appeal is just but academic to this appeal. The appellant in his application had not moved the court *a quo* to declare him the rightful heir to his mother's estate. Appellant seems to argue that by virtue of him of being a son to his late mother the court *a quo* ought to have declared him the beneficiary to his mother's estate. That was not necessary in my view. The application before the court was for eviction of the respondent, which application could have been dismissed if the court would have found that appellant had failed to prove the grounds for eviction, or could have been granted if requirements for *rei vindicatio* have been met. This failure to consider intestate succession was secondary and the primary issue was that of the recognition of the appellant as the son of the deceased and that under customary law appellant was to continue to occupy his mother's property. In as much as succession is concerned it is trite that a husband or child of the deceased is considered first before other relatives of the deceased. It would be aboard if respondent will inherit appellant's mother's

property at the prejudice of the deceased's children. I will uphold the fourth and final ground of appeal.

I would hasten to point out that courts should try to critically look at the pleadings before them and discern what the applicant or plaintiff prays for before giving a decision. The decision must accord well with the pleadings and established facts.

Accordingly the following is given:

1. The appeal be and is hereby upheld.
2. The decision of the court *a quo* is set aside and substituted by the following

“The Respondent and all those claiming occupation through him are hereby ordered to vacate Applicant's place and farming land situated in Manyanya Village, under Chief Marange within seven (7) days from the date of service of this order on him. Respondents to pay costs of the Application.”

MUZENDA J _____

MWAYERA J Agrees _____