

GOMO MASHONGA  
versus  
ENOCK NYAJEKA

HIGH COURT, HARARE  
MAVANGIRA & MAKONESE JJ  
HARARE, 8 November 2011

*M.T. MAJA*, for applicant  
*K. Choga*, for respondent

MAKONESE J: The respondent made an application for summary judgment against the appellant in the Chinhoyi Magistrates Court and obtained judgment on 28 March 2008. The notice of appeal was filed on 3 June 2008. It would appear from a perusal of the record that the learned magistrate issued an *ex tempore* judgment and gave his written reasons for judgment later.

The appellant's grounds of appeal as reflected in the Notice of Appeal are as follows;

- “1. The learned Magistrate erred in finding that proceedings in case No 09/07 were valid. The record clearly shows that the parties have joined issue in case number 451/04. This matter is pending on appeal before the High Court.
2. The Magistrate erred in granting an application for summary judgment in a matter in which he had no jurisdiction to preside.
3. The learned Magistrate was biased in favour of the respondent and this led him to make a ruling so outrageous in its defiance of logic and accepted moral standards that no reasonable judicial authority seized with the matter could have come to it.
4. The learned Magistrate erred in holding that the appellant had no defence to the action. Clearly the defence of prescription was unassailable in the circumstances.
5. WHEREFORE appellant seeks an order setting aside the decision of the learned Magistrate and in substitution thereof with the following; (*sic*)
  - (a) The appeal be and is hereby allowed.
  - (b) That the matter in case No. 09/07 be dismissed with costs.”

The brief facts of the case are that on 29 July 1999 at Chinhoyi the appellant sold his rights, title and interest in house number 656 Chikonohono Township, Chinhoyi to the respondent for the sum of \$90 000. The appellant refused to honour the agreement alleging that the agreement was not valid. The appellant lodged an application for rescission of judgment which was dismissed. The appellant then made an appeal essentially to prevent an eviction from the property in issue. It would appear that the first appeal lapsed for lack of prosecution and the current appeal is in respect of Chinhoyi Magistrates Court case number 09/07.

I will proceed to examine the grounds of appeal; The first ground of appeal can be disposed of easily because it makes no sense and is devoid of any merit concession by legal practitioner. On the second ground of appeal the agreement was held by the learned magistrate to be binding and there is no factual basis for suggesting that the court had no jurisdiction to hear the matter. I would therefore find no merit in this ground of appeal. Thirdly the appellant has imputed bias on the part of the Magistrate. No details of the alleged bias have been proffered. This seems a hollow claim not supported by any facts on the record. This only leaves the fourth ground of appeal wherein the appellant argues that the defence of prescription should have been available to the appellant. The learned magistrate cannot be faulted as the defence of prescription was not properly articulated before him. This defence was couched in vague terms. It is clear that the defence of prescription was an afterthought. I must comment that the host of matters raised in the appellants' Heads of Argument do not form part of the grounds of appeal and accordingly in the absence of an application to amend the grounds of appeal these matters are not relevant to this appeal.

I find that the learned magistrate in the court a quo was correct in granting the application for summary judgment. In the case of *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975(1) RLR 260 the court held that in an application for summary judgment the applicant may verify his cause of action by setting out facts which were not contained in his declaration and may annex relevant documents to his affidavit. There is evidence that there was proof in the form of the agreement which was not challenged by the appellant and for that reason the appellant's entire appeal is not meritorious.

In the result the appeal is accordingly dismissed with costs.

MAVANGIRA J concurred

*Kawonde and Company*, appellant's legal practitioners  
*Muchineripi and Associates*, respondent's legal practitioners