

LUCKSON MATEURE

Versus

SAMUEL CHIDUMWA

IN THE HIGH COURT OF ZIMBABWE
MATHONSI & MAKONESE JJ
BULAWAYO 30TH MAY & 16TH JUNE 2016

Civil Appeal

Mr Mandipa for the appellant
No appearance for the respondent

MAKONESE J: The appellant is a retired soldier. On 30 January 2015 he filed an application for a declaratory order with Magistrates' Court at Masvingo. The relief sought in that application was in the following terms:

- “1. Luckson Mateure is the lawful owner of Mateure homestead and fields in Gono Village, Chief Sumba, Chikavu, Chekai Area, Masvingo Rural District.
2. Luckson Mateure is entitled to do any activities including farming at the said homestead.
3. that the respondent pays the costs.”

The appellant's claims were dismissed by the Magistrate in a brief judgment as follows:-

“Application for a declaratory order dismissed. The reasons are that an application for a declaratory order is unknown in the Magistrates' Court. Further, the applicant's failure to highlight in terms of which law the application is made makes the situation worse. The Magistrates' Court is a creature of statute and where an application like this one is not made in terms of the Magistrates' Court Act or the Magistrates' Court Civil Rules, this court lacks jurisdiction to entertain such application.”

Aggrieved by the decision of the Magistrates' Court the appellant has now noted an appeal against that decision to this court. The appeal is anchored on the following grounds of appeal:-

- “1. the court erred in concluding that the Magistrates’ Court lacked jurisdiction to entertain an application for a declaratory order.
2. the court erred in not considering the application for a declaratory order by the appellant.
3. wherefore appellant prays that the ruling by the court *a quo* be set aside and be substituted by an order that the court *a quo* has the jurisdiction to consider applications for declaratory order and the court *a quo* must consider the appellant’s application.”

Factual Background

The appellant contended in his application before the Magistrates’ Court that he was allocated a piece of land by the village head, with the permission of Chief Shumba Chikava Chekai. Appellant then constructed a homestead for his family. The homestead comprised a five roomed house, a two roomed flat roofed house under zinc, and cattle pens. The applicant averred that he regards the property in question as his only permanent home. The appellant indicated that he had been welcomed by the local Chief in a letter dated 17th June 2012. A dispute arose between the appellant and respondent. The respondent claims that the land upon which the appellant erected his homestead belongs to his late brother Samson Chidumwa. This led to confrontation between the parties. Both appellant and respondent claim that the piece of land belongs to them. The village head failed to resolve the matter resulting in the matter spilling into the courts. The appellant approached the Magistrates’ Court seeking a declaration that he was the lawful owner of the land in question.

Whether the Magistrates’ Court has jurisdiction to grant an application for a Declaratory Order

The issue for determination by this court is simply whether or not the Magistrates’ Court is empowered to grant a declaratur. Appellant’s counsel Mr *Mandipa* argued that in terms of section 85 (1) of Constitution of Zimbabwe (Amendment) No. 20, 2013, this provision not only brought additional rights and liberties but it clearly empowers every court to make a determination on these rights and liberties whenever they are infringed or are likely to be infringed.

Section 85 of the Zimbabwe Constitution provides as follows:-

“Enforcement of fundamental human rights and freedoms

- (1) Any of the following persons, namely;
- (a) any person acting in their own interests;
 - (b) any person acting on behalf of another person who cannot act for themselves;
 - (c) any person acting as a member, or in the interests, of a group or class of person;
 - (d) any person acting in the public interest;
 - (e) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right to freedom enshrined in this chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including declaration of rights and an award of compensation.’

It was argued on behalf of the appellant that the right to convene proceedings under subsection (1) of section 85 gave authority to any court, including the Magistrates’ Court to grant an order for a declaratur. It was further argued that before the advent of the new Constitution, only Superior Courts were seized with the jurisdiction to hear an application for a declaratory order. Appellant’s counsel argued that the position changed by virtue of section 85 of the Constitution and that any court can make a determination regarding the rights and liberties of any person, including the Magistrate’s Court.

The appellant’s case is predicated upon the assumption that section 85 of the Constitution now takes away the power conferred by the High Court in terms of section 14 of the High Court Act (Chapter 7:06). That assertion cannot be a correct interpretation of the law. Section 14 of the High Court Act specifically provides as follows:-

“The High Court may, in its discretion at the instance of any interested person enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

I am not persuaded that section 85 of the Constitution confers any rights upon the Magistrates’ Court to grant orders for a declaratur. In the first instance, there is no evidence on the record that the applicant was alleging infringement of a fundamental right.

In my view for any party to resort to the provisions of section 85 of the Constitution, he must assert infringement of a fundamental right. Section 86 deals with limitation of rights and freedoms and stipulates as follows:-

- “(3) No law may limit the following rights enshrined in this chapter and no person may violate them:-
- (a) the right to life except to the extent specified in section 48.
 - (b) The right to human dignity.
 - (c) The right not to be tortured or subjected to cruel; inhuman or degrading treatment or punishment.
 - (d) The right not to be placed in slavery or servitude;
 - (e) The right to a fair trial
 - (f) The right to obtain an order of *habeas corpus* as provided in section 50 (7) (a).”

It seems to me that the appellant attempted to assert his rights to a piece of land allocated to him by the chief. I am of the view that the appellant is trying to stretch the application of the provisions of section 85 of the Constitution a bit too far. The appellant’s attempt to bring the dispute under the umbrella of fundamental rights is not supported by the facts and the law. The dispute between the appellant and the respondent is simply over who should occupy the disputed land. These disputes are common in most communal lands, and even in land that has now been acquired under the land reform programme. I therefore make the finding that on the facts on record no issue of the infringement of a fundamental right exists.

Now, dealing with the issue of whether the Magistrates’ Court has, the jurisdiction to entertain let alone grant declaratory orders, there can be no doubt the Magistrates’ Court has no power to issue declaratory orders. The learned magistrate in the court *a quo* was correct when he dismissed the application on the grounds that he had no jurisdiction to deal with the matter. The High Court is empowered in terms of section 14 of the High Court to make declaratory orders. The Magistrates’ Court is a creature of statute. It operates in terms of the powers conferred upon it by the legislature. The Magistrates’ Court cannot arrogate to itself powers that are not conferred upon it by statute.

I must observe here, that the issue of the monetary jurisdiction of the Magistrates' Court was not ventilated in the proceedings in the court *a quo*. A five roomed house and a two roomed flat roofed house in a rural setting could very well exceed a value of \$10 000. On that basis alone, the Magistrates' Court would not be empowered to deal with the mater.

The issue of the power of the High Court to grant declaratory orders was canvassed in the case of *AGRIBANK v Machigauta & Another* 2008 (10 ZLR 244 (S)), where GARWE JA, stated at page 248F as follows:

“The above case does not in fact support the appellant’s contention that the High Court has no jurisdiction to hear the application. To the contrary the case is authority for the proposition that the High Court retains its original jurisdiction to grant declaratory orders, even in labour disputes.”

In the case of *Johnsen v AFC* 1995 (1) ZLR 65, GUBBAY CJ had the occasion to consider when a declaratur can be granted. He stated at page 72E-F as follows:

“The condition precedent to the grant of a declaratory order under section 14 of the High Court Act 1981 is that the applicant must be an “interested” person in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto.”

I am not inclined to agree that the appellant established that the Magistrates' Court has jurisdiction to her an application for a Declaratory Order. That right is vested in the High Court in terms of section 14 of the High Court Act. The appellant did not point to the violation of a fundamental right in terms of the Constitution. In any event section 85 of the Constitution does to give the Magistrates' Court the power to deal with applications for declaratory orders.

The appeal clearly has no merit. In the result, the appeal is hereby dismissed.

Mathonsi J I agree

Gundu & Dube c/o Dube-Tachiona & Tsvangirai, appellant's legal practitioners