RICHARD CHIHORO
versus
RUSERE MUROMBO
and
DOROTHY RUSERE

HIGH COURT OF ZIMBABWE
OMERJEE & KARWI JJ
HARARE, 4 May 2011

Civil Appeal

Ms *Chagadama*, for applicant
Mr *Magaya*, for respondent

KARWI J: This matter has a long history of a dispute over the ownership of a piece of communal land, in Mayambara, Seke Communal lands. The parties to the dispute inherited the dispute from their parents. Appellant's father and the respondent' brother, who were the original disputants died many years ago. The matter was further confused by the lack of knowledge of the applicable law on the part of the parties and Court officials. Along the way, wrong advice was given to the parties leading to wrong decisions being given in courts.

The background of this matter is that appellant claims that his father was allocated the stand in question in or around 1960, while respondent says his family has enjoyed undisturbed possession of the stand since 1936. Appellant says that respondent's brother was granted temporary use of the property in dispute as the appellant's father ordinarily resided in the city. Respondent's brother, used structures built by appellant's father. Upon the death of appellant's father and the first respondent's brother continued to stay at the property. Appellant says he was prepared to compensate respondent for the developments made on the stand being a blair toilet and borehole.

According to the appellant s heads of argument, when appellant insisted on the claim to his father s property respondent refused allegedly insisting that he was the rightful owner. Legal proceedings were instituted at the Communal Court, presided ever by Chief Seke on 4 April 2009. The applicant was found to be the rightful owner of the stand as records at the Rural District office confirmed that the land was in appellant s family name and that they were paying levies to Council in respect of the land. The Chief also ordered the eviction of the respondent.

On or about 5 May 2009 and acting on the wrong advice of the clerk of court, Appellant issued summons for the eviction of respondent. At that stage, appellant was a self actor. The presiding Magistrate at the subsequent pre trial conference held on 3 July 2009 ruled that the Chief had already ruled on the matter and that respondent were to appeal against that order if he was not satisfied with the ruling of the Chief. Most importantly, the Magistrate also ruled that the matter was not to be re instated.

Further wrong advice by the clerk of court led to more confusion. He advised the appellant to apply for Summary judgment which was granted in default. On 25 September 2009 respondent applied for the review of the Chief's order of 4 April 2009. The application for review was heard and granted on 8 October 2009. Appellant failed to oppose the applications as his request for extension within which to file opposing papers was denied. It is against the order of the magistrate granting the review of the chief s order that Appellant is appealing to this court.

The application for summary judgment was set down for 4 November 2009 and by the time it was heard appellant had already noted this appeal.

In terms of Rule 10(2) of Statutory Instrument 115 of 1991, a successful party at a hearing at the community court may register the judgment at the Magistrates court in terms of s 17 of the Magistrates Court Act. Upon being issued with a writ of execution by the clerk of court at the magistrate's court, such party may obtain execution on the judgment in all respects as if it were a judgment of the Magistrates court. Unfortunately, due to ignorance on the part of appellant, who was then a self- actor, and wrong legal advice of some bush lawyer in the form of the clerk of court who usurped the proper functions of a legal practitioner, this was not done in this case. This unfortunately led to serious bungling of the case much to the expense and delay in the finalization of this case. The respondent was supposed to appeal against the order of the chief. This again was not done.

It is my considered view that the essence of the ruling by the Magistrate at the pre trial conference, if at all it was a ruling than an observation, was to recognize that the matter had already been entertained at the community court and that correctly it could not be restated by way of summons. The matter had to be treated as a completed matter by the chief. Parties had either to accept the judgment or appeal against it or seek its review in terms of the law. The magistrate was correct to refuse to deal with the so called pre trial conference for there was no such conference properly before him in terms of the law. Wrong procedure had been adopted.

The magistrate was therefore correct to observe that respondent would have to appeal against the chief s order. The matter should have ended there. It should be added that the essence of the observation by the magistrate did not amount to a registration of the chiefs order with the magistrates court as is required by law before one could execute on the strength of a writ from the magistrates court. The observation did not amount to absolution, as it is known in law.

After the Magistrates observation at the ill conceived pre trial conference, parties resorted to so many other wrong procedures, partly as a result of wrong advice. Applications for summary judgment and rescission of judgment were some of the totally unnecessary steps taken by the parties. Whatever decisions taken in pursuance of those applications were of no force or effect and do not advance or resolve this case.

Following his unhappiness with the chief's order, respondent resorted to filing an application for review at the Magistrates court. This approach is perfectly allowed in terms of s 25 of the Customary Law and Local Court Act, [*Cap 7: 05*]. After hearing the matter, the Magistrate annulled the chief's ruling. His reasons for doing so were that s 26 of the Traditional Leaders Act, [*Cap 29; 17*] prohibited occupation of communal land other than with the approval of the Rural District Council. The same section confirms the administrative jurisdiction of Rural District Council over the control, use and allocation of all communal land. The Magistrate found that by ordering the eviction of respondent, the chief had effectively allocated communal land in contravention of s 26 of the Traditional Leaders Act. The Magistrate had further found that by evicting respondent, the chief had usurped the powers of Manyame Rural District Council which had authority over the land in question in terms of s 26(3) of the Communal Lands Act, [*Cap 20:04*]. On that basis alone the chief's judgment was annulled on account of lack of jurisdiction.

It seems to me that the learned Magistrate erred and misdirected himself in holding that the chief had no jurisdiction to entertain the matter considering the correct circumstances of this case. It is my considered view that the chief only entertained a dispute relating to land and did not allocate land. This is so because the land in question was already allocated way back. It is correct that s 16 (g) of the Customary Law and Local Courts Act provides that a local court shall have no jurisdiction in any case to determine rights in respect of land or immovable property. It is equally true that s 5 (1) (e) of the Traditional Leaders Act provides that a chief shall be responsible within his area for discharging any functions conferred upon him in terms

of the Customary Law and Local Courts Act. Section 5 (1) (n) of the Traditional Leaders Act specifically provides that the duties of chiefs as;

> "A chief shall be responsible within his area for
> ……..
> (n) adjudicating in and resolving disputes relating to land in his area"

It is therefore clear that the chief adjudicated and resolved a land dispute in his area in terms of the law. He did not allocate land. Allocation of land and resolving of a dispute are totally different things. Allocation of land in my considered view involves the granting of rights, interest and title to land to an individual, whereas the resolving of a land dispute involves the entertainment of a dispute between or amongst individuals over an already allocated piece of land. The appellant brought a dispute before the chief for resolution not a request for allocation of land. Appellant would not have brought a case for allocation of land because his case was to the effect that his father had been allocated the land in the 1960s and he was paying dues to Council for the piece of land. The Chief made the ruling confirming that position after satisfying himself that the piece of land in question was indeed registered in the names of appellant s father.

Consequently, the appeal succeeds. The review judgment of the Magistrate in the court *a quo* is therefore set aside. The respondents are to pay costs of suit.

O. Matizanadzo & Associates, applicants' legal practitioners

OMERJEE J, agrees ……