AUGUSTINE RUSIKE AND REGIS RUSIKE
versus
MODIE MALIMAO

HIGH COURT OF ZIMBABWE
GUVAVA AND MAWADZE J J.
HARARE 08 June 2011 & 01 March 2012

Civil Appeal

Appellants both in person
S.H. Tsara for the respondent

MAWADZE J: This is an appeal against the judgment of the Goromonzi Magistrate Court delivered on 4 June 2010. The appellants appeal against the entire judgment in which the order sought by the appellants in the court *a quo* was not granted.

The grounds of appeal against the entire judgment are outlined as follows;-

> "The learned Magistrate erred in granting the respondent application without considering the following facts:
>
> - The deceased one James Bvisai never owned any beasts in his lifetime and he was given the cattle in question for safekeeping.
> - So taking into account the above the cattle should not form part of the deceased estate.
> - The Learned Magistrate erred in considering the respondent in this matter's side of the story without taking into consideration that there are witnesses to the Appellant concession (sic)".

The Appellants were not represented in the court *aquo* just like during the hearing of this appeal. This explains probably why the grounds of appeal are not only poorly drafted but fail to capture the cause of action in the court *aquo*. The heads of argument and the supplementary heads of argument filed by the appellants are difficult to comprehend and are a mere repetition of the evidence purportedly led in the court *aquo.*

Be that as it may, the bottom line is that this appeal is sorely based on a dispute of fact rather than law. A brief factual background giving rise to this appeal is in order.

Both appellants are siblings and related to the respondent who was married to one James Bvisai who is now deceased. The late James Bvisai is an elder brother of both appellants and he died intestate on 12 November 2002. The late James Bvisai had entered into an unregistered customary law marriage with the respondent in 1995 which was only dissolved as a result of James Bvisai's demise.

The dispute between the parties came to the fore when the respondent proceeded to register the estate of her late husband James Bvisai in terms of the prevailing customary law at Goromonzi Magistrate court on 31 July 2009. In fact the dispute is solely in respect of the 7 herd of cattle which form part of the late James Bvisai's estate. The respondent as per minutes of the edict meeting held on 31 July 2009 in DR 02109 was appointed the executor of the estate of her late husband. The minutes indicate that the appellants together with one Chakanetsa Elias Pamire attended the edict meeting. The only valuable assets of the estate of the late James Bvisai as is reflected inventory filed of record (pp 28-29) on 31 July 2009 is the 7 herd of cattle valued at US$550-00. The 7 herd of cattle are registered in the stock card (pp 35 of the record) belonging to the late James Bvisai.

As per the reasons for the judgment by the court *a quo* (pp 5-9 of the record) the appellants were aggrieved when respondent included the 7 herd of cattle as part of the estate of the late James Bvisai. As a result the appellants brought an application in the court *a quo* against the respondent which they sought an order excluding the 7 herd of cattle from the estate of the late James Bvisai. The basis for this application in the court a quo was that as per appellants the 7 herd of cattle belong to their own father one Bvisai Rusike who died on 14 April 1978. The appellants wanted the respondent to be ordered to sign all papers and documents necessary to transfer the 7 herd of cattle into Rusike family's name and that she cedes all her claim and rights to the 7 herd of cattle to Rusike family. (whatever that means.)

In order to resolve this dispute the court *aquo* heard evidence from the appellants Augustine Rusike and Regis Rusike together with appellant's elder brother Phineas Rusike and appellant's sister Magreth Hore and one Charles Muzuva a relative. They gave evidence in support of the application filed by the applicants. The respondent testified and did not call any witnesses.

The thrust of the appellants' evidence is that the 7 herd of cattle does not belong to the estate of the late James Bvisai as these cattle belonged to their late father one Bvisai Rusike and were only given to James Bvisai for safekeeping after the death of their father Bvisai Rusike. On the other hand the respondent's contends that the 7 herd of cattle belonged to her late husband James Bvisai and should therefore be part of his estate.

In order to appreciate the findings made by the court a quo one has to briefly summarise the evidence led from each witness moreso when the dispute in this matter is one of fact. I turn briefly to the evidence of each witness.

AUGUSTINE RUSIKE

He is a brother to the late James Bvisai and is one of the appellants. According to Augustine Rusike all the 7 beasts registered in the stock card belonging to the late James Bvisai do not belong to the late James Bvisai. Augustine Rusike said when his late father passed on the beasts were not shared but given to an elder brother Phineas Rusike to keep them in trust of the family. The eldest son then James Bvisai was working in Harare. He said after the late James Bvisai retired he settled at the rural home and as the eldest son he was handed over the cattle by Phineas Rusike also for purposes of holding them in trust of the whole family although he registered them in his name. Augustine gave a history of how the cattle in issue were first acquired. He said their late father owned 16 herd of cattle were all later taken by the late James Bvisai who was also given another 10 herd of cattle by their aunt for safekeeping. According to Augustine Rusike the late Bvisai never purchased any beast throughout his lifetime and was never given any beast in his personal capacity even as a token of appreciation. by their aunt. He said when James Bvisai passed on in 2002 one of the beast in his custody was slaughtered at the funeral and another later at his memorial service.

He said respondent is fully aware that her late husband never owned any cattle and that their brother Regis Bvisai is actually paying the cattle tax for the 7 herd of cattle in issue.

Under cases examination Augustine Rusike was not able to give any reason as to why the 7 herd of cattle remained in respondent's custody after the death of her husband in 2002 until in 2009 a period of 7 years when this dispute arose. Regis Rusike on the other hand did not confirm paying the cattle tax. No reasonable answer was given as to why Regis Rusike would not have the 7 herd cattle of cattle in his name if he was paying the cattle tax and using the cattle. Augustine Rusike's evidence did not explain why the Rusike family did not take the cattle in issue from respondent's custody soon after the death of her husband in 2002.

REGIS RUSIKE

He is also a brother to the late James Bvisai and one of the appellants. His evidence was to the effect that the late James Bvisai never bought any cattle during his lifetime and that none was given to him even as a token of appreciation by their aunt. He said all the 7 herd of cattle now in respondent's custody and registered in the late James Bvisai's stock card were given to the late James Bvisai for keeping them in trust of the whole family as he was the eldest son. He gave the history of how their late father Bvisai Rusike had acquired the cattle. He said one beast was brought by Everisto Rusike their brother who gave it to the late father. Two beasts came from their brother in law one Machaka who also later brought additional 4 beasts. Regis Rusike said these beasts form the core of the 16 beasts later given to the late James Bvisai when he retired. He said the other ten (10) beasts were paid as lobola for their aunt and also given to James Bvisai for safekeeping. He confirmed that a beast was slaughtered at the late James Bvisai's funeral and another at the memorial service.

Under cross examination Regis Rusike admitted that when the late James Bvisai died in 2002 part of his estate was distributed and confirmed being given a cultivator as his share and also retrieving his plough. He was unable to explain in any satisfactory manner why he and others at that material time did not take possession of the remaining 7 herd of cattle in 2002 in the same manner he had taken the cultivator and plough.

All he could say was that he wanted the respondent to benefit from the manure derived from the cattle. As already said he did not confirm paying the cattle tax.

PHINEAS RUSIKE

He is the eldest surviving brother and he testified that when their late father died in 1978 he was given their late father's cattle to keep in his capacity as the eldest son at the rural home. He said when the late James Bvisai who was the eldest son retired from work in Harare and settled at the rural home he surrendered the cattle to the James Bvisai who proceeded to register them in his stock card. On that basis the said respondent cannot lay claim to the cattle as they did not belong to her late husband. Under cross examination he seemed unaware of the fact that part of the late James Bvisai's property like the cultivator and plough were shared amongst the family soon after his demise. He even disputed a fact seemingly common cause that the Respondent has custody of the 7 herd of cattle and that she in fact herds the cattle.

MAGRETH HORE

She is a sister to both appellants, Phineas Rusike and the James Bvisai She a gave somewhat different account in relation to the 7 herd of cattle. She said 2 beasts were left in the custody of the late James Bvisai by their late aunt and that she is entitled to these beasts herself as per custom although she had not taken them soon after the death of the late James Bvisai. Her reason for not taking the cattle is that she wanted Respondent to use them for ploughing and to get manure. She said of the remaining 5 herd of cattle from the 7 herd of cattle belong to their late father who got them as part of lobola paid to him. She said respondent's late husband James Bvisai never acquired any cattle in his own right.

Under cross examination by the respondent she was not able to dispute respondent's account of how the three beasts belonging to the late Bvisai Rusike are accounted for. The respondent said her father in law's beasts were only three and one was sold to meet the medical bills for her ailing aunt, the other was injured and therefore put down and the third one was slaughtered at James Bvisai's funeral. Margreth Hore admitted giving one beast to the late James Bvisai but denied she did so as a token of appreciation. She admitted that she is not paying any cattle tax for the 2 beasts she claims to be hers and conceded respondent is looking after the cattle. Her explanation is that she is married elsewhere.

CHARLES MUZUVA

He is a close relative of the Rusike family. Charles Muzuva also seemed to have a different account of how the late Bvisai Rusike acquired the cattle he says were later given to the late James Bvisai. He said 4 beasts came from Bvisai Rusike's son in law in Masvingo and one from Chiswa in Murehwa. He said the other came from one Dudzu. He said after the death of Bvisai Rusike these cattle were kept by Phineas Rusike and later by the late James Bvisai and were 14 in number. He said soon after the death of the late James Bvisai the beasts were not inherited as they are supposed to be held in trust by the eldest son of the family for the benefit of the whole family.

Under cross examination by the respondent Charles Muzuva admitted that at the time respondent married the late James Bvisai Charles Muzuva was working in Harare. When he was further probed about the history of the cattle in issue he washed his hands by the biblical Pilate saying he had no knowledge of the of the cattle and that this dispute was a family affair.

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THE RESPONDENT - MODIE MALIMAO

Her evidence is that she married her late husband James Bvisai in 1995 and that her husband had a total of 14 cattle of which only one beast, an ox belonged to him. She said 3 of the cattle belonged to her late father in law Bvisai Rusike and 10 cattle to their aunt. She explained what happened to the three cattle belonging to her late father in law. She said one was sold to raise medical fees for her husband's sister Sorotiya who was ill, one was injured and therefore put down and the third one was slaughtered at her late husband's funeral. She denied being in possession of her late father in law's cattle. She explained that the aunt's 10 beasts are not part of the 7 herd of cattle now in dispute as these are available. The respondent then explained the history of the 7 herd of cattle now in dispute. She said the ox owned by her husband at the time she married him was exchanged with a heifer from one Magwaza. This heifer produced 4 other beasts. She said their aunt gave her late husband one heifer as a token of appreciation for looking after the aunt's beasts and this heifer produced 2 other beasts, thus giving a total of 7 herd of cattle. She said these are the beasts currently registered in her late husband's stock card and form part of her late husband's estate. The respondent explained that since her marriage in 1995 she has been looking after the cattle even after the death of her husband in 2002. She said she pays cattle tax for the 7 herd of cattle and that she is the one who always pay compensation to fellow villagers when the cattle destroyed other villagers' crops. She herds the cattle and is the one responsible for them (herding, grazing and dipping them). She maintained that when she got married her husband had only one ox and the other beasts belonged to her late father in law and aunt.

The respondent maintained her story under cross examination in relation to the number of cattle her late husband had when they got married, how her late father in law's beasts are accounted for and that the aunt's beasts were later on sold and are not part of the 7 herd of cattle in issue.

All in all this is the summary of the evidence led before the court *a q*uo

THE LAW

This appeal is sorely based on dispute of fact rather than the law. The law is clear on the basis or grounds upon which the appellate court would interfere with the exercise of judicial discretion on a dispute of fact. These grounds are set out in the case of *Barros & another v Chimponda*1999 (1) ZLR 58 (S) at 62F – 63A in which the learned CHIEF JUSTICE GUBBAY had this to say;-

> " The attack upon which the determination of the learned Judge that there are no special circumstances for preferring the second purchaser above the first – one which clearly involve the exercise of judicial discretion may only be interfered with on limited grounds. These grounds are firmly entrenched. It is not enough that the appellant court considers that if it had been in the position of the primary court it would have taken a different course. It must appear that some error had been made in the exercise of the discretion. If the primary court acts upon wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed
> and the appellant court may exercise its own discretion in substitution, provided always it has the materials for so doing. In short this court is not imbued with the same broad discretion as was enjoyed by the trial court."

See also *Hatendi v Hatendi* 2001 (2) ZLR 530 (S) especially the remarks by SANDURA JA at 533G-H.

I now proceed to apply the principles set out above to the facts of this case. I should consider whether the court a quo made findings of fact based on evidence adduced. This is important in determining whether there is any misdirection on the part of the court a quo and therefore the basis for interference by this court.

In the reasons for judgment the trial magistrate gave an analysis of the evidence on page 8 of the record. The Learned Magistrate made these findings.

(i) that the respondent gave her evidence very well.

(ii) the respondent was not shaken in cross examination

(iii) respondent stuck to her story through and through

(iv) that the Learned Magistrate assesses her to be a credible witness

(v) that the respondent did manage prove her case on a preponderance of probabilities as she managed to chronicle the history of the cattle in issue without any hussles.

The Learned Magistrate went on to also consider the law which governed the administration of estates of persons married in terms unregistered customary law prior to the amendment introduced by Act No. 6/97 and the current position. The Learned Magistrate proceeded to apply the law to the facts of the case and made a finding that respondent was James Bvisai's surviving spouse in whose custody her late husband left the 7 herd of cattle which she kept for 7 years after which she proceeded to register the estate. The Learned Magistrate did find as a fact that the respondent is the keeper of the beasts ever since she was married to date and has she clearly explained which beasts belong to her husband, her late father in law and her aunt and how the beasts belonging to her father in law and aunt were extinguished. The Learned Magistrate did find that the order sought by the appellants was not only misplaced but myopic as it seeks to trapple upon the recognized rights of the respondent. It was on that basis that the court a quo found no merit in the application made by the appellants and that there was no basis to bar respondent from including the 7 herd of cattle in the estate of her late husband as she is the executor.

The only discernable bone of contention by the appellants is that the court a quo should have believed their side of the story rather than the respondent. Put differently the appellant are saying they are credible witnesses who should be believed. While I agree that the issue of credibility is important in the case, I find no basis to fault the Learned Magistrate approach and findings. I am fortified in this view by the remarks made by KORSAH JA in *Kombayi v Berkhout* 1988 (1) ZLR 53 (S) at 59B-C;

> " In the main the case involved a credibility finding by the Learned trial Judge, and he gave a well reasoned and extensive explanation as to his findings of the credibility of witnesses…….Where the question on appeal from a decision of a Judge is one of credibility, the interests of the parties cannot but affect their testimonies even where the story told by either party may be true, or the probabilities do not appear to favour one party more that the other, the appellate court would loathe to reverse the conclusions arrived at by the trial Judge, who had seen and heard the witnesses, unless, it is clearly demonstrated that he had fallen into error."

The above comments apply with equal force in this case. The Learned Magistrate assessed the credibility of the witnesses and made findings in that regard.

I am satisfied that there is no basis in this case to interfere with the determination made by the Learned Magistrate. I find no error made in exercising his discretion in this matter. There is therefore no valid criticism which can meaningfully be made into the manner in which the Learned Magistrate assessed the evidence and exercised his discretion. The Learned Magistrate did not act on wrong principle neither can it be said the Learned Magistrate allowed extraneous or irrelevant matters to guide or effect the findings made. There is therefore no misdiscretion on the part of the Learned Magistrate. It is obviously not the role of this court to substitute the Learned Magistrates decision for its own in the absence of a finding that the Learned Magistrate made findings totally unsupported by the facts. This is clearly not the position in this case.

In the circumstances the appeal is devoid of merit and is therefore dismissed with costs.

GUVAVA J: agrees…….

Tsara and Associates, legal practitioners for the respondent.