

LIBERTY MOYANA
versus
REXINGTON MAGODO
and
CHIPINGE TOWN COUNCIL

HIGH COURT OF ZIMBABWE
MAKONI & UCHENA JJ
HARARE 25 July and 2 October 2013.

Civil Appeal

Mrs J Woods, for the Appellant
V Mukwachari, for the Respondent

UCHENA J: The appellant is the 1st respondent's neighbour. They were, according to the second respondent, (Chipinge Town Council), allocated portions of the subdivided stand 754. The appellant was allocated stand 754B while the 1st respondent was allocated stand 754A.

The 1st respondent applied for an *ex parte* prohibitory interdict, stopping the appellant from developing stand 754B. His application was granted by a Magistrate sitting at Chipinge Magistrate's Court. He alleged and still maintains the allegation that he was allocated the whole of stand 754 in 2006 when he left the 2nd respondent where he was serving as a Councillor.

The appellant appealed to this court against the magistrate's confirmation of the rule *nisi*. He in his notice of appeal says the magistrate misdirected himself when he found that the 2nd respondent subdivided stand 754 after it had been allocated to the 1st respondent. He said he approached 2nd respondent seeking to be allocated a commercial stand in the medium density area. He was offered stand 754 for US\$3000-00, which he could not afford. He wanted a stand valued at US\$1500-00. Stand 754 was subdivided and he was allocated stand 754B which he paid for. He disputes that 1st respondent had prior existing rights when stand 754 was subdivided.

The 2nd respondent disputes the 1st respondent's allegation and stated that he was allocated stand 754A, for which he submitted development plans which it approved. The plans clearly indicate that they were for stand 754A. The plans which were attached to the second respondent's opposing papers as annexure E were approved on 6 November 2009. The magistrate's reasons for judgment did not deal with the existence of Annexure E. In his replying affidavit the 1st respondent said he was forced by the 2nd respondent to submit the development plan under stand 754A. He therefore does not dispute submitting that development plan but seeks to explain why it was submitted for stand 754A. It is inconceivable that the 1st respondent who is able to stand up to the 2nd respondent could have been cowed into submitting his development plans under a portion of the stand he claims to own. His battle against 2nd respondent would have started then instead of obeying the instructions of persons he knew and alleges to be corrupt. That would be strengthening the position of his adversaries. It sounds suspicious and untruthful. He did not make that allegation in his founding affidavit. It could be an attempt to explain away a piece of evidence which has the effect of destroying his case.

The 1st respondent's case faces another serious problem. It is common cause that he left 2nd respondent's employment in 2006. He says he was allocated the stand as his exit package. Second respondent says he was at that time allocated a residential stand which was subsequently condemned by the Surveyor General's office, after which he was allocated stand 754A in 2009. This seems truthful as the 1st respondent's application to acquire or lease land betrays the position. He in it indicates that he and his spouse each earned a salary of US\$165-00 per month. They are both teachers employed by the Ministry of Education. He purports to have filled this form in 2006. It is an undisputed truth that no civil servant was earning US\$ salaries in 2006. The form must have been completed in 2009 as indicated by the 2nd respondent, when the 1st respondent and his wife were now earning their salaries in US dollars.

The above reveals that the 1st respondent was not allocated the undivided stand 754 in 2006. He was allocated stand 754A when the residential stand he was originally allocated was condemned. He submitted the development plan in 2009. Why would he have waited from 2006 to 2009 to submit development plans if the stand had been allocated to him in 2006.

The magistrate's decision to confirm the rule *nisi* was premised on the 1st respondent having been allocated the whole stand 754 in 2006. He reasoned that 2nd respondent had no

right to subdivide it after it had been allocated to him. If it had not been allocated to him before the subdivision then he would not have any prior existing right to warrant a prohibitory interdict in his favour. He therefore did not have a *prima facie* right. The magistrate therefore erred in confirming the rule *nisi*.

In the result the appellant's appeal must be upheld. The trial Magistrate's confirmation of the rule *nisi* is set aside, and is substituted by an order dismissing the rule *nisi* with costs.

Makoni J concurs-----

Messrs Dhlakama B Attorneys, Appellant's Legal Practitioners
Messrs Mhungu Matutu & Magwaliba, 1st Respondents Legal Practitioners
Messrs Bere Brothers, 2nd Respondent's Legal Practitioners.