WISHMAN MUTOMBA
versus
MUCHAFA TAVENGWA
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
CHITAPI & MUNANGATI-MANONGWA JJ
HARARE, 7 September 2023

Civil Appeal

N. Chikono, for the appellant
A. Mufunda, for the 1st respondent
No appearance for the 2nd respondent

CHITAPI J: The appellant was legally represented at the hearing of his appeal on 15 June 2023 against the judgement of the magistrates court, sitting at Harare on 14 November 2022 per Machingura Magistrate *Esquire*. The appeal succeeded albeit the success came by when the court exercised its review powers as provided in s 26 of the High Court Act [*Chapter 7:06*]. By letter dated 10 August 2023 the appellant requests for a "ruling" under case number CIV 'A' 403/22. It is not clear why the appellant has not used his legal practitioners to make the request. It is not clear whether the appellant understands the meaning of a "ruling". I say so because at the end of the hearing, the court issued an order which in fact would equate to the "ruling". The appellant however stated in his letter as follows:

> "This development (i.e. to request for a ruling) came after the Magistrate Court Civil which was handling the matter for eviction under case number 10690/19 requested the ruling for them to execute the order."

I have considered it advised to give the reasons for the order which the court made on appeal. The order was as follows:

"**IT IS ORDERED THAT**:

In terms of the powers given to court to review proceedings as provided under the High Court Act [*Chapter 7:06*] Section 26 thereof:

1. The proceedings in case number 10690/19 are set aside.
2. The matter is referred to the court a quo for a fresh trial before a different magistrate."

I should caution the appellant for future guidance that whether represented or not, if a litigant considers it necessary to address a matter before the court it is not permitted for the litigant to address the judge(s) directly or by copying the correspondence to the judge(s) in letters written in that regard. All communications concerning a matter before the court whether pending or concluded should be addressed to the Registrar of the High Court. The applicant addressed his letter to the Registrar but copied it to "High Court Judge CHITAPI (sic)." The copying to the judge of the letter is not permitted. Where the litigant has done so, the Registrar must not refer the letter to the judge, but should advise the writer to properly address the communication to the Registrar. It is the Registrar who may if he or she considers it necessary to solicit the judges input before replying then refer the letter to the judge. The judge will in turn provide any input to the Registrar who then communicates or responds to the letter.

Having commented on the impropriety of the conduct of the appellant copying his letter to the judge, I outline the reasons for the order which the appeal court made as quoted (*supra*). The appellant was the plaintiff in case number 10690/91 wherein he sued the first and second respondents as first and second defendants for eviction from a property called Stand 13565, Mabvuku, Harare. The appellant in his summons and particulars of claim pleaded that he was the legitimate owner of the property and had been allocated the same by the second respondent in 2015. He pleaded that he paid to the second respondent the full amount representing the intrinsic value of the land, bills for water, sewer and has been paying rates on the property. The appellant pleaded that in 2016, the first respondent unlawfully occupied the property without the authority or consent of the appellant. In consequence the appellant sought the eviction of the first respondent and all other persons claiming rights of occupation of the property through the first respondent.

Both the first and second respondents entered appearance to defend the appellant's action proceedings/claim. The second respondent then filed a plea to the appellant's summons. The second respondent in its plea admitted the appellant's claim and averred that the first respondent should be evicted from the property. The second respondent admitted that it was the plaintiff who was allocated the property in issue. In short the second respondent did not oppose the relief sought by the appellant or rather it admitted the appellant's claim.

The first respondent in denying the claim specially pleaded the dilatory defences of prescription and *res judicta*. The decision on the special plea is not on record. However the matter proceeded to pre-trial conference which implies that the special plea did not succeed. I say so because the pleas of prescription and *res judicta* if they succeed would have disposed of the eviction proceedings thus rendering the pre-trial conference unnecessary.

The first respondent does not seem to have filed a plea on the merits. The record does not contain such plea assuming that it was filed. It would appear that the special plea was all that was filed. Be that as it may the record contains pre-trial conference issues which were prepared by the first respondent's legal practitioners. It is not clear as to whether these were then the adopted trial issues. As for the reasons which will be apparent, it did not became necessary for the appeal court to get into the issue in as much as the parties did not raise it. What it amounted to however was that it was difficult for the court to follow the correct paper trial of the proceedings in the court *a quo*. It is the duty of the parties to an appeal upon being invited to inspect and I agree with the contents of the record which is then certified to pay meticulous care to certification of the record.
The appeal court determines an appeal on the record and where the parties have certified a record, then the appeal is determined on that record.

As far as the pre-trial conference is concerned, although there are notices on record to indicate that it was held on 4 November 2019, there are no agreed or adopted minutes of the pre-trial conference. Only the pre-trial conference minutes of the plaintiff and the first defendant are on record. Again, the record fell short in relation to its completeness and omission of such important record of pre-trial procedure. The issues however could be made out from the

particulars of claim, plea and reply as well as from the draft issues of the plaintiff and first defendant.

The first defendant resisted the claim on the basis that he was the legitimate owner of the property in his own right. The crisp issue for determination was therefore who between the appellant and the first respondent had superior rights to the other. The secondary issue would be whether should the appellant establish superior rights to the property, he was entitled to an order to evict the first respondent therefrom.

Following a full trial, the learned magistrate dismissed the appellant's claim. In dismissing the claim, the learned magistrate noted that both the appellant and the first respondent had each produced documents to show that they each "legally procedurally acquired the stand in question." The learned magistrate generalized the documents. The documents were not individually listed nor was their detail analysed as well as their relevance and effect on the claim or defence as the case maybe. The learned magistrate without analysis then stated in the judgement as follows:-

> "Considering the documents produced by the defendant which are even more than what the plaintiff produced, the plaintiff has not proved on a balance of probabilities that the defendant has no right to be at the stand in question."

The learned magistrate then went on to state that the court could not determine the matter without input from the City of Harare. City of Harare had however consented to the claim.

The record indeed shows that the parties each produced a number of documents linking them to the stand. The determination of who the superior rights holder would be in such a case depended upon an examination of the alleged documents of rights to title and making findings on their authenticity and credibility. Such process would have to be co-joined with a setting out of the paper trial and chronology of the devolution of those documents. The learned magistrate clearly failed to appreciate that it was his function to consider the facts and evidence and set out those facts found to be proved and to thereafter relate them to the determination of the issues for determination. To leave the matter open and to simply state that the first respondent had produced more documents than the appellant and on that basis to then deny the relief sought as

indeed to find for the first respondent was not based upon any accepted principle of evidential assessment and adjudication.

Upon considering the court *a quo*'s judgement, the appeal court was of the unanimous view that the court *a quo*'s judgement was a judgement in name because the learned magistrate did not assess the evidence as he was required to. The judgement if it be so called was hollow and was a regurgitation of documents which the parties had produced as exhibit given in general terms and a decision being made thereon that one party's basket of produced documents was more than the other party's basket. In the case of *S* v *Makawa & Ano* 1991 (1) ZLR 142 (SC) @ p 146 D – E MAKARAU J stated:-

> "Although there are indications in this case that the Magistrate may have considered the case, a large portion of those considerations remained stored in his mind instead of being committed to paper. In the circumstances this amounts to an omission to consider and give reasons. There is a gross irregularity in the proceedings ……. See *R* v *Jokonya*."

Although the authorities cited concerned criminal appeals, the principle underlying the effect of a failure by the judicial officer to give adequate or sufficient reasons for the decision constitutes a gross irregularity which vitiates the judgement. In *casu* by stating that one party produced more documents than the other, it implies that the learned magistrate could have considered the documents but stored to memory what he made out of those documents and conclusions he made thereon. In the case of *Soalemeziz* v *Dudley Holdings* (1987) 10 NSWLR 247 @ 279 MCHUGH JA stated on the need to give reasons for a judicial decision:-

> "The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to use the extent to which that arguments have been understood and accepted as well as the basis of the judge's decision. As Lord MacMillan has pointed out, the main object of a reasoned judgement, is not to do but to seem to do justice. The writing of judgements (1948) 26 CanBar Rev at 491. Thus the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. Secondly the giving of reasons furthers judicial accountability. As Professor Shapiro has recently said (In reference of Judicial CanBar (1987) 100 Harv L Rev 731 at 737):-
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> 'A requirement that judges give reasons for their decisions – grounds of decision that can be debated, attacked and defended …serves a vital function in constraining the judiciary's exercise of power.'
>
> Thirdly under the common law system of adjudication, courts not only resolve disputes – they formulate rules for application in future cases. Taggart "should Canadian judges be legally Required to Give Reasoned Decisions in Civil Cases" (1983) 33 University of Toronto Law

Journal 1 @ 3 – 4. Hence the giving of reasons enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future."

The judgement of the learned magistrate left the court disabled to entertain grounds of appeal. Counsel for both parties when asked for their views on the judgment and the intended disposition of the appeal by way of review expressed the view as well that the judgement was unhelpful as it did not adjudicate on evidence led and documents produced.

In view of the demonstrated gross irregularity noted whose details have been discussed, it was resolved to set aside the proceedings and order a fresh trial before a different magistrate. It was so ordered as per the order granted on 15 June 2023 as quoted. Thus, the full reasons for the order are herein contained.

CHITAPI J:……...

MUNANGATI-MANONGWA J:……..……..I agree

Moyo Chikono and Gumiro, appellant's legal practitioners
Mufunda & Partners, first respondent's legal practitioners
Gambe Law Group, second respondent's legal practitioners