Judgment No. 24/11
Civil Appeal No. 272/10

MARY NYAMUTATA v (1) JOHN CHIKOMO (2) ARIMANDO BREAD (3) EPWORTH LOCAL BOARD

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & CHEDA AJA
HARARE, OCTOBER 11, 2011

C Mavhondo, for the appellant
F M Katsande, for the second respondent

MALABA DCJ: The appellant sued the first respondent and second respondent for nullification of the contract of sale they entered into leading to the third respondent authorizing cession by the first respondent to the second respondent of title, rights and interest in Stand 2110 Solani, Epworth. The appellant had earlier purchased the property from the first respondent.

The ground on which the appellant claimed nullification of the contract of sale is that the second respondent was fully aware at the time of entering into the contract with the first respondent of her prior rights in respect of the property. Summons was served by the Deputy Sheriff on a tenant who accepted service on behalf of the first respondent on 20 July 2006. The first respondent did not enter appearance to defend. The second respondent who entered appearance to defend raised the question of

prescription alleging that the period of prescription had run against the appellant's claim against the first respondent.

The court *a quo* in a terse judgment found in favour of the second respondent without having determined the question whether the first respondent had notice of the summons. The rules of the High Court clearly provide that a return of service by the Deputy Sheriff is *prima facie* evidence of service of process having been effected on the person for whom it is intended. In this case there is no other evidence to rebut the presumption that the first respondent received the summons. The first respondent must be taken as having been in default of appearance at the hearing of the matter by the court *a quo*.

In our view only the first respondent would have had the right to raise the defence of prescription against the appellant in respect of the claim relating to the contract between the two. In the circumstances it was not competent for the second respondent to raise the defence of prescription on behalf of the first respondent against a claim of a debt which he never owed to the appellant.

The learned Judge misdirected himself in accepting that the second respondent could at law raise the defence of prescription in the circumstances of this case. He also misdirected himself by holding that the prescription, if it was valid, would have started to run from 12 March 2000 at which time the first contract had not been performed to give rise to a cause of action against the first respondent.

It is therefore the unanimous view of the Court that the appeal be allowed.

It is therefore ordered as follows:

"1. The appeal is allowed with costs.

2. The judgment of the court *a quo* is set aside and substituted with the following:

"The point in limine is dismissed with costs".

3. The matter shall proceed to trial on the merits."

ZIYAMBI JA: I agree

CHEDA AJA: I agree

Sawyer & Mkushi, appellant's legal practitioners

F M Katsande & Partners, second respondents' legal practitioners