

JOSEPHINE RUNGANGA
Versus
PRESSMORE NYAMANGARA

HIGH COURT OF ZIMBABWE
TSANGA & MUZOFA JJ
CHINHOYI, 27 October 2023 & 2 January 2024

Civil Appeal

Mr Mudhawu, for appellant
Mr M Mutsvairo, for Respondents

MUZOFA J

[1] This is an appeal against the decision of a Magistrate Court sitting as a Community Court of appeal ordering her eviction.

Background Facts

[2] The respondent is the appellant's nephew. Her husband was a brother to respondent's grandmother. The appellant's father was issued a piece of land under Chief Zvimba in Muchenje Village. The appellant's father stayed at Muchenje Village from 1983. The appellant's father Muzvidzwa Nyamayaro is now deceased.

[3] Initially the appellant and her late husband resided in Runganga Village. When they had problems at the village the respondent's mother offered the respondent and her late husband a place to stay in Muchenje Village. They took occupation in 1998.

[4] When the respondent's mother passed on, the appellant remained on the property. In due course the respondent approached the Community Court in his capacity as the heir for the eviction of the appellant.

[5] The Community Court made a finding in favour of the respondent's claim and ordered the appellant's eviction. Dissatisfied by the decision of the Community Court, the appellant approached the Magistrate Court on appeal in terms of s24 (1) of the Customary Law and Local Courts Act (Chapter 7:05) 'hereinafter referred to as the Act'.

[6] Although the appellant had raised a number of grounds of appeal, two main issues were pursued before the Community Court. She argued that the Community court lacked jurisdiction to preside over a land dispute and that there was no credible evidence that the respondent's mother had given her the land on a temporary basis.

[7] In compliance with subsection (2) of s24 of the Act, the Magistrate heard the matter afresh. After considering the facts and the law the court a quo confirmed the community court's decision. It dismissed the appeal.

[8] The court *a quo* reasoned that the Community Court had jurisdiction to deal with the matter. The court relied on the authority of *Chihoro v Rusere*¹ that the land had already been allocated what was before the court was a family dispute. It also made a factual finding that the respondent's mother had given the appellant and her husband a temporary place to stay. They were not supposed to occupy the place on a permanent basis. It also found that the respondent had *locus standi in judicio* to sue since he was the heir to the land in dispute.

The grounds of appeal

[9] Having set out three grounds of appeal, the second ground of appeal was properly abandoned since it was not short and concise but was a long incoherent ground of appeal. The two grounds of appeal raise the following issues for determination by this court,

(i) Whether the court *a quo* misdirected itself in finding that the community court had jurisdiction to deal with a matter involving immovable property or land disputes in view of s16(1)(g) of the Act which the appellant wrongly referred to as s16(1) (e).

(ii) Whether the court *a quo* misdirected itself by failing to find that having been acknowledged by the local authority the appellant was now a permanent resident of Muchenje Village.

The submissions

[10] Both parties relied predominantly on the *Chihoro* case (*supra*) each extrapolating was is favourable to its case.

[11] The appellant's oral submissions as read with the heads of arguments aver that s16 (1) (e) ousts the Community Court's jurisdiction to deal with disputes over land rights. The court *a quo* misdirected itself in applying the principle in the *Chihoro* case (*supra*) since the factual background is different.

[12] On the second issue, the appellant relied on the *Chihoro* case which she initially distanced herself from.

[13] For the respondent, it was submitted that the *Chihoro* case is on all fours with this matter and the court *a quo* correctly applied the principles enunciated therein. The Court *a quo* as in inferior court was bound by the decision under the doctrine of *stare decisis*.

[14] In the alternative it was submitted that in the event the court is of the view that there is a conflict between s16 (1) (g) of the Act and s5 of the Traditional Leaders Act the court was urged to adopt the latter Statute which gives the Community Court jurisdiction to deal with land disputes.

Jurisdiction

[15] According to the doctrine of *stare decisis* an inferior court is bound by the decision of a superior court on like issues. The learned authors Hahlo & Kahn in their book *The South African Legal System and its Background* point out:

¹ HH7/11

"The reasons advanced by the judges for adhering to a doctrine of judicial precedent have been the need for legal certainty, the protection of vested rights, the satisfaction of legitimate expectation and the upholding of the dignity of the court."²

Like cases should be decided in the same way.

[16] We have no doubt that the factual background in the *Chihoro* case is on all fours with this case. In that case the appellant's father was allocated land. The respondent's brother lived on the land and subsequently claimed the land. The issue was whether the respondent was granted temporary use of the land or not.

[17] Similarly in this case the factual background is that the respondent's father was properly allocated the land. The respondent's mother entered into an agreement with the appellant's husband in respect of the land. The issue is whether the respondent's mother gave away their rights in the land on a permanent basis to the appellant's husband.

[18] Having said so, we find no misdirection in the application by the court a quo of the *ratio decidendi* in the *Chihoro* case. The court a quo was bound by the decision of the superior court.

[19] There is no doubt that a community court has no jurisdiction to determine rights in respect of land or other immovable property in terms of s16 (g) of the Act. A Chief presides over matters in the community court. However, in terms of the Traditional Leaders Act, Chiefs have jurisdiction to adjudicate in and resolve disputes relating to land in his or her area. When a Chief presides over matters under both Acts, he and she exercises a judicial function and has jurisdiction as provided in the enabling legislation.

[20] As properly submitted, a salient contradiction arises between the two Acts since a land dispute may involve the parties' rights in the land. The lack of cohesion in the two provisions may require the legislature to bring some unity between the two Acts to clearly provide for the jurisdiction of the Community Court in land disputes.

[22] We were urged to adopt the latter statute, the Traditional Leaders Acts promulgated in 2000 instead of Part IV of the Act which came into effect in 1992. In our view it is unnecessary to apply that statutory interpretation principle in this case since the cause of action is not strictly speaking a dispute of right in the land.

[23] In the *Chihoro* case the court considered the cause of action whether it was a dispute of right as in the allocation of land or not. In that case it concluded that the Chief had jurisdiction to deal with the matter since it was not about allocation of land. Allocation of land invariably deals with ownership rights which the Chief cannot deal with.

[24] In this case, it is common cause that the respondent's father was allocated the land. This was not an issue before the Community Court. The Community court was required to preside over the dispute arising from the bilateral agreement between the respondent's mother and the appellant. It had nothing to do with the allocation of the land by the authorized body to either of the parties. The Chief had to decide on the agreement whether the respondent's mother had given the appellant the land on a permanent basis or not.

² Cited in *Ethnomusicology Trust v Deputy Chairman, Labour Relations Tribunal & Ors* 1997 (2) ZLR 207 (HC)

[23] It then follows that the Community court had jurisdiction to deal with the matter. The ground of appeal has no merit.

The effect of recognition by the Rural District Council

[24] The main point taken by the appellant was that since they paid Council levies and their names were in the register, they were now permanent residents of the Muchenje Village. Although the appellant relied on the *Chihoro* case as authority for that proposition, the case does not at any point state as such. The closest the Chihoro case referred to the Council registration and payment of levies is in narrating the findings by the Local Court and the Magistrates Court. The court made its decision based on the jurisdiction of the Community Court.

[25] Muchenje Village falls within communal land whose administration is under the Zvimba Rural District Council ‘the ZRDC’. In terms of s8 of the Communal Land Act (Chapter 20:04) a symbiotic relationship exists between a Rural District and traditional leaders particularly the Chiefs. A Rural District may allocate land after consultation with the local Chiefs. It must observe the customary practices of the area in the allocation of land.

[26] The duties of a Chief under s5 of the Traditional Leaders Act (Chapter 29:17) include (g) allocation of land in consultation with the Rural District Council. It is also the Chief’s duty in terms of subsection (I) of the same section to notify the Rural District Council of any intended disposal of a homestead and the permanent departure of any inhabitant from his area, and, acting on the advice of the headman, to approve the settlement of any new settler in his area.

[27] So any allocation or occupation of land by the appellant or any person in Muchenje Village must have involved the traditional leadership. The Chief would have then advised the ZRDC. There was no evidence of such processes.

[28] Section 96 of the Rural District Councils Act provides for payment of levies in rural areas. Subsection 2 thereof specifically allows the Council to levy a head of a household. A head of household is defined in s95 of the same Act as

‘a person who occupies or uses—

- (a) Communal Land for agricultural or residential purposes in terms of subsection (1) or (3) of section 8 of the Communal Land Act [*Chapter 20:04*], otherwise than as a spouse, child or dependant of any other person who occupies the same land’

[29] A letter from Zvimba Rural Council was produced before the court a quo in which the Council confirmed that the appellant was a resident of Muchenje village and had been paying her levies. In that letter the Council did not confirm that she was a permanent resident.

[30] If the appellant and her husband were given the piece of land for use, all things being equal they would not fall under a spouse, a child or a dependant of the respondent’s mother. They would invariably be expected to pay levies regardless of the status of their occupation whether they were permanent occupants or temporary occupants.

[31] It would appear that levies are paid by occupiers and users of communal land. It does not refer to those that occupy the land permanently only. It is my considered view that payment of levies is not on its own evidence of permanent residency in the village.

[32] In his evidence in chief the respondent indicated that levies were payable by all residents regardless of the status of their occupancy. This evidence was not controverted.

[33] In any event whether the appellant was a permanent resident of Muchenje Village or not cannot be derived from payment of levies to the Council. It is derived from the agreement entered into between the respondent's mother and the appellant together with her late husband. The appellant has not appealed against the substantive finding by the court a quo that the land was not given to them on a permanent basis.

[34] It is also highly unlikely that the respondent's mother would have given away the land on a permanent basis taking into account that in terms of customary and traditional practices, the land is the family inheritance. Similarly, the Council could not have issued the land to the appellant's family without the involvement of the Chief. It could only recognise the occupation for purposes of collection of levies. That is the primary reason the appellant and her late husband's names would of right be in the Council books.

[35] From the forgoing we therefore come to the conclusion that recognition by the Council or even payment of levies is not synonymous with ownership of land or permanent residency. There is more to it. In this case there must have been proof that the respondent's mother gave the appellant and her husband the land on a permanent basis.

The ground of appeal has no merit.

[36] On costs no reasons were given to depart from the traditional approach that costs follow the cause.

Accordingly, the appeal is dismissed with costs

Mbano & Gasva, appellant's legal practitioners

Mushonga, Mutsvairo, the respondent's legal practitioners

TSANGA J Agrees