

WONDER DUBE  
versus  
KEITH MATSEKA

HIGH COURT OF ZIMBABWE  
TSANGA & MAXWELL JJ  
HARARE, 15 March, & 31 March, 2022

### **Civil Appeal**

*K Gama*, for the Appellant  
*J Dondo*, for the Respondent

#### **MAXWELL J:**

This is an appeal against the judgment of the Magistrates Court sitting at Chivhu handed down on 22 September 2011.

#### **Background**

The Respondent issued summons for the eviction of the Appellant, his belongings and all those claiming occupation through him from Stand Number 1, Village 5, Central Estates, Mvuma. In Further Particulars Respondent stated that he had been allocated the stand in 2000 and was later granted an offer letter on 20 February 2004. He claimed that Appellant occupied part of his stand in 2002. Appellant opposed the claim on the basis that he was not occupying Stand Number 1, but was actually occupying Stand Number 2 for which he is the owner and as such Respondent could not evict him. The matter went to trial and the court found in favour of the Respondent, ordering Appellant's eviction.

#### **Judgment of the Court a Quo**

The court *a quo* considered the evidence led in court and concluded that Stand Number 1 was allocated to the Respondent and Stand Number 2 to the Appellant. It also considered a map that was produced as an exhibit and carried out an inspection *in loco*. It concluded that Appellant was occupying Stand Number 1, not Stand Number 2 that was allocated to him. It stated that the Appellant was occupying a piece of land that is between water ways when stand Number 2 is beyond the second water way. The court observed that the District Administrator had testified in favour of the Appellant and it ruled that his evidence was not credible. He was found to be biased and lying. He had testified that Stand Number 1 was not allocated to anyone and that no one held

an offer letter to that stand. When he was shown Respondent's offer letter he did not dispute that it was an authentic document from his office. The court allowed the eviction of the Appellant, his belongings and all those claiming occupation through him.

### **Grounds of Appeal**

Appellant was aggrieved and noted an appeal on the following grounds;-

1. The court *a quo* was misdirected into believing that exhibit two (2) was the map in respect of the area in dispute yet it was not the actual map in the records at the District Administrator's Office.
2. The court *a quo* had no jurisdiction over the dispute which should have been referred to the Ministry of Lands since it was a dispute as to boundaries.
3. The representations by the Lands Officer ought to have been disregarded as incorrect and or biased. The District Administration office was not aware of the inspection *in loco* and does not have the records of the inspection.
4. The result of the proceedings is such that almost all the villagers should have been relocated yet the judgment only affects the Appellant.
5. The judgment of the court *a quo* is inappropriate as it seeks to move the Appellant to plot number 4 which in fact is occupied by third party, this effectively means that every villager is to move a plot further from where they are settled.

Appellant prayed that the judgment of the court *a quo* be set aside and that the matter be referred for a fresh trial.

### **Submissions by the Parties**

In heads of argument, Appellant argued that the provisions of the Land Survey Act [*Chapter 20:12*] should have been followed. He stated that the undisputed facts are that the land in question was surveyed and beacons installed therefore the beacons should have been located to resolve the dispute. According to him, beacons had to be located by a land surveyor. In oral submission *Mr Gama* based his submissions on *obiter dictum* by BERE J (as he then was) in HH 96/18 in which Appellant was seeking the reinstatement of this appeal following its dismissal on 16 July 2013. He reiterated that resolution of the matter depended on the Surveyor General's Office.

Respondent, in his heads of argument, stated that the court had jurisdiction as this was an ejectment matter. He referred to section 11 (1) (b) (iii) of the Magistrates Court Act [Chapter 7:10] which states that;

**“11 Jurisdiction in civil cases**

(1) Every court shall have in all civil cases, whether determinable by the general law of Zimbabwe or by customary law, the following jurisdiction—

a).....

b) with regard to causes of action—

(iii) in actions of ejectment against the occupier of any house, land or premises situate within the province:

Provided that, where the right of occupation of any such house, land or premises is in dispute between the parties, such right does not exceed such amount as may be prescribed in rules in clear value to the occupier;”

He argued that in order for Appellant to succeed in ousting the jurisdiction of the trial court, he had to show that there was a *bona fide* dispute as to the right of occupation and that such right was worth more than \$2000.00 to the occupier. Respondent submitted that Appellant had not laid out any facts upon which one can make a finding that the right of occupation is more than \$2000.00.

He also submitted that, in any event, the land in dispute is State land and whatever value can be placed on it does not accrue to the Appellant. Respondent argued that the court *a quo* properly assessed the evidence before it and arrived at a correct decision. He asserted that he had set out a proper cause of action for the ejectment of Appellant from Plot Number 1 and his evidence, which was largely unchallenged, supported the cause of action. He submitted that Appellant’s evidence revealed no proper defence to the ejectment process. *Mr Dondo* submitted that the judgment by BERE J (as he then was) does not resolve the matter as all it did was to give the Appellant the right to appeal. He argued that the Land Survey Act applied to the registration of land in the Deeds Office. He further submitted that the court *a quo* made findings of fact supported by evidence and that those findings should not be interfered with unless demonstrated to be wrong. He pointed out that the relief sought is incompetent as Applicant is seeking remittal of the matter to a court he alleges has no jurisdiction. Respondent stated that the appeal has no merit and should be dismissed with costs.

## **Analysis**

Appellant sought to rely on the Land Survey Act [*Chapter20:12*]. Section 3 thereof states;

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### **“3 Application of Act**

This Act shall only apply to any survey used for the purpose of effecting the registration of any land in the Deeds Registry, or for re-determining the position of a curvilinear boundary, or of any beacon defining the terminal of any boundary of a piece of land registered in the Deeds Registry.”

The statement in Appellant’s heads of argument that the land had been surveyed and beacons installed was without evidential basis. There is no evidence on record that the land had been surveyed for registration in the Deeds Office. This Court finds that Appellant’s submissions in that regard are misdirected. It appears to us that Counsel for the Appellant blindly followed the utterances in HH 96/18 without bothering to read the Land Survey Act itself. We say so because had he read section 3 quoted above, he would not have persisted with submissions faulting the court *a quo* of not taking heed of the provisions of the said Act. Nevertheless, the Court will consider the grounds of appeal proffered by the Appellant.

### **Ground One**

Appellant criticizes the lower court for believing that exhibit 2 was the map in respect of the area in dispute. According to him, it was not the map in the records at the District Administrator’s Office. This is totally without merit as the District Administrator stated in cross examination that Ministry of Lands is the custodian of the map for village 5. The map was produced through a witness from the Ministry of Lands. *Mr Gama* argued that there was no reference to beacons or coordinates. As stated above, the issue of beacons does not arise in the circumstances of this case. This ground of appeal therefore fails.

### **Ground Two**

Appellant submitted that the lower court had no jurisdiction over the dispute as it was a dispute as to boundaries. In his view, the dispute should have been referred to the Ministry of Lands. In heads of argument, Appellant submitted that a boundary dispute can only be determined by the High Court as a court of first instance. For that submission, he relied on the Land Survey Act which is not applicable in this case. *Mr Dondo* submitted that the issue of jurisdiction was raised after the proceedings and that Appellant did not meet the requirements of raising an issue

for the first time on appeal. He stated that Appellant did not state in what way the lower court does not have jurisdiction or what disempowers it.

The record of proceedings confirms that there are no facts upon which jurisdiction was challenged. Reliance on the Land Survey Act was misplaced. The Appellant did not establish a basis for impugning the jurisdiction of the lower court in this matter. In any event, the matter before the court was of ejectment. As stated in Respondent's heads of argument, all the court needed was to be satisfied that Respondent had alleged and established that Appellant was in unlawful occupation of the property. This was established through evidence from witnesses as well as observations by the court during the inspection *in loco*. We do not find any misdirection in the decision of the lower court on this issue. This ground of appeal also fails.

### **Ground Three**

Appellant alleges that the District Administrator's Office was not aware of the inspection *in loco* therefore the representations by the Lands Officer ought to be disregarded. It is interesting that Appellant does not dispute that the inspection *in loco* was done, neither does he state whether or not he participated in it. The lower court stated that it went for the inspection *in loco* with all parties present. We find that this ground of appeal was not substantiated. The Appellant cannot speak for the District Administrator's Office. The court has a discretion to hold an inspection *in loco* to observe an object which cannot be produced in court. Inspections *in loco* were covered in Order 21 Rule 1 (1) (d) of the Magistrates Court (Civil) Rules 1980. The inspection *in loco* is for the court to be able to follow the oral evidence more closely and to observe some real evidence in addition to oral evidence. See *Principles of Evidence*, 4<sup>th</sup> edition by PJ Schwikkard and SE Van Der Merwe, p427. There is no merit in this ground of appeal.

### **Grounds Four and Five**

Appellant complains that the result of the proceedings is that almost all the villagers should have been relocated and that every villager is to move a plot further from where they are settled. Appellant is merely expressing his concern on what he perceives to be the effect of the order of the lower court. The task before this court was merely to ascertain if there was a basis for impugning the lower court's decision. The two grounds of appeal are on an issue outside the mandate of this court. The grounds of appeal therefore fail.

In the final analysis, there is no merit in this appeal. The following order is appropriate.

The appeal be and is hereby dismissed with costs.

TSANGA J.....I AGREE

*C. Mutsahuni Chikore and Partners, Appellant's Legal Practitioners.*  
*Dondo and Partners, Respondent's Legal Practitioners.*