

JANET KAMUKWEDZE
versus
WESTON MUNAKI

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 26 May & 8 September 2022

Civil Appeal

E Chizengera, for the appellant
E. Jena, for the respondent

MAXWELL J: Appellant appealed against the decision of the Magistrate's Court sitting at Mt Darwin delivered on 28 May 2021.

BACKGROUND

Respondent appealed to the lower court against a decision by Chief Nembire which had been passed on 28 November 2020. The judgment had been given in default against one Robert Kupfuwamhandu. The judgment, in essence, awarded Appellant land which was being occupied by the Respondent herein. Respondent was aggrieved and appealed to the lower court. The lower court set aside the judgment by Chief Nembire and ordered that Respondent continue residing at his communal homestead and use his fields as he used to do. Appellant was aggrieved and noted an appeal in this Court.

GROUND OF APPEAL

The Appellant noted the appeal on the following grounds.

1. The learned magistrate erred in entertaining a party who had no *locus standi* before the court. The court *a quo* was dealing with a self-actor and should have noted that Respondent was never a party to the judgment that was being appealed against.

2. The learned magistrate erred in concluding that Respondent was allocated the communal land by the late Chief Nembire when no evidence was put before him to prove same.

Appellant prayed for the setting aside of the judgment of the lower court.

SUBMISSIONS BY THE PARTIES

Submissions were made for the Appellant only as Respondent's Counsel failed to file heads of argument. Respondent was barred as a result.

Appellant submitted that Respondent had no *locus standi* to appeal as he was not a party to the community court proceedings. Her heads of argument made reference to the case of *Makarudze & Anor v Bungu & Ors* 2015 (1) ZLR 15 (H), among others, in which it was held that *locus standi in judicio* refers to one's right, ability or capacity to bring legal proceedings in a court of law and that one must justify such right by showing that one has a direct and substantial interest in the subject-matter and outcome of the litigation. Further that such an interest is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the court. She argued that Respondent was not a party to the proceedings before the community court and the ruling was not against him, therefore he had no legal basis in terms of law to appeal against a judgment of a matter he was never a part to. According to her, the lower court erred in entertaining him when he had no *locus standi* before it. Appellant also argued that no proof was brought before the court to prove whether or not Respondent was allocated the communal land by the late Chief Nembire

ANALYSIS

An appeal from the judgment of the Community Court is in terms of section 24 (1) of the Customary Law and Local Courts Act [*Chapter 7:05*] (the Act) the section provides that

“24 Appeals from community courts

- (1) Any person who is dissatisfied with any decision of a community court may, in the time and manner prescribed, appeal against such decision to a magistrate for the province within which the community court is situated.”

(underlining for emphasis)

This Court has already held that the right of appeal from the Community Court should not be restricted to persons who were parties in proceedings before the community court. The phrase ‘any person’ covers any person who is materially affected by the decision. See *Bona Mutsahuni-*

Mugabe N.O & Ors v Tinos Manongovere HH 309-22. For that reason, the first ground of appeal was dismissed on the hearing day.

In the second ground of appeal, Appellant criticizes the lower court for concluding that Respondent was allocated the communal land by the late Chief Nembire when no evidence was proffered to prove same. In the judgment of the lower court, it is stated that the former Chief Nembire gave the Respondent herein a piece of land and nothing was done to challenge that position. The lower court seems to have disregarded the evidence in the opposing affidavit deposed by the Appellant herein. She outlined the efforts made to reclaim the land without success, which efforts were confirmed on affidavit by the village head. The village head's affidavit is on page 18 of the record. He states that

“I became the village head of Mumvuraunga in 1966 taking over from my uncle Rari Nyamombe. When I became the village head the land in question was being utilized by Janet Kamukwedze. She used the land until early 80's until her land was robbed by the alleged late chief who wasn't a chief at all. Janet Kamukwedze frequently consulted the authorities demanding her land back. We would not assist her at that moment since the then alleged late chief was not approachable and could neither take advice from anyone. The woman survived by renting fields from the Nyamutiro family. This can be testified by the surviving elder son of Mr Nyamutiro, Lancelot Nembire who is now demanding the land back from Janet Kamukwedze.”

The lower court further stated that Respondent herein has built structures and invested a lot financially on his homestead and all his family and siblings over the years have invested on this land. Nowhere on the record is there reference to structures and financial investment on the land. It is not clear on what the lower court based these findings.

The lower court further stated that in any event Respondent has another piece of land that she is occupying and has been using for the past forty years with her family. The lower court ignored submissions by the Respondent that she was depending on renting fields, which submissions were also confirmed in the village head's affidavit. The record of proceedings in the lower court shows that only the appellant and Respondent testified before it. The Appellant therein did not produce any evidence of his entitlement to the land. There is no affidavit from him or anyone else to support his claim.

In *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 it is stated that an appellate court can interfere with the discretion of the lower court where it appears that some error has been made

in exercising the discretion. Such error is evident where the lower court acts upon a wrong principle, or if it mistakes the facts or if it does not take into account some relevant consideration. It was therefore an error for the lower court to ignore averments made under oath where there was nothing to the contrary. It is also important that the critical averments on how the land had come to be in the occupation of the Respondent herein were made on oath by the village head who had knowledge on what was happening on the ground. The magistrate appears to have been more persuaded by the length of time the Respondent herein has been in occupation of the land as opposed to the surrounding circumstances of that occupation or residence. A basis exists for interfering with the discretion of the lower court and there is merit in the second ground of appeal.

DISPOSITION

The appeal partially succeeds. The following order is made.

The first ground of appeal having been dismissed, the second ground of appeal be and is hereby upheld.

The judgment handed down by the court *a quo* on 28 May, 2021 be and is hereby set aside.

Respondent is to pay costs of suit.

TSANGA J.....Agrees

Legal Aid Directorate, appellant's legal practitioners
Jena and Associates, respondent's legal practitioners