

MONICA GONDO  
versus  
RAYMOND TAFADZWA NHOWE

HIGH COURT OF ZIMBABWE  
WAMAMBO & MUCHAWA JJ  
HARARE, 22 September & 19 October 2022

### **Civil Appeal**

Mr *K Gama*, for appellant  
Mr *S T Mutema*, for respondent

MUCHAWA J: The appellant issued summons out of the Magistrates Court in which she sought the eviction of the respondent from a subdivision of No. 9 Vickers Road, Belvedere, a property which she allegedly bought from one Shingirai Fabion Nhowe on 30 October 2017, and for which she held title deeds after having paid the purchase price. She also sought payment of rental arrears in the sum of US \$ 3 000.00 for the period December 2018 to February 2019. Holding over damages at the rate of 35RTGS Bond per day from date of service of summons up to date of vacation or eviction, which ever occurred first, were also prayed for. The basis of the claim was that after getting title deeds on 28 November 2018, the appellant had given the defendant three months' notice to vacate but this had not been heeded. The claim was vehemently defended. The issues referred to trial were the following;

- i. Whether the plaintiff is entitled to occupy part of subdivision of 9 Vickers Road held under title deed number 0007167/2018
- ii. Whether or not the defendant has any right to refuse vacating the same.

The court *a quo* properly sums up the issue by saying, in its ruling, that the dispute before it involves an ownership wrangle between the appellant and respondent's mother, one Ntombizodwa Nhowe wherein the appellant claims ownership on the basis of her title deed to the property whilst the respondent's claim is that he has rights through his mother who was granted rights over the property through a High Court order of 20 May 2021 which gave her rights over the property.

After a full trial, the court *a quo* found that in order to resolve the dispute, there was need to make a decision which has a declaratory effect, which powers, it found, it did not have as it involved deciding on who had the legal right to be on the stand between appellant and Ntombizodwa Nhowe. Such powers were said to lie with the superior courts. The matter was then dismissed for want of jurisdiction.

Disgruntled, the appellant has lodged this appeal on the following grounds:

- i. The court *a quo* erred in finding, after a full trial, that it had no jurisdiction to order eviction of, and to award holding over damages against, the respondent.
- ii. The court *a quo* further erred in finding that it was required to issue a declaratory order when it was clearly not required to do so and had not been called upon to do so.
- iii. The court *a quo* erred in dismissing the claims before it when appellant had proved all the requirements for the *rei vindicatio* and for holding over damages on a balance of probabilities.
- iv. Having erroneously and irregularly found that it had no jurisdiction to order the eviction of, and award holding over damages against the respondent, the court *a quo* further erred and misdirected itself in dismissing the claims instead of striking the matter off the roll.
- v. The court *a quo* erred in finding that there was an ownership dispute between appellant and Ntombizodwa Nhowe before it when in fact there was none as Ntombizodwa Nhowe was not a party to the dispute before the court.
- vi. Furthermore, the court *a quo* erred in resolving the dispute on the basis of a point of law, namely lack of jurisdiction, which it had not asked the parties to address at any stage of the proceedings.

The relief sought on appeal is set out as follows:

- a. That the appeal be allowed with costs on the higher scale.
- b. That the judgment of the court *a quo* be set aside and in its place the following order be made:
  - i. The plaintiff's claims for an eviction order and for holding over damages be and is hereby granted.
  - ii. The defendant and all those claiming occupation through him be and are hereby ordered to vacate stand 40715 Harare Township of stand 13687 Salisbury Township

measuring 1000 square meters, otherwise known as number 9 Vickers Road, Belvedere, Harare, forthwith, failing which the Messenger of Court shall evict them.

- iii. Defendant shall pay Plaintiff holding over damages at the rate of USD\$15 (or the Zimbabwe dollars equivalent thereto per day from 1 March 2019 to the date on which the defendant vacates the property.
- iv. Defendant shall pay interest on the holding over damages at the prescribed rate of 5% per annum from the date on which the damages became due to the date of full and final payment; and
- v. Defendant shall pay costs on a legal practitioner and client scale

Mr *Mutema* for the respondent took some points *in limine* and we heard the parties on these and reserved our ruling. This is it.

**Whether the relief sought by the appellant is incompetent**

Mr *Mutema* submitted that it is incompetent for the appellant to seek a substitution of the order of the court *a quo* in the manner she has done as the order of the court *a quo* simply stated it had no jurisdiction meaning that it did not entertain the matter. It was averred that the appropriate substitution would be to remit the matter back to the magistrates' court so that it entertains the matter first.

Furthermore, Mr *Mutema* explained that if this appellate court was to grant the order sought and grant eviction and holding over damages, this would have the effect of the appellate court usurping the right to hear the matter and decide on the merits as a court of first instance. Grounds of appeal 1, 2 and 3, it was argued, should have resulted in a prayer for remittal of the matter. It was contended that the grounds of appeal and the relief sought are irreconcilably contradictory on the strength of the case of *Tamanikwa & Anor v Zimbabwe Manpower Development Fund & Anor* SC 73/17.

In relation to ground 4 of appeal, it is argued that since the complaint is that the court *a quo* should not have dismissed the claim after finding that it has no jurisdiction but should have struck the matter off the roll, the appellant should have alternatively prayed for the striking off of the matter from the roll. The substitution with an order for eviction and granting of holding over

damages, in the circumstances, is alleged to be incompetent. We were referred to the case of *Sambaza v Al Shams Global Limited* SC 03/18.

Mr *Mutema* prayed for the upholding of the point *in limine* as he argued that due to the incompetent relief sought, the appeal is fatally defective and ought to be struck off the roll with costs on a higher scale.

Mr *Gama* submitted that the point taken is a red herring, frivolous and vexatious and the respondent is merely resorting to technicalities without citing the Rules he is relying on but seeking recourse in Supreme Court judgments that interpret r 29 of the repealed Supreme Court Rules which are not applicable here. He further averred that there is a proviso to r 95 of the High Court Rules, 2021 which provides that any failure to strictly comply with r 95 does not render the notice of appeal null and void as the appellant may seek condonation.

Furthermore, Mr *Gama* contended that it is false that the court *a quo* did not entertain the matter as it presided over a full trial after dismissing the application for absolution from the instance. We were referred to page 7 of the record and it was pointed out that the court *a quo* made five critical findings which include that Mr Shingirai Fabian sold the stand to the appellant.

Regarding ground of appeal 3, it was argued that the court *a quo* ought to have granted the relief sought and if the matter were to be remitted, what would be the directions given as the court *a quo* already had a full trial and disposed of the matter on the merits.

Reference was made to s 31 (1) (a) of the High Court Act in contending that the section sets out the powers of the High Court in an appeal and such powers are wide. What the appellant was said to be seeking is a substitution of this court's decision for that of the court *a quo* as all the information the court requires is before it. The grounds of appeal were alleged to therefore speak to the relief sought. Mr *Gama* submitted that he was ready to apply for condonation depending on the finding of the court, in relation to ground 4 of appeal.

In his reply, Mr *Mutema* contended that it is a basic principle that an appeal is an attack against the operative part of the decision and not the reasons for it. The operative part of the court *a quo*'s decision was pointed to and on p 5 of record it says:

**“IT IS HEREBY ORDERED THAT:**

1. Matter be and is hereby dismissed for want of jurisdiction.
2. Remedy of parties lies in the superior courts as this court has no powers to give decisions which have a declaratory effect.
3. Each party to bear own costs.”

It was pointed out too that though Mr *Gama* had said he stands ready to apply for condonation, there was no such application before the court. In any event, it was argued that a fatally defective notice of appeal cannot be amended. Mr *Mutema* persisted with the prayer that the matter be struck off with costs on the higher scale.

In the event that this court were to uphold the appeal, the relief sought by the appellant would be incompetent. The matter, in the operative part of the judgment was clearly disposed of on account of a lack of jurisdiction. At no point did the court *a quo* pronounce itself on the two issues referred to trial, being

- i. Whether the plaintiff is entitled to occupy part of subdivision of 9 Vickers Road held under title deed number 0007167/2018
- ii. Whether or not the defendant has any right to refuse vacating the same.

In fact, the court did not go into the merits of the matter and refrained to make a finding either way on these issues. All it did was to give a brief factual background and then proceeded to say it was called upon to resolve who the legal owner of the stand in issue was and doing so would result in an order with a declaratory effect. In ground 3 of appeal, the applicant avers that he proved all the requirements of *rei vindication* and for holding over damages on a balance of probabilities. The court *a quo* did not make such findings as to whether the requirements of *rei vindicatio* and holding over damages had either been proved or not.

It would be incompetent for this court to be invited through an appeal to impugn findings which were never made by the court *a quo* and substitute the court *a quo*'s findings on lack of jurisdiction with those which go to the merits of the case. That would be grossly improper.

Furthermore, the grounds of appeal, particularly grounds 1, and 2 are irreconcilably contradictory to the relief sought. In ground 1 the appellant impugns that the court found it had no jurisdiction after a full trial. In ground 2 the complaint is that the court *a quo* should not have found that it was required to issue a declaratory order and then proceed to decline jurisdiction. Where the finding is one of a lack of jurisdiction, it is inconceivable to then seek that that decision be substituted with one granting eviction and holding over damages, among other things. As stated, by Mr *Mutema*, competent relief would be to remit the matter back to the court *a quo*, if the appeal were to succeed so that the matter may be determined on the merits.

Regarding ground 4 of appeal, Mr *Mutema* correctly conceded that after finding that it had no jurisdiction, the court *a quo* should have struck the matter off the roll instead of dismissing it. Curiously, the appellant does not pray for substitution of the court *a quo*'s order of dismissal with one of striking off the roll. She wants an order of eviction and holding over damages.

Mr *Gama* sought to rely on s 31 (1) (a) of the High Court Act which provides as follows:

**“Powers of High Court on appeal in civil cases**

(1) On the hearing of a civil appeal the High Court—

(a) shall have power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require.”

Such powers can however, only be exercised where there is a valid notice of appeal before the court, not as *in casu*, where the relief sought is incompetent.

In *Freezwell Refrigeration Services (Private) Limited v Bard Real Estate (Private) Limited* SC 61/03, it was held that a fatally defective appeal cannot be condoned or amended. It can only be struck off. The notice of appeal in this case is therefore fatally defective and a nullity at law. For that reason it is incurably bad and beyond repair.

It is my finding that the relief sought is incompetent and this renders the notice of appeal incompetent and incurable. Nothing turns on the remaining grounds of appeal which could salvage this notice of appeal.

**Costs**

Mr *Mutema* prayed for costs on a higher scale for the reason that the appellant was alerted of the fatal defect in the notice of appeal but she did not withdraw the appeal causing the respondent to be put out of pocket and the court was inconvenienced by having to go through a 406 page record, unnecessarily.

Mr *Gama* made no submissions on the issue of costs. It is trite however that costs on a higher scale should be awarded only in exceptional circumstances where a party's conduct is mischievous and objectionable and the cause of all the costs. Factors such as dishonesty, absence of bona fides in conducting litigation or mere harassment of the defendant/ respondent are good grounds for awarding costs on a higher scale. The mere fact that the appeal was ill conceived and doomed to failure is not a justifiable basis for costs on an attorney and client scale. See *Faust Products (Pvt) Ltd v Continental Fashions (Pvt) Ltd* 1987 (1) ZLR 45 (HC), *Davidson v Standard Finance Ltd* 1985 (1) ZLR 173 (HC) and *Chioza v Sawyer* 1997 (2) ZLR 178 (SC).

Mr *Mutema* has not complained of any opprobrious conduct on the part of the appellant, a lack of *bonafides* or dishonesty. He has merely said that the appeal was doomed to fail and ill conceived. Costs on a higher scale have not been justified.

There is however no reason why costs on an ordinary scale should not follow the cause. Accordingly, the point *in limine* is upheld and I order as follows:

The appeal be and is hereby struck off the roll with costs

MUCHAWA J .....

WAMAMBO J, agrees .....

*Gama & Partners*, appellant's legal practitioners  
*Stansilous & Associates Law Firm*, respondent's legal practitioners