

JOHN CHIGAVAKAVA
versus
MUGIRIKI WAIRE

HIGH COURT OF ZIMBABWE
MAWADZE J & WAMAMBO J.
MASVINGO, 27 November 2019 and 10 March, 2021

Civil Appeal

R.C. Chakauya for appellant
R. Chavi for the respondent

WAMAMBO J: This is an appeal of a judgment of the Magistrate sitting at Zaka.
The order granted by the Magistrate reads as follows:-

“It is ordered as follows:-

- 1. Respondent be and is hereby ordered to keep and observe peace towards applicant.*
- 2. Respondent and all other persons acting through him or on his instructions are interdicted from remaining on Govo land for the purpose of threatening or interfering with the normal business and farming operations of applicant, his people, his heirs executors, administrators, successions or assigns*
- 3. Respondent and all other persons acting through him and on his instructions be and is hereby ordered and directed to cease any cutting of trees, clearing land for agriculture, constructing any structures and/or carrying out any form of agriculture north east of Veza school adjacent to Masiyemvura dip tank.*
- 4. Respondents to pay costs of this application on an ordinary scale.”*

The background to the matter is as follows: A boundary dispute arose between Govo and Rombai villages under Chief Nyakunhuwa in Zaka. The appellant and respondent are village heads in Rombai and Govo villages, respectively. The matter was brought to the attention of Chief Nyakunhuwa who gave his ruling on 31 August, 2018.

The ruling by Chief Nyakunhuwa can be summarised as follows:-

Chief Nyakunhuwa summoned the village heads of Govo and Rombai villages to attend a hearing on 25 June 2018. Headman Rombai did not attend. The Chief summoned the two headman to attend hearings on 27 June 2018 and 21 July 2018 and on both occasions headman Rombai failed to attend. The Chief in the company of the said two headmen proceeded to the District Administrator's Office where they learnt that Govo village was registered first before Rombai village. The Chief then ruled that Govo village head is entitled to the land in question and he knows the boundaries. Before the Magistrate appellant and respondent were respondent and appellant. In the application before the Magistrate respondent avers that flowing from Chief Nyakunhuwa's ruling his people are entitled to the land in question.

Further that the registration of Chief Nyakunhuwa's ruling has been delayed while appellant continues to encroach on his land clearing it, moulding bricks and growing crops.

Appellant in the meanwhile opposed the application. He avers that he has never encroached on respondent's land. His area is bound by a river stream as depicted on an annexed map. He has witnesses who were present when the boundaries were marked, 50 year before the dispute arose.

Appellant avers that Chief Nyakunhuwa's ruling is faulty because there is "no agreement reached" and that the ruling was not written in his presence. He avers that he never failed to attend the Chief's court but that in fact was never invited.

The court *a quo* found that the Chief's order was still operational. The appellant was advised that the District Administrator's Office has no jurisdiction to deal with appeals or reviews from the Chief court.

The court found that by virtue of the Chief's judgment respondent has the power to interdict appellant in respect of the disputed land. The Court further found that the application for an interdict and binding over to keep peace was properly before the Court.

The appellant before this Court raised two grounds of appeal couched as follows:-

- “1. *The Honourable Court a quo erred and grossly misdirected itself in making a finding that the now respondent was entitled to the relief of a binding over order and an interdict.*
2. *The Honourable Court a quo erred and grossly misdirected itself by failing to consider the legal requirements of an interdict which were not met in this matter.”*

Ms Chakauya for the appellant submitted as follows:-

There is a conflict between the Customary Law and Local Courts, Act [*Chapter 7:05*] and The Traditional Leaders, Act [*Chapter 29:17*]. She referred to section 16(1)(g) of the Customary Law and Local Court, Act and section 5(1) of the Traditional Leaders, Act [*Chapter 29:17*].

She pointed out that the Chief’s order was never confirmed by a Magistrate.

Mr Chavi agreed that there is a conflict between the Customary Law and Local Courts, Act and the Traditional Leaders Act. He further made reference to the Constitution of Zimbabwe.

He submitted that a Chief wears two hats a judicial one and another where he can solve disputes but not sitting as a Court. He was of the view that there is no legal requirement for a Chief’s judgment to be confirmed by a Magistrate.

Section 16(1) (g) of the Customary Law and Local Courts, Act [*Chapter 7:05*] reads on the pertinent portion as follows:-

“16 *Limits of jurisdiction of local courts*

(1) *A local court shall have no jurisdiction in any case —*

(a) where the claim is not determinable by customary law; or

(b)

(c)

(d)

(e)

(f)

(g) to determine rights in respect of land or other immovable property”

According to section 11 of the Customary and Local Courts, Act [*Chapter 7:05*] local Courts are Primary and Community Courts. A Primary Court is presided over by a headman or other person appointed by the Minister or by a person designated by the Minister.

A Community Court is presided over by a Chief or other person so appointed by the Minister or his designated officer.

The alleged apparent contradiction between section 16(1)(g) of the Customary Law and Local Courts, Act [Chapter 7:05] and section 5 of the Traditional Leaders Act, [Chapter 29:17] was resolved in the following manner by KARWI J in the matter of *Richard Chihoro v Rusere Murombo and Dorothy Rusike* HH 07/2011 at pages 3 - 4 as follows:-

“It seems to me that the learned Magistrate erred and misdirected himself in holding that the chief had no jurisdiction to entertain the matter considering the current circumstances of this case. It is my considered view that the chief only entertained a dispute relating to land and did not allocate land. This is so because the land in question was allocated way back. It is correct that section 16(g), of the Customary Law and Local Courts, Act provides that a local court shall have no jurisdiction in any case to determine its rights in respect of land or immovable property. It is equally true that section 5(1)(e) of the Traditional Leaders, Act provides the duties of chiefs

A chief shall be responsible within his area for discharging any function conferred upon him in terms of the Customary Law and Local Courts, Act. Section 5(1)(n) of the Traditional Leaders Act, specifically provides that the duties of Chiefs as :-

A chief shall be responsible within his area for

.....

(n) Adjudicating in and resolving disputes relating to land in his area.”

It is therefore clear that the Chief adjudicated and resolved a land dispute in his area in terms of the law. He did not allocate land. Allocating of land and resolving of a dispute are totally different things. Allocation of land in my considered view involves the granting of rights, interests and title of land to an individual, whereas the resolving of a land dispute involves the entertainment of a dispute between or amongst individuals over an already allocated piece of land. The appellant brought a dispute before the Chief for resolution not a request for allocation of land because his case was to the effect that his father had been allocated the land in the 1960s and he was paying dues to Council for the piece of land. The Chief made the ruling confirming that position after satisfying himself that the piece of land in question has indeed registered in the names of appellant’s father”

In the case at hand it is clear that the Chief did not allocate land but resolved a dispute relating to land. It is common cause that the land was already allocated to the respective village heads long back. The Chief was thus within his powers to act as he did.

It is however the manner in which the Chief resolved the land boundaries and how the trial Magistrate dealt with the application before him that deserves closer scrutiny.

This matter is one of a number emanating originally from the local courts that I have dealt with. It would appear that the judgments of the local courts are rarely translated into English. This raises a number of issues like a Judge who has little or no grasp of the indigenous language in which the local court's judgment will be expressed. Perhaps its high time the party who brings the matter on appeal to have the local court's judgment translated into English by a court interpreter.

In this case the local court's judgment is expressed in Shona and there is no English version accompanying it.

Be that as it may the judgment raises another issue. The issue is how the issues are resolved and expressed. In the instant matter the verdict of the local court was that Govo is the "owner" of the area and thus knows his boundaries.

The issue before the local court was not who was the "owner" of the area. It called for a proper analysis and findings on the boundary between Govo and Rombai villages if one considers the submissions of the parties before the Magistrate.

The judgment of the local court itself does not identify the issue or issues to be decided on. It narrates the various meetings held and the participants thereof. In the last paragraph it is held that Govo village was established first and the Govo village head knows his boundaries.

What boundaries those are is not established in the local court's judgment.

It is also unclear on what basis at law the applications for a binding over order and interdict were brought before the Magistrate.

The Chief's judgment certainly did not establish any of the detail as reflected in the draft order.

The order eventually granted by the Magistrate expands greatly from the findings of the Chief's Court.

The order starts off with interdicting persons from remaining on Govo land. Govo land was not established with any precision in the Chief's judgment. In paragraph 3 the Magistrate's order talks to respondent and others being interdicted from carrying out various activities "north east of Veza School adjacent to Masiyemvura dip tank".

It is unclear where Veza School and Masiyemvura dip tank came from. These are certainly not mentioned nor referred to in the Chief's judgment.

On what basis the application before the Magistrate was made is also not clarified.

The application could have been brought as a review or appeal in terms of sections 23 to 25 of the Customary Law and Local Courts, Act [*Chapter 7:05*]. The application is however silent on that score. Had the application been brought as either an appeal of review it would have been easy to determine whether the requirements were satisfied or not as they are clearly spelt out in sections 23 to 25 of the Customary Law and Local Courts, Act [*Chapter 7:05*].

In the circumstances it appears that not only was the Chief's judgment vague and did not deal with the issues raised but that the respondent used the wrong procedure and requested and obtained a much broader relief than that granted by the Chief's Court.

A consideration of S.I. 115 of 1991 the Local Court Rules 1991 may be of relevance.

Section 7 thereof provides that defendant should be "clearly informed of the nature and grounds of complaint or claim against him" and given a reasonable time to prepare his case. This does not seem to have been the case in the instant case. The Chief's judgment reflects that the defendant did not turn up on a number of occasions when summoned. However the same judgment reflects that on 16 August 2018 the Chief along with both village heads Gova and Romba visited the District Administrator's Offices on inquiry on the issues to be decided. There is no reflection that the defendant was told of the claim against him as per section 7 above.

The procedure followed both in the Chief's Court and in bringing the application before the Magistrate was most improper. It would appear to a large extent to mirror the improper procedures followed as fully expressed by KARWI J in *Richard Chihoro v Rusere Murombo and Dorothy Rusike* (supra). The learned Judge at page 2 said;

"In terms of Rule 10(2) of Statutory Instrument 115 of 1991 a successful party at a hearing at the Community Court may register the judgment at the Magistrates Court in terms of s 17 of the Magistrates Court, Act. Upon being issued with a writ of execution by the Clerk of Court at the Magistrates Court, such party may obtain execution on the judgment in all respects of the Magistrates Court. Unfortunately due to ignorance on the part of the appellant, who was then a self-actor and wrong legal advice of some bush lawyer in the form of the Clerk of Court who usurped the proper functions of a legal practitioner, this was not done in this case. This unfortunately led to serious bungling of the case much to the expense and delay in the finalisation of the case. The respondent was supposed to appeal against the order of the Chief. This was not done."

The above quotation has an apparent typographical error where it refers to section 17 of the Magistrates Court Act. The correct citation currently is section 18 of the Customary Law and Local Courts Act, [*Chapter 7:05*] which reads as follows:-

“18(1) where a judgment of a local court is not satisfied within the period specified by the court, the judgment creditor may request the clerk of the local court to issue a writ of execution against the property of the judgment debtor.”

In the instant case not only was the Chief’s judgment vague in its formulation it also did not specify the period in which he had to be satisfied.

Though formulated rather broadly it appears that the first ground of appeal is meritorious. The brief reasons are that it was improper to grant an order for binding over to keep peace and an interdict in the circumstances where the wrong procedure was used. Further the Chief’s order was formulated vaguely and difficult if not impossible to satisfy.

The appeal is therefore meritorious.

It is ordered as follows:-

1. The appeal be and is hereby upheld
2. The order by the court *a quo* be and is hereby set aside and substituted with the following;

The application for binding over order and an interdict be and is hereby dismissed with costs.

WAMAMBO J

MAWADZE J agrees.....

*Muzenda and Chitsama Attorneys, appellant’s legal practitioners
Ross Chavi Law Office, respondent’s legal practitioners*