EDWIN MOYO
versus
LIVINGSTONE MUZIVI

HIGH COURT OF ZIMBABWE
UCHENA and MWAYERA JJ
HARARE, 6 and 19 November 2014

Civil Appeal

Appellant in person
Respondent in Person

UCHENA J: The appellant and the respondent are neighbours. They were resettled at Constone farm. The appellant is an A2 farmer while the respondent is an A1 farmer. The pieces of land allocated to them are adjacent to each other.

The appellant issued summons in the magistrate's court seeking an eviction order against the respondent who he alleged was building on the piece of land allocated to him. The trial magistrate, after hearing the appellants' evidence, heard the respondent's witnesses evidence, before the appellant had closed his case. She after hearing two witnesses for the respondent absolved the respondent from the instance.

The appellant appealed to this court seeking the setting aside of the magistrate's decision on the grounds that;

1. The magistrate erred by not giving him an opportunity to call Ministry of Lands officials whom he had asked the court to *subpoena*.
2. That she erred by not giving the defendant a chance to testify
3. That the magistrate closed the defendant's case in his absence.
4. That the magistrate neglected her duty to assist the unrepresented appellant.
5. That the magistrate misdirected herself when she found that the appellant had not proved his case when he had produced a map.

6. That the magistrate misdirected herself when she found that he had not proved his case when he had led adequate evidence tilting the scale on a balance of probabilities in his favour.

At the hearing of the appeal both parties confirmed that the case was postponed to the 21st October 2013, after the appellant's evidence. Both parties were, asked to bring their witnesses. When the case resumed on 16 December 2013 the defence led evidence from two of its wittiness and closed its case. The magistrate then absolved the respondent from the instance. Both parties agree that the appellant indicated that he wanted to call Ministry of Lands officials as his witnesses and that he wanted to *subpoena* them as they were not willing to come without being subpoenaed as they were busy.

The above confirms that the trial magistrate erred when;

1. She did not give the appellant an opportunity to close his case.
2. When she allowed the defence case to be opened before the plaintiff's case had been closed.
3. When she absolved the respondent from the instance when the appellant had not finished leading his evidence.

I am satisfied that the above mentioned irregularities, justify the upholding of the appellant's appeal. If the appellant still had confidence in the trial magistrate it would have been appropriate to set aside the magistrate's decision and order that the appellant be given an opportunity to call his witnesses. The appellant however believes that the magistrate is biased against him. The manner in which she conducted the trial justifies his apprehension. When a reasonable litigant has a reasonable apprehension of bias the judicial officer should, recuse herself. (See the case of *Matapo & Others* v *Bhila No & Another* 2010 (1) ZLR 321 (H).) We are in this case satisfied that the appellant's apprehension of bias is justified by the irregularities committed by the magistrate during the trial under appeal. It is only fair that the proceedings in the court *a quo*, be set aside and a trial *de novo* be held before a different magistrate.

This appeal was occasioned by the magistrate's failure to properly handle the trial. It is not fair that either-party be ordered to pay the costs of this appeal.

In the result it is ordered that;

1. The appellant's appeal be and is hereby upheld.

2. The decision of the court *a quo* and the proceedings which preceded it be and are hereby set aside.
3. The case shall be heard de novo before a different magistrate.
4. Each party shall bear his own costs.

MWAYERA J agrees ----------