GERALD CHIRENJE
versus
MARSHAL JONGA

HIGH COURT OF ZIMBABWE
TSANGA & CHINAMORA JJ
HARARE, 5 October & 29 February 2023

Civil Appeal

F Majome, for appellant
Z Dumbura, for respondent

TSANGA J:

THE BACKGROUND FACTS

This appeal is against the decision of the Concession Magistrates Court which was sitting as an appeal court against the decision of Chief Negomo. In the Chief's Court the respondent herein had approached the court complaining that appellant was annexing portions of his land and allocating it to other people. The Chief found in the respondent's favour concluding that he was within the confines of the land that had been allocated to his grandmother and which had passed on to the respondent when his own father died. Displeased with this verdict, the appellant had approached the magistrate court to hear the matter de novo.

Certain facts were not in dispute. The respondent's grandmother Mary had indeed been given a piece of land within a family context when she came back from Zambia in 1983. This had been done through Silas Chirenje who was then the village head and did so acting on behalf of the Chief. Mary had two sons and a daughter. Both sons are now late and the respondent is the offspring of one of the sons Ranganai who died in 2019.

According to the appellant at whose instigation the matter was then re-heard with him as defendant and the respondent as plaintiff, the land portion allocated to Mary raised a boundary dispute. This was particularly on the extent of the land that was initially allocated to her whose boundaries the appellant maintained the respondent was over reaching. He was also said to be selling the land to non-family members- an accusation both sides levelled with equal measure at each other. Thus in the court *a quo* the appellant's position was that the respondent

retains and is confined only his to legitimate portion of land and stops 'selling' any other land beyond it in Mupfunya Village in Chiweshe Communal Lands.

In hearing the matter *de novo* the magistrate found in favour of the respondent ruling that the latter was within the boundaries of land allocated to him through his grandmother. The lower court considered the evidence placed before it and concluded that from none of the witnesses who testified on either side could the issue of boundaries be determined. However, the magistrate did give weight to the evidence of the village head, Elliot Gatsi, who indeed said to his knowledge, the land in question which the respondent was said to have parcelled out fell within the ambit of land allocated to his grandmother Mary.

At the conclusion of the evidence in chief, cross examination and re-examination of the appellant's last witness's (who was the defendant in the court below) his lawyer had then asked for an inspection *in loco*. The magistrate had ruled that the application was ill-timed as it was also made after the plaintiff had given evidence and would not be able to be cross examined. In the main judgment the magistrate also referenced the fact that the matter had been deliberated in the Chief's Court. The court's remark was also that at law the Chief was privy to the boundaries in dispute. In the absence of the evidence the court resolving the boundary dispute she had remarked the Chief's judgment was reasonable "as he is the one on the ground who knows the land better".

GROUNDS OF APPEAL

The grounds of appeal from the court *a quo's* finding are as follows:

1. The court *a quo* misdirected itself in relying on the judgement of Chief Negomo being appealed against, regarding the boundaries of the disputed land, on the basis that it had no other means of appreciating such boundaries, yet it had refused to conduct an inspection *in loco* to establish the same, and had a duty to scrutinize that very issue.
2. The court made a misdirection in finding that the respondent was occupying land within the confines of what his late grandmother Mary Munjeri had been allocated.
3. Having admittedly failed to appreciate the boundaries of the land in dispute, the court misdirected itself in failing to remit the matter to the court of Chief Negomo for the verification of the boundaries in dispute.
4. The court erred and misdirected itself in arbitrarily selecting the evidence of:

a. only Elliot Gatsi one of the village heads who testified as the sole authority of land allocation while discarding the evidence of the other village head Abiot Chirenje.
b. Elliot Gatsi only for the purpose of supporting its unjustified opinion of the correctness of the extent of respondent's occupation while arbitrarily discarding his evidence of the respondent's 'sale' of State land.

5. The court misdirected itself in misconstruing the dispute as a trial of 'sales' of State land yet that issue was only corroborative of the unlawful expansion of respondent beyond his inheritance, being a profit motive.
6. The court also erred in finding that the respondent was not unlawfully purporting to sell State land, yet witnesses identified some of the illegal 'buyers'; to such an extent that the court contradicted itself in acceding that village head Elliot Gatsi gave evidence that respondent was 'selling' State land.
7. In all circumstances the court judgment was so unreasonable no reasonable court properly applying its mind to the facts and the law would have reached the same conclusion of law and facts.

The order sought is as follows:

1. Appeal be and is hereby granted
2. The respondent be and is hereby ordered to confine himself to the portion of land that his late grandmother was allocated.
3. Any allocations by respondent outside the law and the village head's authority are nullified and the relevant occupiers vacate within twenty one (21) days.
4. For the purpose of effecting paragraphs 3 and 4 the matter is remitted to the Court of Chief Negomo for the establishment of the boundaries of the land originally allocated to the respondent's late grandmother Mary Munjeri.
5. respondent be and is hereby ordered to pay appellant's costs on a legal practitioner and client scale.

THE LEGAL SUBMISSIONS

Ms *Majome* who appeared for the appellant, stood by her heads of argument touching on the above grounds of appeal. Whilst acknowledging that the Chief had already conducted an inspection *in loco*, however, she emphasised that it was nonetheless still the duty of the court to understand the matter and that the court should have decided to conduct an inspection *in*

loco, mero motu. Mr *Dumbura,* on the other hand, argued that there was no way it could be said that the decision of the lower court was unreasonable. More particularly, he highlighted that the magistrate's issue was not with the inspection *in loco* itself but the stage at which it had been requested. The application for an inspection *in loco* was said to have been made when the witnesses were no longer there. Since an inspection *in loco* is part of evidence, his point was that it should follow the rules of evidence.

THE LEGAL FRAMEWORK

The objectives of an inspection are crystallised thus:

> "The object of an inspection or view is to see the place or thing or to hear or otherwise apprehend it through the senses, or as has been expressed to learn certain facts from an inspection."[1]

In terms of s24 (2) an appeal from the community court lies with the magistrates court which rehears the case. It is, in other words, a trial *de novo* meaning it is a fresh trial as if no trial was ever held. As such, it is within the ambit of a magistrate, if so needed, to conduct an inspection *loco*. Whilst it is trite also that the court can adjourn its proceedings in order to conduct an inspection *in loco,* the timing is crucial. As highlighted in *Evans Mulauzi* v *Rusape Town Council & Ors* HMT 58/19, "an inspection *in loco* remains at the discretion of the court, it is not automatic that when a litigant requests for an inspection such an application is granted".

The authors Herbstein and Van Winsen[2] in their book on Civil Procedure state the following regarding inspections *in loco* in general and their timing;

"Either party may apply for the holding of an inspection *in loco* at any time during the hearing of the action. It lies within the court's discretion to grant or refuse the application, and if the application is granted, the court may decide at what stage to hold the inspection. The inspection can be held on the initiative of the court even if neither party has applied for it. The following remarks of Feetham J (Grindley-Ferris AJ concurring) in *Goldstuck* v *Mappin & Webb Ltd* were made in respect of inspections by magistrates, but they appear to be of equal application to the High Court:

> 'It seems to me inadvisable, as a general rule, that a magistrate should hold an inspection at the close of a case after all the evidence and arguments have been heard, because, when an inspection takes place at that stage, the parties do not become aware of the nature of the observations made by the magistrate until judgment is delivered. It seems to me that the preferable procedure is that any necessary inspection should be made at an earlier stage, while the case is still proceeding, so that the Court may intimate to the parties the results of any observations made, and the parties may have an opportunity either of offering evidence to correct such observations if they see fit to do so, or at any rate of arguing their case in the light of any intimation given by the Court as to the result of such observations.' (My emphasis)

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[1] See S .B Kitchin *Inspection in Loco* (1940) 57 (3) South Africa Law Journal 243-249 in which he points to *Wagenaar v. du Plessis,* 1931, A.D. 83) on these basic objectives.

[2] Herbstein and Van Winsen *The Civil Practice of the High Courts* of South Africa 5th Ed, 2009 Volume 1 (Juta: at p900

ANALYSIS

1. Whether the court *a quo* misdirected itself in failing to conduct an inspection *in loco* and relying on the judgement of Chief Negomo on the boundaries

Materially in dismissing the application for an inspection *in loco* the magistrate stated as follows:

> "It is the court's finding and conclusion that the stage at which the application was made is improper. What is desirable is to do it at the initial stage so that whatever evidence is gathered at the inspection *in loco* is cross examined when the plaintiff gives evidence. At this stage it can no longer be done as the application has been made at the judgment stage. If issues arise at the inspection *in loco* who will lead evidence in court, and how it to be cross examined."

The record indeed confirms that the application for an inspection *in loco* was only made after the defendants fourth and last witness had given evidence and had been cross examined and re-examined. This was despite the fact that two of the respondent's witnesses as plaintiff, had been asked by appellants counsel if they would be willing to show the court the land in question and they had answered affirmatively yet no application was made at that time for adjournment so that the inspection could be done. By the time the appellant's counsel sought to apply for an inspection *in loco* the respondent and his witnesses had long since given their evidence and the last of the appellant's own witnesses had finished their evidence and had been cross-examined and re-examined. It is trite that to avoid prejudice, both parties, meaning their witnesses and their counsel included must be present at an inspection *in loco*. The details of the inspection must relate to the oral evidence given or to be given or the facts to be proved. The Magistrate cannot thus be faulted in holding that the timing of the application was out of sync with the standard procedures for an inspection *in loco*.

The magistrate did not just rely on Chief Negomo's findings because the court refused an inspection *in loco*. In the absence of the evidence from either side failing to resolve the issue of boundaries, it was in that context that the trial court had referred to the Chief's decision as being reasonable and the Chief being more familiar with the boundaries. After all, the record itself shows that the witnesses made various references to the Chief's attendance and it was in this context that the magistrate then made the remarks that the Chief is the one on the ground and knows the land better. The ground of appeal lacks merit and is dismissed.

2. Whether the court misdirected itself in finding that the respondent was occupying land within the confines of what his late grandmother had been allocated.

The court in its ruling indeed placed weight on Elliot Gatsi's evidence that the land in question which the respondent was occupying fell under the land allocated to Mary. Elliot Gatsi is the head of Gatsi Village. From the record, his rough estimate was that the piece of land given to Mary was at least 2 hectares as appears at page 120 of the record where he was asked to explain the small piece of land and his answer was as follows"

> "It could accommodate a house and a small portion of land for farming. In my eyes it is not more than 2 hectares."

Materially, Elliot Gatsi's evidence seemed to point to the reason for repossession being that the land was too big for the respondent. Even if the exact boundaries were not determinable what the record shows is that the respondent's witnesses had put the land at between 3 and 3.5 hectares. This is in contrast to appellant's counsel own line of cross examination throughout the record where she had sought to put across that the land allocated to Mary was at most an acre if not less. If indeed the village head, Elliot Gatsi, estimated it at two hectares one cannot find fault with the magistrate's finding that the respondent must have indeed been occupying land which was within the confines of that which was allocated to his late grandmother. There is a vast difference between the land being an acre and it being a minimum of 2 hectares. There is no merit in this ground of appeal. The court's finding that the respondent was within the confines of the land allocated to his grandmother was not all unreasonable. The ground of appeal is accordingly dismissed.

3. Whether the court misdirected itself in failing to remit the matter to the court of Chief Negomo for the verification of the boundaries in dispute.

Whilst it is true that the court concluded that it was unable to ascertain the exact boundaries from the evidence of witnesses on either side, whether the magistrate should have remitted the matter to the Chief's court for verification of the boundaries is an issue that is best spoken to by the evidence in the record itself regarding what the witnessing themselves had to say on the Chief's involvement. For instance, at page 66 of the record, when Alice Jonga gave evidence on behalf of the respondent herein, she was asked to comment on the verdict of the Chief. She indicated that Chief Negomo had gone to the farm and questioned why proceedings were being instituted against grandchildren when none had been instituted against Ranganai, Mary's son. Further, on page 81 when Pilemon Gatsi also gave evidence on behalf of the respondent, in being cross examined he was asked if he maintained that the Chief had gone to piece of land. He too confirmed that the Chief went with Elliot Gatsi. There is again also reference to the Chief's attendance on p 93 of the record when the appellant was giving his

evidence-in-chief. He alluded to the fact that the Chief gave instructions and mandated the involvement of Elliot Gatsi and Albert Chirenje who are both headmen.

In essence, there is evidence that the Chief did not decide in a vacuum that the land being occupied belonged to Mary's grandmother. In other words, there is no basis for the assertion that the matter was one that should have been remitted back again for the boundaries to be ascertained when the very same Chief had engaged the parties and local leadership and concluded that "the land in contention belonged to Mary". What is also evident from the record is that the appellant wanted the respondent to be confined to only the land with the homestead as he was now occupying part of the respondent's land. The family's reasons why Mary had left the village need not bog down this court but were also part of the reasons why the appellant wanted the land back. The magistrate there did not err as in not remitting the matter based of the record.

4. Whether the court erred in arbitrarily selecting the evidence of one village head over that of another

This appeal ground delves on findings of fact. The legal position is that appeal courts do not generally interfere with factual findings unless they are so unreasonable that no person applying their mind to the facts would have arrived at such a decision. See *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) The lower court's findings do not fall within the ambit of unreasonableness and as such this appeal court has no basis for interfering with them. As highlighted in *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (SC)

> "It is not enough that the appellate court thinks that it would have taken a different course from the trial court. It must appear that some error had been made in exercising the discretion, such as acting on a wrong principle, allowing extraneous or irrelevant considerations to affect its decision, making mistakes of facts or not taking into account relevant considerations."

5 & 6: Whether the court misdirected itself in misconstruing the dispute as a trial of 'sales' of State land when that issue was only corroborative of the unlawful expansion

Grounds 5 and 6 are closely related. In one breath the complaint is that the court erred in making the issue about sale of state land and in the next breath the complaint that the court erred in not finding that there was a sale of state land. The court below distilled that main issue firstly, as whether the respondent had annexed a piece of land beyond the allocated portion and secondly, that he was selling pieces of land to people. The respondent had initially approached the Chief's Court on the basis that it was the appellant who had annexed his land and was selling to other people. The judgment itself shows that the bulk of it addressed the issue of

boundaries. The issue of lack of evidence on purported sales is only addressed towards the end of the judgment. It can hardly be said that the court misconstrued the dispute as being that of a sale of state land. In fact the record shows that the line of cross examination by appellant's own counsel coagulated issues as to what the real dispute was about. Again, there are no merits in these two grounds of appeal as the court addressed the issue of whether the respondent was encroaching on land not given to his grandmother. Both parties accused each other of selling land.

7. Whether the court judgment was unreasonable to merit interference

As already stated there was nothing so manifestly unreasonable in the court reaching a conclusion that the respondent was entitled to continue occupying land which had been given to his grandmother some 39 years earlier.

The respondent has sought that the matter be dismissed with costs on a higher scale. The appellant was entitled as of right to appeal to assess the lower court's findings. Costs on a higher scale are not justifiable.

Accordingly:

The appeal lacks merit and is dismissed with costs on an ordinary scale.

CHINAMORA J:……Agrees

Jessie Majome & Company, appellant's legal practitioners
Zimudzi and Associates, respondent's legal practitioners