ROPARASHE NYORE
versus
SAFIRIYO MAPHOSA

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 26 May and 14 July 2022

Civil Appeal

K Masiyenyama, for the Appellant
Respondent in person

MAXWELL J: This is an appeal against a decision of the lower court dismissing an appeal against an order by the Community Court. The appeal before the lower court was in terms of s 24 (1) of the Customary Law and Local Courts Act [*Chapter 7:05*]. In terms of that provision, the Magistrates Court dealing with the appeal must rehear the matter.

BACKGROUND

The Appellant appealed to the lower court against the decision of Chief Chinamora on a dispute relating to the occupation and use of a piece of land situated in Chirimuuta 2 Village, Domboshava. The Chief ruled in favour of the Respondent. Appellant approached the lower court on appeal. The matter was heard *de novo* and after hearing the witnesses, the appeal was dismissed. Appellant was aggrieved and noted an appeal in this court.

GROUNDS OF APPEAL

Appellant noted an appeal on the following grounds:

1. The learned Magistrate grossly misdirected herself on the law when she treated the matter as an ordinary appeal when she was supposed to rehear the matter afresh as provided for in terms of s 24 (2) of the Customary Law and Local Courts Act [*Chapter 7:05*].
2. The learned Magistrate grossly misdirected herself on the law by failing to consider the legal manner through which communal land ought to be allocated.

3. The learned Magistrate erred at law when she concluded that the Chief did not err in his decision to confirm allocation of the piece of land in question to the Respondent when it is clear that such allocation was unprocedural and illegal.
4. The learned Magistrate erred at law by drawing conclusions on what took place in the proceedings before the Community Court when no record of such proceedings was placed before her.
5. The learned Magistrate grossly erred at law and on the facts when she failed to take into consideration the fact that Appellant's family have been traditionally in occupation of this piece of communal land, yet Respondent has no connection whatsoever with the piece of land in dispute.
6. The learned Magistrate misdirected herself by placing over reliance on the evidence of Martin Daniel when his testimony was heavily challenged.

Appellant prayed for the overturning of the judgment of the lower court and that an order be given declaring him to be the lawful inhabitant and occupier of the land in question and that Respondent be ordered to vacate the land within seven days. Appellant also prayed for costs of suit.

SUBMISSIONS BY THE PARTIES

Appellant argued that even though witnesses were called in to testify in the lower court, the decision was based on what transpired in the Chief's Court. He pointed out that in the Chief's Court, his right to be heard had been violated and the lower court ought not to have relied on such proceedings. Appellant further argued that the lower court paid a deaf ear to his challenge to the legality and manner through which Respondent claimed to have been allocated the communal land. According to him, only the Rural District Council of the concerned area had the jurisdiction to allocate communal land and the traditional leaders' powers are only limited to giving recommendations to it. Appellant also argued that the land in question was occupied by his lineage and the Village Head took it away and allocated it to the Respondent yet the Village Head does not have authority to allocate communal land. Appellant submitted that the lower court made conclusions on what transpired in the Chief's Court that 15 witnesses had been randomly picked and 12 supported Respondent, in the absence of a record of proceedings. He pointed out that he had disputed the basis of the evidence of the witnesses as they had settled in the village after 2005

and therefore did not know the history of the land prior to 2005. Appellant faulted the lower court for disregarding the fact that his family had traditionally been in occupation of the land. According to him, if the letter and the spirit of the Communal Land Act [*Chapter 20:04*] are to be followed, he has the right to occupy the land in question. Appellant also submitted that the reliance by the lower court on the evidence of a witness whose capacity in which he testified was challenged was a miscarriage of justice.

Respondent submitted that a full trial in which evidence was led by both parties was conducted in the lower court, after which the court assessed the evidence and arrived at the decision it gave. Further, that no procedure was offended in the handling of the matter. Respondent also submitted that land ownership under the customary law system entails the idea that land is owned by the whole community and is at the disposal of the individuals of that community under the umbrella term of communal ownership. He submitted further that under that communal ownership, members are not free to dispose of their rights in land without authorization from the relevant authorities and that chiefs and headmen are the custodians of the communal land. Respondent asserted that the allocation and distribution of the communal land is the sole responsibility of the chiefs and headmen, working hand in glove with the Rural District Council.

Respondent pointed out that in order to ascertain the ownership of the disputed piece of land, the Chief called 15 members of the community of whom 12 confirmed that the land belongs to him, one member requested to be excused and only two were in favour of Appellant. Respondent further pointed out that Appellant has always been aware that the land was allocated to him but never raised any objection from 2005 until 2019. He submitted that he used to hire the Appellant to work on the same piece of land and if Appellant had a right to the land, he would have approached the Village head in 2005 when the allocation was done.

ANALYSIS

Mr *Masiyenyama* conceded that the complaint in the first ground of appeal that the lower court ought to have reheard the matter was without merit as the procedure followed was proper. He however sought to argue that there was no record from the chief's court before the lower court. The first ground of appeal was not challenging the absence of the chief's court's record. It therefore follows that on the concession made, the first ground of appeal does not succeed. In the second and third grounds of appeal, Appellant criticizes the lower court for not considering the legal

manner through which communal land ought to be allocated. He argued that the Chief's confirmation of the allocation was wrong as the allocation was unprocedural therefore the lower court erred in upholding the decision of the Chief. As submitted by Respondent, communal land is allocated by chiefs and headmen in conjunction with the Rural District Council. Even though Appellant argued that only the Rural District Council for the area had jurisdiction to allocate communal land, there was no evidence that the Rural District Council did not approve of the allocation in question. In any event, Appellant was not alleging that the land was allocated to him or to his family by the Rural District Council for the area. Respondent's submission that after the allocation her name was entered into the register which was submitted to the Rural District Council for tax payments through the traditional leadership confirms that there was substantial compliance with the requirements of the law. Moreover, the Rural District Council did not complain about the allocation. There is no merit in the second and third grounds of appeal.

In the fourth ground of appeal, Appellant faults the lower court for drawing conclusions on what took place in the Chief's court in the absence of a record of proceedings. From his heads of argument, it is clear that Appellant took issue with the finding of the lower court that 15 witnesses were called in the Chief's court. He stated in para 18 of his heads of argument:

> "It was therefore not a finding of fact that in the community court witnesses were called in and testified as the principles of natural justice were not adhered to and the court aquo drew conclusions from the air without any record being placed upon it."

In this ground of appeal, Appellant clearly demonstrates that his appeal is not *bona fide.* On p 14 of the record, Appellant was giving evidence-in-chief being led by Mr *Masiyenyama*. The following appears:

> "Q. The Respondent stated that at the proceedings before chief Chinhamora 15 witnesses were called and from these 12 testified against you?
> A. Yes, they testified. I have taken oath. However, from all those 15 witnesses one of them stayed there before my father."

Appellant cannot turn around and say the lower court drew conclusions from the air when he admitted before it that 15 witnesses were called in the Chief's court. The law relating to admissions is settled in this jurisdiction. Section 36 of the Civil Evidence Act [*Chapter 8:01*] provides that:

> "(1) An admission as to any fact in issue in civil proceedings, made by or on behalf of a party to those proceedings, shall be admissible in evidence as proof of that fact, whether the admission was made orally or in writing or otherwise."

Subsections 3 and 4 of the same section state:

> "(3) It shall not be necessary for any party to civil proceedings to prove any fact admitted on the record of the proceedings.
>
> (4) It shall not be competent for any party to civil proceedings to disprove any fact admitted by him on the record of the proceedings."

The record of the proceedings before the Chief was therefore not necessary in the circumstances. This ground of appeal also lacks merit.

In the fifth ground of appeal Applicant faults the lower court for not considering that his family had been traditionally in occupation of the land and that Respondent has no connection with it. Appellant submitted that the lower court found it common cause that his uncle occupied the land prior to its allocation to Respondent yet it did not bother to establish the period under which his uncle occupied the land. Appellant's criticism ignores the fact that a witness testified that his uncle was given the land to use temporarily. The witness further testified that Appellant's uncle did not stay for long at the land, and that he used it for less than a year. In the absence of evidence to the contrary, the lower court cannot be faulted. In the sixth ground of appeal, Appellant criticizes the lower court for relying on the evidence of Martin Daniel which evidence Appellant submitted was heavily challenged. Appellant was impugning findings of fact and credibility made by the court *a quo*. It is trite that courts of appeal are very reluctant to disturb findings which depend upon credibility. In *Susan Rich* v *Jack Rich* SC 16/01, EBRAHIM JA cited with approval the remarks in Hoffman and Zeffert, *The South African Law of Evidence*, 4th ed, at p 489 that:

> "There are no rules of law which define circumstances in which a finding of fact may be reversed, but as a matter of common sense the appellate court must recognize that the trial court was in some respects better situated to make such findings. In particular, the trial court was able to observe the demeanor of the witnesses, and courts of appeal are therefore very reluctant to disturb findings which depend upon credibility."

In any event, the question is whether or not the lower court's reliance on the evidence of Martin Daniel can be described as so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion. See *Hama vs National Railways of Zimbabwe* 1996

(1) ZLR 664. No facts have been submitted to establish that the decision was outrageous. There is no merit in this ground of appeal as well.

DISPOSITION

The appeal therefore fails. The following order is made.

The appeal be and is hereby dismissed with costs.

TSANGA J, agrees…….

Chikwangwani Tapi Attorneys, appellant's legal practitioners