ALEXIO KUFAHAKUNAMEMBA MUROMBO
versus
MUCHANETA ELIZABETH MWAMBO

HIGH COURT OF ZIMBABWE
MWAYERA, MUNANGATI-MANONGWA JJ
HARARE, 25 July 2017 and 5 October 2017

Civil Appeal

F. Mahere, for the appellant
Ms *V. Sigauke,* for the respondent

MWAYERA J: On 23 June 2010 the Magistrates Court granted judgment for sharing of property by the parties whose customary law union had come to an end. The judgment was not timeously executed and by operation of law the judgment become superannuated. On 23 June 2016 the respondent applied to the Magistrates Court for revival of the judgment which application was granted.

The judgment of the court *a quo* reviving the judgment is what prompted the appellant to approach the court on appeal.

The appellant raised three grounds of appeal as follows:

"2.1 The court *a quo* grossly erred in reviving judgments which were beyond the court's jurisdiction.

2.2 The learned magistrate erred in failing to consider the court's power to set aside judgments void *ab origine*

2.3 The learned magistrate fell into serious error and misdirected herself in granting the order as amended when those amendments were not part of the initial judgments whilst admitting in her reasons the impropriety thereof."

I must mention at the outset that the last ground of appeal was abandoned during oral submissions as there clearly was no amendment effected to the order.

The history of the matter as discerned from the record, heads of arguments and oral submissions can be briefly summarised as follows: Upon termination of their customary union the respondent obtained two judgments as follows, one for distribution of the parties' property and the other for leave to execute pending appeal by the appellant who noted an appeal against

the decision of the court *a quo* although she did not pursue the appeal. The appellant in turn did not execute the judgment until such a time that it superannuated. In June 2016, the respondent who considered that his children were majors and staying abroad then obtained an order for revival of the judgment in terms of s 20 (4) of the Magistrates Court Act [*Chapter 7:10*]. The section reads:

> "No writ of execution shall be issued after the lapse of two years calculated from the day on which judgment is pronounced, unless the said judgment has first been revived but writs of execution once issued shall remain of force until such time as the judgment has been satisfied."

Section 20 (5) states:

> " A judgment may be revived either in the court in which it was pronounced or in any other court having jurisdiction in respect of the judgment debtor."

It is clear once a judgment has superannuated its revival upon application is at the discretion of the court. The court *a quo* exercised its discretion and revived the judgment. It is settled the court is empowered to exercise its discretion to either revive or refuses to revive a superannuated judgment.

In the case of *Cooper* v *The Van Rhyn Gold Mines Estates Limited and Mining Commissioner of Boksburg* 1908-TS698 the court exercised its discretion in an application for revival of superannuated decision. It was stated

> "It is trite law that court has the discretion to either abide to an application for revival or to refuse it. A court will not revive an old judgment if, on the facts before it, such revival would be futile, will only lead to useless litigation and would not give the applicant any remedy."

In this case the court *a quo* revived the judgment which would effectively give the then applicant, now the respondent a remedy to evict the appellant. The court *a quo* had before it an application for revival of its own order and had to consider whether or not a real remedy would be obtained by the revival in the circumstances. Given the facts of the matter the decision of the court *a quo* cannot be said to be unreasonable and improperly reached, as to warrant interference. It is apparent from the record that the court *a quo* properly applied its mind to the facts and circumstances of the matter presented and found no basis for denying revival of the judgment. It is important to highlight that there is a clear difference between appealing against the judgment entered in 2010 and appealing against revival of the judgment granted by the court *a quo* in 2016. What falls for scrutiny in the latter judgment is whether or not the court *a quo* improperly and unreasonably exercised its discretion when it revived the superannuated judgment. Once it is established that the factual findings of the court *a quo* were reasonable and the conclusion well supported by facts and law the appellate court will not interfere with

the court a *quo's* decision as a matter of course. The court *a quo* had issued a judgment in 2010 and the same had superannuated by operation of law. When the applicant sought revival the explanation tendered for the delay that he was waiting for the parties' children to be majors before evicting the mother was viewed as reasonable.

I am alive to the argument presented by the appellant that the court *a quo* ought not to have revived the superannuated judgment because it was void *ab origine* given the value of the property in question the court *a quo* had no jurisdiction to entertain the matter. Indeed the magistrate court is a court created by statute and as such operates within the realms of the statute. The jurisdiction of the court is spelt out clearly in s 11 of the Magistrates Court Act [*Chapter 7:10*] which states "every court shall have in all civil cases were determinable by the general law of Zimbabwe or by customary law, the following jurisdiction

"a. ---

b. with regard to causes of action in all actions other than those already specified in this paragraph where the claim or the value of matter in dispute does not exceed such amount as may be prescribed in the rules: provided that the court shall have jurisdiction to try any action on case referred to in subparagraph (i), (ii) (iii) or (vii) otherwise beyond its jurisdiction in terms of this paragraph if the defendant has consented thereto in writing."

The jurisdiction of the magistrate court in 2010 was at most pegged at $10 000 or for any amount provided the parties gave written consent. The record of proceedings p 22 the original judgment which was revived by the court *a quo* shows a finding by the court that the parties consented to the jurisdiction of the magistrate court. The parties who were customarily married dissolved their union and then sought sharing of property. The court *a quo* made a finding that the appellant was to vacate the property in question No. 26 Wedy Drive Belvedere Harare as there was no basis for the appellant holding over the property since she had not contributed to the acquisition and there was no unjust enrichment which would occur following her eviction. In any event it is worth noting that what was sought before the court *a quo* was eviction and what is central is value to occupier as such the question of jurisdiction does not arise. Assuming the value exceeded the court's jurisdiction, that was overridden by the consent or submission to jurisdiction by the parties. Given the original judgment on eviction and given the consent by the parties to the court's jurisdiction the issue of the judgment being void *ab origine* does not arise. The respondent despite having the judgment and a further judgment for execution pending appeal did not execute judgment till it superannuated. The approach to the court *a quo* was for revival of the original judgment. The respondent's reasons for not

executing earlier given the parties had children who were still minors at the time is understandable more so, when one considers that at the time the application for revival of the order to facilitate eviction of the appellant the said children were majors living in the United Kingdom. The reasoning of the court *a quo* in exercising its discretion to revive the judgment cannot be faulted.

The judgment so revived was a valid judgment. The two grounds of appeal centered on jurisdiction tainting the validity of the original judgment cannot be sustained more so considering that what is at stake here is eviction and only value to occupier arises. The value to occupier in the circumstances could not exceed the magistrate's court monetary jurisdiction of $10 000-00, such that the question of jurisdiction does not arise. In the premises the appeals lacks merit.

Accordingly it is ordered that: The appeal be and is hereby dismissed with costs.

Tendai Biti Law Firm, applicant's legal practitioners
Mbidzo Muchadehama & Makoni, defendant's legal practitioners