

MANGO ISHMAEL & 11 OTHERS
versus
COMMUNITY TECHNOLOGY DEVELOPMENT ORGANISATION

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA & MWAYERA JJ
HARARE, 20 July 2017

CIVIL APPEAL

T Nyakumba, for the appellants
Ms S Banda, for the respondent

MUNANGATI-MANONGWA J: The respondent in this case approached the Magistrates Court seeking a prohibitory interdict against the appellants. The court *a quo* granted the appellants the relief as prayed for. Aggrieved by that decision the appellants appealed to this court on the following grounds:

1. The court *a quo* erred in granting a final prohibitory interdict against the appellants despite that;
 - a) Respondent dismally failed to establish a clear right.
 - b) The lease agreement relied upon by the court *a quo* had an incomplete clause and accordingly no title/rights passed on the respondent.
 - c) The balance of convenience did not lie in disposing the appellants of their fields in the balance of alternative land.
2. The court *a quo* misdirected itself on a point of law and fact in failing to apply S.26 of the Traditional Leaders Act *vis-a-vis* the fact that the appellants were already and properly in occupation and use of communal land as recognized by the Communal Land Act [*Chapter 20:04*].

Wherefore Appellants pray that the appeal be upheld and that order of the court *a quo* be set aside and substituted with the following:

“The application be and is hereby dismissed with costs.”

The facts of the matter are as follows: The respondent a private voluntary organisation entered into a lease agreement with Uzumba Maramba Pfungwe Zvataida Rural District Council to lease a 20 hectare piece of land for 10 years. The commencement date of the lease was never indicated on the agreement but the respondent took occupation. The respondent made developments, clearing the land, built blair toilets and a 2 roomed house, tilled the land, installed irrigation pipes, installed a water pump and was already watering the fields in preparation for planting when problems arose. Respondent alleged that the 1st to 12th respondents and persons claiming through them came and invaded the land, started planting their own crops claiming the land was theirs. This prompted the respondent to approach the court *a quo* for a final interdict against the appellants on the basis that appellants had invaded its lawfully held land.

The appellants had opposed the granting of the relief on the basis that the land in issue was being occupied and or utilised by them as their ploughing fields before the lease agreement. They had not agreed to their fields being taken away, the relevant chief of the area concerned had not agreed or been consulted neither were the other traditional leaders. They having been in lawful occupation, they were protected in terms of Section 26 of the Traditional Leaders Act as they were occupying and using land designated as communal land as recognised by the Communal Land Act (Chapter 20:04)

Appellants had further submitted that, the lease itself indicated in clause 14 that the lease was being granted upon the representation by the Lessee that the land represented in the plan is in fact available and is not subject to any prior right of occupation or use by any other person. The clause also made it clear that if found that the stand is unavailable or is a subject to a prior right of occupation or use the lease may be cancelled. In essence appellants challenged the allegation by respondent that it had a clear right. In so doing letters were placed before the court from traditional leaders ranging from a chief, to a headman and several village heads indicating that they were not consulted when council had entered into a lease agreement with respondent.

In determining the application the court *a quo* was obliged to consider the requirements of a prohibitory interdict which are:¹

¹ Universal Merchant Bank Zimbabwe Ltd v Zimbank Independent and Another 2000 (1) ZLR 234, Silberberg & Schoeman The law of Property 3rd ed at 146
Setlogelo v Setlogelo 1913 AD221 at 227

- a) a clear right established on a balance of probabilities
- b) an injury actually committed or reasonably apprehended and
- c) the absence of similar protection by any other remedy.

The issue becomes whether or not the respondent satisfied or met all the three requirements. Firstly did the respondent establish a clear right on a balance of probabilities? It is common cause that respondent produced a lease agreement between it and the rural district council. The lease agreement was duly signed and dated by both parties. The parties were duly spelt out, the leased property properly identified in terms of hectarage and the duration of the lease stated. Thus the respondent placed before the court *a quo* the document proving where its occupational rights to the land in issue emanated from. The appellants raise the ground that the lease agreement relied upon by the court *a quo* had an incomplete clause and hence no rights passed to the respondent. The alleged incompleteness pertains to the fact that the lease agreement had no commencement date or expiry date. The fact that the lease agreement had not been endorsed a commencement date is not fatal and neither does it make the lease agreement invalid. As the respondent had taken occupation the commencement date would thus be the date of occupation. Given that the duration of the lease is stipulated the expiry thereof would simply be at the end of 10 years. The lease agreement was adequate in the circumstances as proof of a clear right. In that regard the court *a quo* did not err in finding that the respondent had established a clear right therefore grounds 1(a) and (b) of appeal are without merit and are therefore dismissed.

As to whether the respondent suffered an injury or any prejudice, the facts of the record bear testimony. In paragraph 18 of its founding affidavit the respondent had made it clear that the appellants had invaded its land. It was never disputed in the opposing affidavits filed by the appellants that they had occupied the land which the respondent had developed. The opposing affidavit filed and signed by 1st respondent simply states that respondents objected to the unilateral taking away of the fields without specifically addressing the issue of invading the respondent's leased land. This serious and material averment not having been disputed is taken as conceded. In that regard the respondent had suffered an injury by the occupation of its land when it was preparing to commence its farming activities. It had no other remedy available to it apart from the relief it sought which is an interdict. That the balance of convenience favoured the appellants is not supported by any evidence given that the appellants themselves imposed themselves on the already prepared land of the respondent. The subject

at hand is a piece of land described as vacant in the lease agreement. It is the respondent which had developed it and respondent was ready to plant such that if anything the balance of convenience favoured the respondent as opposed to the appellant, moreso, when it is not the respondent who bears the duty to provide alternative land to appellants but council. This finding puts to rest the ground of appeal appearing as 1(c). It has no merit and is accordingly dismissed.

The 2nd ground raised by the appellant is that the court failed to take cognisance of the provisions of Section 26(2) of the Traditional Leaders Act as read with the Communal Lands Act. The said section reads as follows:

“The allocation of Communal Land in terms of this Act shall be carried out in accordance with the Communal Land Act [*Chapter 20:04*] and in such manner as prescribed.”

The appellants thus allege that the granting of the lease was not done properly as provisions of the Communal Lands Act (Chapter 20:04) were not followed particularly that the appellants were the lawful occupiers hence the land was not vacant, their traditional leaders were not consulted neither did the rural district council observe the customary practices of the inhabitants who are the appellants in casu. Mr. *Nyakumba* for the appellants further pointed to clause 14 of the lease agreement which stated that the lease is granted upon the representation by the lessee that the land represented in the plan is available and not subject to any prior right of occupation or use by any other person.

In essence the appellants impute that Council was wrong in allocating the said land to the respondent as the legal provisions of the aforementioned Acts were not complied with.

In our view any challenges to the manner the lease agreement came about and its validity thereof constitute a different cause of action. On the face of it the lease document is valid. What the court *a quo* was concerned with was a different cause, a complaint on the appellants' unlawful conduct and a quest for the relief of an interdict. Appellants had in their heads of argument indicated that they are challenging the validity of the lease agreement in the High Court which would be the proper course of action. Appellants should direct their concerns against council. However, at the hearing Mr *Nyakumba* indicated that the proceedings of challenging the lease agreement in the High Court had been withdrawn. By withdrawing proceedings challenging the validity of the lease agreement the appellants were thus accepting that the lease is valid. That being so, appellants can therefore not seek to have

this appeals court determine that the lease came into existence irregularly. That was not an issue for the court *a quo* nor is it an issue for this court. Given the foregoing we find the 2nd ground of appeal as being misplaced and without merit. Regard being made to the facts at hand as reflected in the record of the court *a quo* the respondent satisfied the three requirements justifying the relief sought. That being so, there was no misdirection by the court *a quo*.

Accordingly, the appeal is without merit and is dismissed with costs.

MWAYERA J agrees

Mupindu legal Practitioners, appellants' legal practitioners
J Mambara & Partners, respondent's legal practitioners