

MORRIS BHAMU
versus
EDWELL BEREJENA

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 15 June 2017

Civil Appeal

Mr *R J Gumbo*, for the appellant
Mr *Z Kajokoto*, for the respondent

MUNANGATI-MANONGWA J: The respondent sought eviction of the appellant from House No. B35 on the pretext that he had bought the property. The court *a quo* granted the order sought and Appellant aggrieved by that court's decision appealed to this court. We upheld the appeal with costs and below are the reasons for our decision.

The appellant fielded a number of grounds of appeal but ultimately we decided the appeal on a point of law which was raised on the day of hearing, which although raised in the pleadings had not been determined by the court *a quo* specifically the issue of jurisdiction: That the court *a quo* had no jurisdiction to determine the matter given the issues at hand. The following grounds had been noted as the basis for challenging the judgment:

- “1. The learned magistrate erred at law in holding that the affidavit written by Takesure Chigutiro was not sufficient proof that the house in question had been sold to Guilty Savanhu by his father.
2. The court erred at law in holding that failure to change names by Guilty Savanhu and Appellant was fatal to their claims that they had bought the house in question.
3. The court erred at law in holding that plaintiff had bought the house above board and that the registration of the estate of the late Romeo Chigutiro was above board.
4. The court erred in failing to realize that the absence of Takesure Chigutiro as a witness to plaintiff's case was fatal to plaintiff's case.

5. The court erred at both law and fact in concluding that the defendant be evicted from the house in question.
6. The court erred on a point of fact by disbelieving the evidence of appellant's witnesses.

WHEREFORE Appellant prays for

- (a) An order setting aside the entire decision of the court a quo substituting it with an order dismissing respondent's case with costs."

The history of the case shows that the immovable property No B35 (hereinafter referred to as the "property") was initially owned by one Romeo Chigutiro. Romeo Chigutiro sold the property to one Guilty Savanhu in 1997 and the latter took occupation although no cession was done. The undisputed evidence shows that the house had two rooms and a toilet. Romeo Chigutiro died in 1998, followed by his wife in 2003. The estate of Romeo Chigutiro was not registered until 2013 when his son registered it and was appointed executor.

Meanwhile in 2004 Guilty Savanhu sold his rights and interest in the property to the appellant. Appellant took occupation and developed the two roomed house into a six roomed house. In 2014 the appellant received eviction summons from the respondent who incidentally had bought the property from one Takesure Chigutiro the son of the original owner. The said son had in 2013 registered his father Romeo's estate, been appointed executor and sold the property on 25 November 2013 to respondent and cession effected into the respondent's name on 30 June 2014. Relying on the rights bestowed by the cession, respondent had issued eviction summons.

In his plea the appellant had indicated that he had bought the property and the said Takesure Chigutiro had no house to sale. The plea also indicated that Takesure Chigutiro had averred to an affidavit confirming that his father had sold the property to one Guilty Savanhu as such the latter could dispose the property. He also alleged in his plea that the sale of the property to the respondent was a fraud. Thus the issue of ownership was present from the onset. Further, as the matter related to ownership or a declaration of the rights of the parties the Magistrates' court had no jurisdiction to hear the matter. It is not clear why the issue of jurisdiction was not deliberated on in the court a quo. It does not appear on the issues referred for trial but it surfaced and again on appeal the issue of jurisdiction arose. Since the issue of jurisdiction is a point of law it can be raised at any stage and hence we dealt with it on appeal.

It is common cause that the respondent bought the house for US\$16 000. He relies on his acquired rights to seek eviction of the appellant, he claims ownership. The appellant equally claims

to have rights to the property as an owner and he produced evidence of having purchased the property from one Guilty Savanhu and it was not disputed that he had developed the property from a two roomed house to a six roomed house. The court *a quo* was thus faced with an ownership dispute irrespective of the cession that had taken place. This is because allegations of fraud had been raised as against the person who facilitated cession. It is clear from the record that the issue of rights, title and interest resonates from the pleadings up to trial. Appellant led witnesses who confirmed that he had purchased the property including Guilty Savanhu who initially bought the property from the original owner. This coupled with the allegations of fraud against the son of the original owner, one Takesure Chigutiro, should have alerted the Magistrate to the fact that the matter called for a declaration as to who is entitled to own the property which determination he had no powers to make. This is so, because of the operation of Section 14 of the Magistrate Court Act [*Chapter 7:10*]. Interesting are the concluding remarks of the Magistrate in his judgment which read:

“Defendant seeks to challenge that sale but its coming too late. Issues the defendant raised were raised in the wrong fora.”

The appellant’s defence was not coming late because it was in his plea and in the evidence presented to court. Furthermore whilst the issue of ownership could be determined by a higher court it was being properly raised in this court as a defence. The monetary jurisdiction for the Magistrates Court for delivery of immovable property and for actions of ejectment as per Sections 11(1)(b)(i) and (ii) of the Magistrates Court Act is US\$10 000-00. The house at the centre of the dispute was bought by the respondent for \$16 000-00 an amount way above the court’s jurisdiction. Equally the appellant purported to have bought the same house in 2004 for \$26 000 000-00 way back in 2004. In my mind the value to the occupier who basis his claim on ownership can only be the value of the property unlike in the instance of a tenant who has to consider the rentals he pays to secure his tenancy as value to for his occupancy. That being so the court was faced with a situation where the value of the claim went beyond its monetary jurisdiction.

MWAYERA J stated in *Zimbabwe Revenue Authority v Montsun (Pvt) (Ltd)* HH990/15 that failure to make a determination on the issue of jurisdiction goes to the root of the matter. Rightly so because the court has to be clothed with the power to hear and determine a matter before it. Without such, the proceedings are a nullity. What the court had to do was to simply decline to

determine the matter for want of jurisdiction given the value of the property ranging between US\$16000-00 and US\$26 000-00, and the competing interests that the appellant had raised. Given the foregoing, the court *a quo* had no legal capacity to declare the property to belong to respondent when it stated “He (respondent) was successful and the same house at law is his.” Due to the misdirection on the issue of jurisdiction the decision of the court *a quo* had to be set aside.

Accordingly we upheld the appeal for the stated reasons.

MWAYERA J agrees

Gumbo & Associates, the appellant’s legal practitioners
Kajokoto & Company, the respondent’s legal practitioners