MICHAEL GWATIDZO
versus
SARAH MURAMBWA
and
SYDNEY MAKOMBE

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 4 October 2022 & 26 April 2023

**Civil Appeal**

*T K Hove,* for the appellant
*T R Pfumayi*, for the respondent

**TSANGA J**: This appeal centres on a land ownership dispute in Manjonjo Village, Murehwa. In hearing the matter *de novo* as per s 24(2) of the Customary law and Local Courts Act [*Chapter 7:05*] the Magistrate determined that the focus should be to ascertain, on a balance of probabilities, who is the owner of the land in the sense of who was actually allocated the land in the initial instance upon the facts submitted. This was in contrast to the Chief's approach in the community court where the matter had been decided as if the dispute was one of boundaries.

The evidence accepted by the Magistrate in the court a quo was that Sarah Murambwa, the first respondent herein aged 80, is the rightful owner of the land in the sense described above of having been the one actually allocated the land in the initial instance. The court accepted her evidence that her now late husband and she were allocated the land in 1968 by the village head, one Martin Manjonjo. She then allowed the appellant's father, Wenyika Goho, to plough temporarily from about 1980 to 1997. The appellant had then fenced the land in 2020 leading to this dispute which was initially in the village court presided over by a headman before it escalated to the community court presided over by a chief in October 2020. The Chief, upon hearing the matter in the presence of the families and the village head, had found in favour of the appellant by

ordering a division of the said piece of land. Dissatisfied, the respondents had appealed to the magistrate court where the matter had been heard *de novo*.

**The evidence led in the court *a quo***

Apart from the first respondent's own evidence as plaintiff outlining how she had been given the land as captured above, the court also heard the evidence of four other witnesses. Her second witness, Wengesayi Sidney Makombe attested to having grown up using the land with his parents, which land belonged to the first respondent, Sarah Murambwa. He also attested to the fact that the appellant's father had then used the land from 1980-1997. Her third witness, Fanuel Chimhanya had ploughed on the land for her in 1971 whilst her fourth witness, her daughter Rosemary Taonei, had also said she had grown up using the land until 1975 when she married. Of significance was the evidence of Rungano Manjonjo the fifth witness from the neighboring piece of land. His evidence, which the lower court found corroborative of Sarah's own evidence was that he is a neighbor to the land in dispute and that the land, which was Sarah's was used by her before the war. After the war, one Edward Gwatidzo, a brother to the appellant had come and used the land for some time and had gone away. This witness had been asked to plough the land by Edward Gwatidzo around 1989-90 before he had gone away. In 2020 that is when the fencing of the land by the appellant, Michael Gwatidzo had taken place.

The court found some of the appellant's witnesses, on the other hand, far from credible. It also found that with others, their evidence in fact corroborated that of the respondents, in that the land was Sarah's. The appellant led evidence from the one Fabion Manjonjo, the village head who said he had lived in the village since 1940 which was the year he was born. He told the court that the appellant's family had moved onto the land in 1949. He added that he had in fact accompanied his father when the land was allocated to the appellant's father, Goho Wenyika way back then. The court found that he would have been only 9 years old at the time and could not have been telling the truth in terms of his role in the alleged process. It found his testimony "very much biased, un-credible and unreliable".

The second witness for the appellant was the acting headman Nicholas Chakavarika whose evidence was that the land belonged to the appellant only in the sense that they were using it and that it was on that basis that the Chief, upon hearing the matter, had divided the land into two so

both would have a share. The court found that this witness's evidence in fact corroborated that of Rungano Manjonjo who was Sarah Murambwa's fifth witness.

The third witness for the appellant was one Lovemore Gwatidzo, a brother to the appellant. He told the court that his father Wenyika Goho had been given the land which he had used without interruption. He had also told the court that his father was a Chief in Mudzimurema leading to the court a quo to raise the issue of the anomaly of a chief in another village wanting land in another village when he has land in his own village.

The fourth witness, Edward Gwatidzo, was a brother to the appellant and also a son to Wenyika Goho. He had not disputed that the land belonged to Sarah Murambwa and that his father got it for temporary use. The court had found that he had tried to change his story in cross-examination.

The last witness was the appellant himself who was born in 1970. The court found that he was in court when all the evidence was being led and was therefore biased in giving his evidence. He had not left the court when asked to and the court's finding was that he was listening to the evidence so as to build his case.

The Magistrate therefore found in Sara Murambwa, the first respondent's favour whose evidence she said was corroborated mainly by that of Rungano Manjonjo who had lived in the village since 1970. On the appellant's part, whilst there was evidence of use and enjoyment, there was no evidence of who gave the appellant the land for permanent use. The court found that Sarah Murambwa was the owner who temporarily relinquished her rights of use to one Wenyika Goho, the father of the appellant. The appellant could therefore have no greater rights than the first respondent as the owner of that land. She could, however, allow the appellant to use the land as per agreement with their father. The court also concluded that the appellant had raised new issues in his closing submissions and not in the trial itself such as delegation of allocation of land powers and inspection *in loco* issues. The court therefore refused to address these issues.

Upon analysis of the evidence, the lower court's order therefore upheld the appeal from the Community Court. It set aside the judgment. The court also ordered that Sarah Murambwa had been established to be the owner of the field in dispute. Each party was ordered to pay in its own costs.

**The grounds of appeal**

There are four grounds of appeal paraphrased more simply as follows:

1. The court erred by holding that the testimony of Sarah Murambwa was credible to the exclusion of the testimony of the Village Head (Sabhuku) namely Fabion Manjonjo and the Chief's Policeman, Nicholas Chakavarika, whose version was more credible.
2. No due weight was placed on the provisions of the Traditional leaders Act [*Chapter 29:17*] s 12(e) and (g) in so far as they relate to the duties of the Village Head and Chief with respect to the power to allocate land.
3. No due weight was placed on the fact that the Respondents as the Applicants in the court *a quo* did not insist on an inspection *in loco* and neither had they filed written submissions as directed by the court.
4. Respondents failed to establish their case on a balance of probabilities that they own the land.

The appellant seeks that the appeal succeeds with costs and that the order of the court below be substituted as follows:

1. The appeal be and is hereby dismissed with costs
2. The appellant be and is hereby declared the lawful legitimate owner of the communal land.
3. The respondents and their legal practitioners shall pay the appellants costs on a scale of attorney and client jointly and severally, the one paying for the other to be absolved.

**Submissions by parties**

Regarding the first ground of appeal in particular impugning the first respondent's credibility as opposed to that of the appellant's s own witnesses, the appellant's submission was in essence that the court *a quo* ought to have taken into account that the Village Head and the Chief's policemen are quasi-judicial officers. Therefore, the argument was that they are independent and impartial witnesses who have knowledge of village land allocation. Furthermore, they are involved in the day-to-day affairs in the allocation of land in rural areas. Their evidence

said to have been excluded was that filed in the form of affidavits to the notice of opposition of the appellant from the local courts. Appellant's counsel, Mr *Hove* also emphasized that the appellant's family was allocated the land in 1949 and yet the respondents said they had come to the area only in 1968.

With respect to the second ground of appeal appellant submitted that the decision of the court *a quo* was made without full appreciation of provisions of the Traditional leaders Act [*Chapter29:17*] as read with s 282 (1) (d) and (2) of the Constitution of Zimbabwe Amendment Act No 2 of 2013 said to outline clearly the duties of the relevant personnel in allocating land. With no inspection *in loco* the respondents were said not to have proven their case on a balance of probabilities.

Mr Pfumayi, for the respondents, submitted that the essence of the appeal is against findings of fact which appeal courts do not lightly over turn. In addition he submitted that the respondents had proven their case on a balance of probabilities. *Beckford v Beckford* 2009 (1) ZLR 271 (S). Furthermore, the onus of proof was said to lie on the village head, Fabian Manjonjo to prove that he was a village head in 1968 when the first respondent was allocated the land in question.

As regards the inspection *in loco* argument his submission was that the respondents did not require an inspection *in loco* to prove their case and neither was it a duty of the court to insist on one. If the appellant had regarded an inspection *in loco* necessary then his argument was that he should have ordered one. As for costs on a higher scale the submission was that no case had been laid out for these. The respondent's prayer was therefore that the appeal is devoid of merit and should in fact be dismissed with costs on a higher scale.

**Analysis and conclusion**

This is indeed essentially an appeal against findings of fact against the backdrop of a judgment where the lower court gave very clear reasons as to why it regarded the evidence of the appellant himself and his witnesses unreliable or in other cases corroborative of the respondents claim.

Our courts are clear on the issue of upsetting findings of fact. There can be no upsetting findings of fact on appeal unless they are so outrageous that no reasonable person applying their mind to the facts would have reached such a conclusion. See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (SC) *at p 670.*

Regarding the first ground of appeal that the court erred in finding the evidence of Sarah Murambwa credible compared to that of village head Fabion Manjonjo, and, the chief's policeman Nicolas Chakavarika, this court has set out the evidence of each of the witnesses for both parties which the lower court analysed in arriving at the conclusion that it did. Indeed on commenting on the grounds of appeal the magistrate reiterates this very point that the lower court balanced all the evidence presented before it. It must also be emphasized that in hearing an appeal from the community court the matter is heard afresh.

The appellant's argument that the court ought to have been guided by the fact that appellant's witnesses are quasi-judicial officers misses the point that one can be a quasi-judicial officer but that does not mean that a court should not make a finding on a quasi-judicial officer's credibility. On the issue of credibility of the village head's evidence, the following is insightful. His evidence was found to lack credibility when he said he had gone with his father to allocate land to the Wenyika Goho in 1949 when he was nine years old and in the same breath then said he was 18 years old when this happened.

On p 106 of the record the witness disclosed when he was born.

Q Do you remember when you were born?

A 1940

Q Where?

A Manjonjo Village

On p112 of the record the following exchange took place.

Q Who allocated the Gwatidzo land?

A My father.

Q At that particular time did you accompany him?

A Myself? Yes

Q When was the land allocated to the Gwatidzo?

An In **1949** when their father came to the village. He had all his children whilst staying there.

On p 113 he was asked the following:

Q Do you remember how old you were when you accompanied your father to allocate Goho Wenyika Land?

A I can say I was 18 years

His evidence was clearly contradictory. As for the Nicholas Chakavarika's evidence, the record on page 140 does support the magistrate's findings that indeed the Chief acted out of expediency in dividing the land between the disputants. Their use of the land as opposed to their actual allocation of it in the initial instance was the deciding factor for the chief in dividing the land. If indeed the evidence had been clear cut that the appellant family was allocated the land in 1949, there would have been no need for the chief to have divided their land especially to someone who came in 1968 some twenty years later. The fact is that the lower court failed to resolve the dispute tends to support the respondent's version as to what had really happened. It is also important for the court to be alive to the very real possibilities of old widows being taken advantage of by being dispossessed of land in very patriarchal settings.

With regard to the second ground of appeal where reference is made to s 12 of the Traditional leaders Act, notably this provision makes it the duty of village heads to settle disputes involving customary law and traditions including matters relating to grazing land and agricultural land. Reference was also made to s 282 of the Constitution which in essence spells out the functions of traditional leaders within their areas of jurisdiction in particular the duty to administer communal land to and to protect the environment.

The magistrate rightly pointed out in commenting on this ground of appeal that neither of the two occupied positions as traditional leaders at the time that the land was said to have been allocated to the appellant. The Village Head had only become such in 2019. Essentially, at the time the land was claimed to be allocated to the appellant in 1949, he was certainly not bestowed with any powers which the Act confers. As such, the magistrate rightly deemed the provisions of the act complained about to have been irrelevant to the case in point. They were inapplicable to the broader facts at hand. The lower court made it clear that the dispute was about ownership of the

piece of land. The evidence led and on record clearly speaks to the land having been allocated to Sarah Murambwa who in turn, even according to some of the appellant's own witnesses allowed the appellant's father to use the land. There was no fault on the part of the magistrate in this regard in not utilizing the said provisions. In any event as the magistrates also commented, the village head and the head man were just eye witnesses at the Chief's meeting and were not there at the initial allocation of the land. There is nothing to fault in the magistrates' finding that the actual ownership of the land was with Sarah Murambwa as this was the essence of the dispute. Both the first and second grounds of appeal lack merit.

Turning to the third of appeal that the respondents did not ask for an inspection *in loco*. The lower court clearly stated that the issue was being raised in the closing submissions. In any case as the magistrate's correctly observes in commenting on this ground, if the appellant in the court *a quo* was of the view that such an inspection would aid his case, he could have asked for it. The failure to call for one cannot now be laid at the door of the court which made it clear from the onset that it was not dealing with a boundary dispute but an issue of ownership. The chief himself who had done an inspection *in loco* still resolved the matter on the basis of equity as opposed to what he saw. The magistrate was familiar with the chief's inspection *in loco*. Another inspection would have taken the matter no further since as the magistrate pointed out this was not a boundary dispute but an issue of ownership. Indeed it was from the overall issues that were placed before the community court that the court *a quo* had found it necessary to distill the real issue behind the dispute which it said was ownership in the sense that has been described.

The issue of the respondent's failure to file submissions in the court below was not pursued at the appeal hearing and in any event the magistrate had chided both parties for unprofessionalism in the overall conduct of the case.

The fourth ground that the respondents did not establish their case on a balance of probability is mere hyperbole as it is certainly evident from the court's decision that it laid out the evidence of all the witnesses on both sides. It was in analysing the evidence of each that it reached the conclusion that the respondents' evidence was on a far firmer footing.

The appeal is clearly lacking in merit and is dismissed with costs.

TSANGA J:…….

MAXWELL J, AGREES……

*T K Hove & Partners*, appellant's legal practitioners
*Macheyo Law Chambers*, respondents' legal practitioners