

WILLIAM H. CHIROMBE
versus
JOHN MUTAMBURO

HIGH COURT OF ZIMBABWE
MUREMBA & MANZUNZU JJ
HARARE, 4 July, 2019 and 19 December 2019

Civil Appeal

T. M Takawira, for the appellant
Respondent in person

MANZUNZU J: This is an appeal against the decision of the Magistrate sitting at Marondera on 23 May 2017 where the plaintiff's claim was dismissed with no order as to costs. The appellant was the plaintiff in the lower court with the respondent as defendant. The appellant claimed among other remedies arrear rentals and holding over damages. The prayer for cancellation of the lease agreement and eviction was abandoned at trial as that was overtaken by events. After a full trial the appellant's claim was dismissed. The appellant initially raised 4 grounds of appeal before abandoning the 3rd and 4th ground at the hearing. The two grounds of appeal relied upon are:

- “1. The learned magistrate erred in fact and law in dismissing the appellant's claim based on the reasoning that the lessor has the onus to prove non-payment of arrear rentals despite the law clearly stating that the lessee has the burden to prove payment of alleged arrear rentals. Specifically, the court erred in dismissing appellant's claim in the absence of proof that respondent had indeed paid the claimed rentals.
2. The learned magistrate erred in fact and in law in making a finding that the lease agreement had been orally varied by failing to consider the non-variation clause in the lease agreement and the parole evidence rule.”

The background to this matter is that appellant leased his stand 2792 Rujeko North Township Marondera to the respondent. A written lease agreement was drawn and signed by the parties. It was a 4 year lease agreement running from 1st March 2013 to 1st March 2017. In 2016 the appellant sued the respondent for \$2 800 arrear rentals and holding over damages. After hearing evidence the magistrate dismissed the plaintiff's claim. The court made certain findings of fact. Key findings of fact which led to the dismissal of the appellant's claim were that appellant had ceded his rights to receive rent to one Maphious Mutonhori the prospective new owner to the property. Furthermore, that the respondent had proved that he paid the said arrear rentals to the said Maphious Mutonhori.

The grounds of appeal allege misdirection on the part of the Magistrate on both the findings of fact and law. The case of *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njanjai & Others* 2001 (1) ZLR 85 SC set the circumstances under which an appeal court can interfere with the decision of the court *a quo*, per SANDURA JA.

“An appeal court will generally not interfere with the exercise of a discretion of a lower court. However the appeal court is entitled to substitute its discretion for that of the lower court where the lower court's exercise of its discretion was based on error such as where it has acted on a wrong principle, or took into account extraneous or irrelevant matter or did not take into account relevant considerations or it was mistaken about facts.”

a) Ground of Appeal No. 1

The appellant's first ground of appeal attacks the judgment of the court *a quo* from two angles. The first being that the court applied a wrong principle of law when it pronounced that the lessor has the onus to prove non-payment of arrear rentals. A reading of the judgment is clear in that nowhere did the court say lessor has a duty to prove non-payment. The closest to that was when the court stated, “The plaintiff bears the onus of proof in relation to (a) and (b) but the lessor must prove payment.” Paragraph (a) and (b) in the judgment relates to proof for the existence of the contract and the lessor's duties to the contract. The use of the word “lessor” in the sentence quoted above was an obvious mistake where it was meant to be “lessee” otherwise no logic can be drawn if the word lessor is used.

It is incorrect as suggested by the appellant in the heads that the claim was dismissed on the basis that the court had reasoned that the lessor had the onus to prove non-payment.

The second leg of this ground of appeal is that there was no proof of payment of rentals by the respondent. The judgment is clear in this aspect. It was the court's finding that the rightful recipient to the rent was Maphious Mutonhori who corroborated the respondent's evidence and also confirmed receipt of the rentals as per their prior trio agreement. That finding is based on evidence on record. We did not find any misdirection on the part of the court *a quo* in regard to this.

b) Ground of Appeal No. 2

This ground of appeal attacked the judgment in that Magistrate erred in his finding that the lease agreement was varied orally. What is clear from the judgment is that no terms of the lease agreement was varied. The oral agreement only dealt with the issue of who was entitled to receive rent. In other words the appellant ceded his rights to receive rent to Maphious Mutonhori who for all intents and purposes took appellant's legal position. An attempt was also made by the appellant to rely on the parole evidence rule. The parole evidence rule is a principle that preserves integrity of written documents. The rule applies to integrated contracts i.e. where parties acknowledge in writing that the document or statement is the complete and exclusive declaration of their agreement.

The findings of the court *a quo* was that there was a cession of rights in that as a result of the verbal agreement the existing creditor (appellant) ceased to be a creditor and a new creditor (Maphious Mutonhori) became a new creditor. Such an agreement in our view cannot be defeated by a non-variation clause or principle of parole evidence rule.

We found no merit in this ground of appeal.

The appeal cannot succeed. Accordingly the appeal is dismissed with costs.

MUREMBA J agrees:.....

Mupanga Bhatasara Attorneys, appellant's legal practitioners