REFAYI CHIKANDIWA
and
PAMETI NYEMBA
versus
ANDERSON CHIKANDIWA
and
MADZUDZO CHIKANDIWA
and
TARISAYI KAPUYA
and
CHAMUNORWA KAPUYA
and
VILLAGE HEAD KANENGONI
and
CHIEF NEGOMO

HIGH COURT OF ZIMBABWE
TAGU & MAXWELL JJ
HARARE, 21 June & 2 November 2022

Civil Appeal

KF Chipudya, for the appellants
S Mushonga, for the 1st and 2nd respondents

TAGU J: This is an appeal against the whole judgment of the Magistrates Court of Zimbabwe sitting at Concession under case number C 57/21 handed down on 21 December 2021.

BACKGROUND FACTS

The appellants are husband and wife. In the court *a quo* the appellants filed an application for interdict seeking that the first to the fourth respondents be interdicted from interfering with their farming activities in Kakora village. The basis of the application being that the first appellant was the only child born of his parents. He was gifted with land approximately one hectare in extent by his late father Hensen Kapuya and he assumed occupation immediately. From 2002 to date he and his wife exercised farming rights over the piece of land including cultivation of maize, cotton

and sunflower. Disputes over the land started in the year 2020 when the respondents started to allege that first appellant was not a biological son of Hensen Kapuya and that he should surrender the land to them. Respondents started to interfere with his farming activities. The dispute escalated and was referred to the fifth respondent (village head Kanengoni) who further referred the matter to the sixth respondent (chief Negomo). The sixth respondent ruled that the land belonged to the Appellants by virtue of it having previously belonged to his late parents. Despite the chief's order the first to the fourth respondent started interfering with the appellants leading to them filing an application for an interdict against the first to the fourth respondents.

The court *a quo* dismissed the application. Dissatisfied with the court *a quo*'s ruling, the appellants filed the present appeal.

GROUNDS OF APPEAL

"(1) In denying appellants an interim interdict when all the essential elements thereof had been met, the court *a quo* erred at law and grossly misdirected itself.

(2) In holding that appellants had not established a prima facie right by reason of there being two contradictory judgments from sixth respondent without applying her mind on the aspect of the legality of the second judgment, the learned magistrate *a quo* misdirected herself.

(3) The court *a quo* grossly misdirected itself on the facts and at law by failing to observe that the second judgment from sixth respondent was a nullity at law by reason of sixth respondent's court being *functus officio* and also by virtue of the absence of evidence to otherwise justify a redetermination of the land dispute.

(4) In failing to observe that first applicant had properly demonstrated a *prima facie* right in the disputed land by virtue of his inheritance of same and also from confirmation of the inheritance by sixth respondent, the court *a quo* misdirected itself."

APPLICATION OF THE LAW TO THE FACTS

What was brought before the court *a quo* by the appellants was an application for an interim interdict. What the appellants were supposed to satisfy in order to be successful in their application were the following:

1. That the right which was the subject matter of the main action and for which they sought to protect by means of an interim relief was clear, or if not clear is prima facie established though open to some doubt.
2. That if the right was only *prima facie* established, there was a well-grounded apprehension of irreparable harm to the appellants if the interim relief was not granted.
3. That the balance of convenience favours the granting of the interim relief.

4. That the appellants had no other satisfactory remedy.

In dismissing the appellants' application the court *a quo* reasoned as follows:

> "*In casu* there are 2 contrary Chief's judgments on the same subject matter. In the first court judgment dated 14 August 2021 is in favour of the applicants and second judgment dated 27th November 2021 is in favour of the respondents.
> With such a scenario can it be said the applicants have established a *prima facie* right? With two contrary judgments from the same chief's court it is the court's view that applicant has not established a *prima facie* right. Which judgment should the court belief? The circumstances surrounding 2 contrary judgments being issued by the same court are not before the court."

In reasoning in the manner it did, the court *a quo* missed the point. Firstly, all that the appellants needed to establish had been established. That the appellants had a *prima facie* right had been established regard being heard to the facts that the first appellant had inherited the piece of land from his late parents, and that when the dispute started the sixth respondent ruled in his favour. It appears the court *a quo* treated both judgments as being equal although they were contradictory. If the court *a quo* had applied its mind it would have realized that the second judgment was a nullity at law by reason of the sixth respondent's court being *functus officio* and also by virtue of the absence of evidence to otherwise justify a redetermination of the land dispute. The respondents argued that the initial judgment was rescinded and a trial denovo ensued. I was not persuaded because a perusal of the record does not show the sequence of events as narrated by the respondents. In fact at p 23 of the record there is an order made at Harare Magistrate Court dated 18 October 2021 which reads as follows:

> "Matter referred back to the Court a quo for Applicant to make an application for rescission of judgment"

Other than this there is no proof that an application for rescission was indeed made. No proof that the rescission was granted. No proof that a rehearing was ordered. The court *a quo* even made the following pertinent observations – "Which judgment should the court believe? The circumstances surrounding 2 contrary judgments being issued by the same court are not before the court. Clearly, the court *a quo* misdirected itself, and if it had applied its mind it would not have dismissed the application on the basis it did. The respondents had failed to justify the granting of the second contradictory judgment.

IT IS ORDERED THAT:

1. The appeal is allowed.

2. The decision of the court *a quo* be and is hereby set aside and the operative part of the court *a quo's* order be and is hereby substituted with the following:

   "That the application be and is hereby granted with costs."

TAGU J:……..……...

MAXWELL J:…….Agrees

Ruth Zimvumi, appellants' legal practitioners
Mushonga Mutsvairo & Associates, first and second respondents' legal practitioners