MUZVARE TARWIREI
versus
CHIEF MUROZVA
and
MICHAEL MACHINGURA

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND CHIRAWU-MUGOMBA JJ
HARARE 2 & 16 October 2018

Appeal

W Madzimambo for appellant
Respondents in default

CHITAKUNYE J. On 2 October 2018 we set aside the proceedings in the lower court that were being appealed against and remitted the case to the court a quo for a proper hearing of the matter. Our reasons for so ordering were as follows:

The appellant sued the 2nd respondent in the Community Court of Chief Marozva over the ownership or right of occupation of a piece of land under Tarwirei Ward 11. The dispute had been on-going for some years.

On the 6th February 2017, the presiding officer, Joseph Philip Mughe, sitting with two assessors dismissed the appellants claim. The appellant being dissatisfied with the judgement of the Community Court appealed to the magistrate court at Bikita. In his appeal the appellant outlined several grounds of appeal and prayed for the setting aside of the judgement of the Community Court.

In considering the appeal the magistrate did not rehear the matter but proceeded on the papers filed of record. He thereafter dismissed the appeal without any evidence being led.

The appellant being further dissatisfied appealed to this court against the magistrate's decision.

It is apparent that the learned trial magistrate was oblivious to the provisions relating to appeals from the community court. He thus erred and purported to hear an appeal in the manner he did. The community court record of proceedings is scant and, as is traditional, recorded in vernacular. The documents attached were also mostly in vernacular. The 'record' is in fact not recognised as an official record of court proceedings.

When we inquired with the appellant's counsel as to what exactly happened at the magistrate's court, he seemed to confirm that the hearing was not in terms of the Customary Law and Local Court's Act. It was evident that the magistrate did not know how to proceed and ended up merely considering the papers from the community court as they are and made a determination.

Section 24 of the Customary Law and Local courts Act [C*hapter 7:05]* provides, *inter alia*, that:

> "(1) Any person who is dissatisfied with any decision of a community court may, in the time and manner prescribed, appeal against such decision to a magistrate for the province within which the community court is situated."

Subsection 2 thereof then provides that:

"(2) Upon an appeal being made in terms of subsection (1), the magistrate shall rehear the case and shall give such decision**,** order or direction as he thinks fit."

It is clear that an appeal from the community court is heard as a rehearing. In this regard the matter is virtually heard afresh with the calling of witnesses and a proper assessment of the testimony given by each witness by the magistrate. That then becomes the primary record of proceedings upon which an aggrieved party can appeal to this court.

It is thus our considered view that there was no proper hearing of the appeal before the magistrate; the proceedings were a nullity and cannot stand. The matter should be remitted to the magistrate court for a proper hearing of the matter in terms of section 24 (2) of the Act.

Accordingly it is hereby ordered that:

1. The proceedings in the magistrate court be and are hereby set aside;
2. The matter is hereby remitted to the magistrate court for a proper hearing of the appeal from the Community court in terms of section 24 (2) of the Customary Law and Local Courts Act, [*Chapter 7:05*].
3. Each party to bear their own costs.

CHIRAWU-MUGOMBA J agrees…….

Madotsa & Partners, appellant's legal practitioners.