JOSHUA MAVHANGIRA MADZIVANYIKA
and
JOHN MAVHANGIRAMADZIVANYIKA
and
TAPFUMA MADZIVANYIKA
and
SIMON MADZIMURE
and
BLANTINA MAGIDHI
and
RODGERS MADZIVANYIKA
and
NICHOLAS MUTSVATA
and
SYLIVIA CHIPANGO
and
TARISAI MUBATA
and
MONDAY MANYERE
and
DAVID MANYERE
and
VERONICA BASVI
versus
MUNDA FAMILY TRUST being
represented by KENNEDY POMERAI MUNDA

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 25 January 2022 & 12 January 2023

Civil Appeal

E Dondo, for appellants
M Mavhiringidze, for respondents

WAMAMBO J: This is an appeal against the judgment of the Magistrates Court sitting at Murambinda.

The respondent in this appeal was the applicant while the appellants were the respondents in the court *a quo*.

The respondent filed an application for an interdict against the appellants

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The background of the matter is that respondent purchased forty (40) hectares of land at a village in Buhera from the Buhera Rural District Council for the construction of a boarding school. The respondent commenced construction of the boarding school. The appellants physically blocked the construction company from commencing the work and threatened to continue the disturbances. As a result respondent was unable to proceed with construction resulting in her approaching the court a quo seeking relief in the form of an interdict against the appellants.

The court a *quo* found for the respondent and rendered the following order;

1. "The respondents, jointly and severally be and are hereby interdicted from blocking or hindering the construction of the boarding school by the applicant.
2. The respondents jointly and severally be and are hereby ordered to allow the construction company to commence the construction of the school.
3. In the event that the respondents fail to comply with para 1 and 2 above, the members of Zimbabwe Republic Police be and are hereby authorized, directed and empowered to ensure respondents comply with the order
4. The respondents are hereby ordered to bear costs of suits."

Dissatisfied with the order of the court *a quo* as adumbrated above the appellants filed an appeal. This is the appeal this court is seized with.

The notice of appeal contains four grounds of appeal as follows;

1. The court *a quo* grossly erred at law by granting the relief of a final interdict to the respondent when the legal requirements of clear right, proof of a well-grounded harm and unavailability of other remedies were not established. No final interdict can be grated (*sic*) when these essentials have not been established.
2. The court *a quo* grossly erred at law by acting on a nullity. By relying on an illegal agreement of sale the court acted on a nullity thus its decision must be vacated and is equally bad at law. There is no legal right than can flow from a legal nullity.
3. The court *a quo* erred at law by failing to realize that there were material disputes of fact which rendered the application incapable of being disposed on papers. In

fact the court made contradictory findings in that on one hand it ruled that respondent should have proceeded by way of action and ought to have anticipated that there are material disputes of facts while on the other hand it held that there were no material disputes of facts. The point in reference pertains to the call for inspection in *loco*

4. The court *a quo* erred at law in holding that respondent is a legal person capable of instituting legal proceedings. The settled legal position in this jurisdiction is that a Trust is not a legal person and it cannot sue neither can it be sued. As such there was no application before the court.

Before us the appellants' submission argued as follows;

Appellants are residents of Madzivanyika village, Chief Chitsunge, Buhera. Pursuant to respondent purchasing forty hectares of communal land from Buhera Rural District Council respondent brought its construction machines on site. Appellants opposed the proposed development and aver that the land in question is their ancestral inheritance communal land. Further that same cannot be taken away from them without them being given alternative and suitable land for settlement. The appellants submitted that they should have been consulted as the land in question consists of their homesteads, grazing land and fields.

Appellants submitted that the land in question is not in Gandiwa village as contented by respondent but is in Madzivanyika village. This is anchored on a letter penned by the District Administrator to the effect that Gandiwa village does not exist.

It was submitted that communal land cannot be sold and that requirements relevant to communal land passing hands were not satisfied.

Reference was made to s 9,10,12 (1)(b) of the Communal Lands Act [*Chapter 20:04]* and the Regional Town and Country Planning Act *[Chapter 29:12]*

It was contented on behalf of the appellants that respondents requested for an inspection in loco. Further that, in dismissing the said application the court *a quo* made contradictory findings suggesting that the matter should have proceeded by way of action as there was disputes of fact.

Before us respondent submitted as follows:-

The court *a quo* correctly identified and applied the requirements of a final interdict

Respondent proved that she had a clear right through production of an approval letter from a council meeting, a permit from the Department of Physical Planning and an agreement of sale.

Respondent relies on s 4 of the Communal Land Act [*Chapter 20:04*] and s 26 of the Traditional Leaders Act [*Chapter 29:17]* which speak to all communal land being vested in the President and that it shall be occupied and used in accordance with the Communal Lands Act. Section 26 principally refers to communal land being allocated with the approval of the appropriate Rural District Council.

Respondent is of the view that the legality of the agreement of sale is under the purview of the High Court under HC 6547/20.

Respondent also sought to persuade us that as a court of appeal we cannot determine the legality of the agreement of sale as it is relevant to the resolution of the issues as there are two matters pending before this court that will resolve these issues. The cases are said to be HC 6547/20 and HC 4780/21.

Respondent contends that no material disputes of fact arose before the court *a quo.*

It was submitted that appellants did not address ground four of their grounds of appeal and that it should be presumed that the fourth ground of appeal is being abandoned.

We are clear that the issues we will determine pertain to this application. The substantive issues are open for determination in the declarator application under HC 6547/20. I will now deal with the grounds of appeal.

The grounds of appeal do not appear to be clear and concise. Most of them tend to incline towards the verbose and argumentative. For purposes of bringing finality to the matter in so far as the appeal is concerned the "grounds" will be considered in full.

The chronology of the grounds as given appears disjointed. The issue of *locus standi* should clearly have been the first ground of appeal. The ground is so couched that it avers effectively that because a Trust is not a legal person "it cannot sue neither can it be sued. As such there was no applicant before the court."

This issue was raised in the court *a quo* and the court dealt with it at pp 8 to 10. The court *a quo* quoted with approval a number of authorities including *Ignatious Musemwa and 9 Others* v *E/L Misheck Taponwa and Others* HH 136/16, *Women and Law in Southern Africa Research*

and Education Trust and Elizabeth Shongwe and Others HH 202/03, *Crundall Brothers (Pvt) Ltd* v *Lazarus N.O & Another* 1991 (2) ZLR 125.

The Supreme Court in *Sharadkumar Patel and Meadows (Pvt) Ltd* v *The Cosmo Trust & 6 Others* SC 163/21 found, that the common law position is reflected in the *Crundall Brothers (Pvt) Ltd* v *Lazarus and Ignatious Msemwa and 9 Others* v *Estate late Misheck Taponwa (supra.* However, the Supreme Court went further to find that the common law position has been modified to create *locus standi* for a *trust.*

This has been achieved through order 2A of the High Court Rules 1971 which has since been repealed and replaced by the High Court Rules 2021.

For clarity the Supreme Court in *Sharadkumar Patel and Meadows (Private) Limited* v *The Cosmo Trust and 6 Others supra* per GARWE JA (as he then was) at p 20 para 44 said:-

> "This means that a trustee can sue or be sued in the place of the trust and conversely a trust can sue and be sued in its own name. To this extent the Rules have modified the common law in order to create *locus standi* for a trust."

In the circumstances I find that the court *a quo* was correct, to find that respondent had *locus standi* to institute proceedings before it.

I note though that although in oral argument before us Mr Dondo for the appellants sought to argue all four grounds of appeal he did not touch on ground four neither did he do so in the heads of argument. I have determined on the issue raised in ground four as it was not particularly abandoned

Ground one attacks the court *a quo* as not having considered the requirements of an interdict. It would appear therefrom that the other grounds of appeal essentially flow from the first ground of appeal. To that end I will consider the grounds as compounded. I will not seek to enumerate each ground of appeal separately due to the manner in which the grounds of appeal are couched I will however endeavor to deal with the grounds of appeal wholesome.

To effectively do that I will deal with the requirements of a final interdict.

In *Antony Rugare Junior Kaondera* v *Isheanopa Ramone Kaondera and Rugare Kaondera* HH 792/20 TSANGA J at p 2 enunciated the requirements of a final interdict as follows:

> "Turning to the merits of the matter what the applicant seek is a final interdict whose requirements are a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy." *Setllogelo* v *Setlogelo* 1914AD 221; *Phillips*

Electrical (Pvt) Ltd v *Gwanzura* 1988(2) ZLR 117(HC); *Econet Wireless Holdings* v *Minister of Information* 2001(1) ZLR 373 at 374B and *Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004(1) ZLR p 511.

The first issue I will determine is whether or not respondent has a clear right in the circumstances of this case.

In this regard an analysis of the issue of the "Memorandum of agreement of sale – purchase of land," Annexure B appearing at p 30 of the record is of vital importance.

The agreement is entered into between Buhera Rural District Council and respondent. Under the said agreement are the following valient features.

- The sale is for forty (40) hectares of land under Chief Chitsunge, Gandawa Village Ward 8.
- The cost of the land is $2 392 000.00
- The purchaser shall obtain a development permit after full payment of the purchase price.

It is common cause that the full price was duly paid.

The appellants argue that Annexure "B" was entered into illegally, without consultation.

Their argument is premises on the following:

- Communal land cannot be sold
- There is no statutory instrument as per the requirements of the law
- There is no permit as required by the law
- The land belongs to the applicants and if taken away there must be compensation

The appellants relied on section 9 of the Communal Lands Act [*Chapter 20:04*] which provides as follows:

> "A rural district council, may, with the approval of the Minister, issue a permit authorizing any person or class of person to occupy and use subject to the Regional Town and Plan Act [*Chapter 29:12*] and any order issued in terms thereof any portion of Communal Land within the area of such rural district council where such occupation or use is for any of the following purposes –
> (a) ……..
> (b) Religion or education purposed on the interests of inhabitants of the area concerned
> (c) ….
> (d) ….

(e) Any other purpose whatsoever which in the opinion of the rural district is in the interest of inhabitants of the area in question."

What becomes clear is that the approval of the Minister is not peremptory. Thus, the use of the word "may".

A reading of s 9 clearly reflects a school as covered under educational purposes under subsection (b) thereof.

Permits to occupy or use communal lands is clearly in the hands of the Rural District Council. The permits that can be issued by the rural district council are for broad purposes as can be gleaned from s 9(e) which speaks to any other purpose whatsoever.

It is noteworthy that s 9(e) places "the opinion of the rural district in the interests of inhabitants of the area concerned" as decisive.

It is telling that s 9(2) speaks to a rural district council impose such conditions "as may be specified in the permit".

Section 9 does not provide that the Minister "must issue" a permit as appellants submits in para 25 of their heads of argument.

It is in s 10(3) of the Communal Lands Act [*Chapter 20:04*] which provides for the publication of a Statutory Instrument by the Minister.

This, however, relates to lands for the establishment of a township village, business centre or an irrigation scheme.

The issue of compensation of appellants is not covered in s 9 of the Communal Lands Act which is the applicable section to this case.

Section 12(1)(b) which is referred by the appellants as the basis for their claim for compensation actually speaks to ss 6 or 10 of the Communal Lands Act which are not applicable to this case.

I find in the circumstances that the respondent established a clear right as they were authorized by Buhera Rural District Council to occupy and use communal land for the establishment of a school pursuant to s 9 of the Communal Lands Act [*Chapter 20:04*].

I further note that no specific legal authority has been referred to by appellants to the effect that communal land cannot be sold. To the contrary the same Act provides that a rural district

council may impose such conditions as may be specified in the permit under s 9(2). The payment of a purchase price in this case is one such condition amongst others.

The sale of communal land should be read against s 4 of the Communal Lands Act which vests all communal land in the President as follows:

> "4. Communal land shall be vested in the President who shall permit it to be occupied and used in accordance with this Act."

The next requirement under a final interdict is injury actually committed or reasonably apprehended. I deal with this requirement next.

The court *a quo* dealt with this requirement at p 13 of the record.

The court *a quo* found that the now respondent hired graders and caterpillars to commence development on the land in question. Further that the now respondent seeks development and would have proceeded were it not for the interruptions incurred by the appellants. The court found due regard being had to the above, that the now respondent will suffer injury from the appellant's conduct. I agree with the above analysis.

I have to add that a reading of the record reflects that the appellants claim that their fields, homesteads and grazing fields have been invaded through the proposed building of the school by respondent. None of the appellants in the court *a quo* pointed out that their particular field or homestead was affected. None pointed out the location within the land use of their homes, fields or grazing lands. It was but generalized averments. Surely if one's homestead was affected by the respondent's occupation this would have been clearly articulated in the appellant's papers

Apart from first appellant's opposing affidavit which gives some detail the rest of the appellants chose to associate themselves with averments by first appellant.

Notably the Provincial Planning Officer Manicaland at p 47 of the record notes no objection to the proposed development of the school and justified the same *inter alia* on long distances children travel to previously established school justifying the need for the establishment of respondent's school.

I find in the circumstances that the court *a quo* was correct to find that the now respondent proved actual injury or reasonable apprehension of injury.

At p 13 of the record the court *a quo* dealt with the balance of convenience and now respondent having no other alternative remedy. The court *a quo* pointed to a pending case before

the High court which will determine the legality of the contract between Buhera District Council and the respondent. The court *a quo* found it convenient to allow development at the site pending the High Court case as aforementioned.

The court *a quo* found that there is no alternative remedy for now respondent and based thus on the pending High Court Case and found that if the application was not granted the agreement between now respondent and Buhera District Council would be of no use before the High Court has even determined the rights to land in dispute in the pending matter. The court adverted to the losses incurred by the now respondent while awaiting the declaratur application before the High Court.

I cannot find any misdirections with the above findings. In the circumstances I find that grounds of appeal 1, 2 and 4 are hereby dismissed.

I turn to ground three which speaks to material disputes of fact. There is particular emphasis laid on which village the land in question lies. Whether it lies in Gandiwa or Madzivanyika village.

At the end of the day, I find that the issue so raised can be determined on the paper if a robust approach is employed. It is not every dispute that should result in a matter being referred for trial action. The land where the school seeks to be established is well known to the parties. Whether officially or unofficially it is referred to as Gandiwa or Madzivanyika village is not a material dispute that cannot be resolved on the papers. Annexure "B","D" and "E' refer to the land in question as Gandiwa village.

It is the Annexure at p 121 of the record that reflects that Gandiwa village is not a registered village. It is dated 3 October 2018 Annexure B, D and E all bear later dates. Even if reliance is placed on the Annexure at p 121 it does not dislodge that Gandiwa Village could have been established after that letter was written, considering the Annexures which were all written by responsible authorities namely Buhera District Council and notably the Department of Physical Planning.

I find that the court *a quo* was correct to find that there are no material disputes of fact in this matter. In any case I do not see how the alleged dispute can assist in the resolution of the matter were it to be referred for trial.

In light of the above I find that the appellant's appeal is devoid of merit.

The respondent seeks costs on a higher scale on the basis that appellants' conduct in trying to stop a first class school by fielding falsehoods deserve censure. It was not brought to our attention the nature of the falsehoods.

We have not been furnished with any grounded basis for ordering costs on a higher scale.

The matter is of community and public interest in any case. We order that costs be on the ordinary scale.

In the circumstances we order as follows:

The appeal be and is hereby dismissed with costs.

MUCHAWA J:: …….Agrees

Saunyama and Dondo, appellant's legal practitioners
Mavhiringidze and Mashanyare, respondent's legal practitioners