

RIDGEWAY TICHAWONA CHANAKIRA
versus
GEORGE CHANAKIRA

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI MANONGWA JJ
HARARE, 5 July 2016

Civil Appeal

R Kunze, for the appellant
S Hashiti, for the respondent

MWAYERA J: On 5 July 2016, upon considering the record of proceedings, heads of argument and hearing oral submissions we upheld the appeal and made the following order:

“It is ordered that:

1. The appeal be and is hereby upheld.
2. The decision of the court *a quo* is set aside and substituted as follows:
 - (i) the respondent and all those claiming occupation through the respondent be and are hereby ordered to vacate from No. TT 2455 Madamombe Business Center Seke, Goromonzi within (21) days of the granting of this order.
 - (ii) the respondent shall pay the appellant’s costs.”

The reasons for our disposition are herein outlined. The appellant was irked by the decision of the court *a quo* wherein the court *a quo* dismissed the appellant’s claim for eviction of the respondent from No. TT 2455, Madamombe Business Center, Seke Goromonzi.

The appellant raised 8 grounds of appeal seeking to illustrate that the court *a quo* erred and misdirected itself when it dismissed the eviction claim. The grounds of appeal as outlined by the appellant are that the court *a quo* grossly erred:

1. In dismissing the applicant’s action for eviction of the respondent notwithstanding the fact that the appellant had proved that he had title over the premises namely, No, TT 2455, Madamombe Business Center, Seke Goromonzi, on which the respondent was or is operating a general dealer and bottle store business;

2. In failing to acknowledge that the said property was ceded to the appellant by his brother, the late Kupara Myles Chanakira, who passed on on 8 March 2010;
3. In failing to realise that the appellant remained the registered tenant with Manyame Rural District Council and recognised as such by the State.
4. In failing to realise that the appellant has not relinquished his rights over the property to the late Kupara Myles Chanakira, or to any person whatsoever, the defendant included.
5. In failing to appreciate that the respondent only enjoyed occupation of the property aforesaid by virtue of his employment with the late Kupara Myles Chanakira;
6. In failing to appreciate that the respondent's right to use or enjoy occupation of the property concerned terminated soon after the death of Kupara Myles Chanakira.
7. In ignoring the fact that the respondent had not produced documentary evidence to substantiate his contention of being the rightful owner of the property.
8. In failing to realise that, the appellant as the owner of the property has vindication rights over whosoever occupies the property, the respondent included.

What falls for determination in this appeal is whether or not the court *a quo* erred and misdirected itself by dismissing the appellant's action for the eviction of the respondent. There are factors which are common cause from perusal of the record of proceedings and also from consideration of the heads of argument and oral submissions. It is not in dispute that the appellant is the owner of the property from which he sought to evict the respondent. The respondent confirmed this position that the property is registered in the appellant's name p 69 of the record of proceedings categorically confirmed that the property was registered in the appellant's name and his trade name. The court *a quo* actually made a finding that the property belonged to the appellant. The appellant in a bid to prove *locus standi* tendered the lease agreement and confirmation of ownership tendered exh on pp 80 to 86 and p 87 the lease of land and confirmation of ownership. In an understandable manner the court *a quo*, which also made a finding on p 11 that the respondent and his witnesses had no proof that they owed the property in question dismissed the appellant's action for eviction on the basis that the appellant had not tendered sufficient grounds that would warrant the eviction at the defendant. The court *a quo*, remarked at p 12, of the record:

“whilst the plaintiff has informed the court that he would like to make use of his property he has not tendered sufficient grounds that warrant for eviction of the defendant.”

It is these remarks by the court *a quo* which occasioned the misdirection on the disposition of the court *a quo*. The appellant had on a balance of probabilities shown that the property in question was his. Further the respondent had been given notice to vacate but did not vacate. The appellant had shown he had better rights than the respondent, and thus the appellant legally sought eviction of the respondent. The appellant, by way of evidence produced proof of title, the lease agreement and cession form schedule 6 which showed property had been ceded to the appellant as way back as 31 January, 1985. The cession was with the blessing of Manyame, Rural District council and the Ministry of Local government Rural and Urban Development. Given this clear evidence that the appellant assumed the position of lessee to the local authority his rights and entitlement to evict any person in occupation of the leased property is beyond questioning. The court *a quo* fell into the error of not appreciating the rights of ownership which the appellant had *visa vis* the property in question. The court *a quo* fell into the error of trying to be a court based on humanitarian needs as opposed to being a court of law. The appellant is the recognized holder of a lease and title of the property in question and thus was entitled to evict the respondent. The evidence adduced and the history of acquisition of the property in question is clear even as observed by the court *a quo*. The property was ceded to the appellant and despite giving Myles Kupara or even respondent right to use and occupy the property, the property belonged to the appellant. The appellant remained the owner of the property, and he rightly sought to evict the respondent after giving notice. Other than the court *a quo* pointing out that there were no sufficient grounds to warrant eviction in the absence of proof that the respondent had better rights than the owner of the property, there was no cogent reason for dismissing the eviction. The court *a quo* grossly misdirected itself in its finding of fact and in law warranting interference with its decision by the appeal court.

The respondent had no superior title than that of the property owner, hence nothing entitled the respondent to remain in occupation at the appellant's property, ignoring proof of rights which the appellant has.

It has been stated in a number of cases that an owner of property has rights over the property against the whole world. In *Principles of South African Law* 5th ed at p 196 G. Willie had this to say in respect of vindication:

“the absolute owner of a thing has the following rights in the thing
(1) to possess it

- (2) to use and enjoy it .. if he is illegally deprived of his possession, he may by means of vindication or reclaim, recover the possession from any person in whose possession the thing is found.”

Given the background of the matter and the clear right of ownership vested in the appellant the court *a quo* fell into error when it declined to evict the respondent.

The respondent raised the issue of jurisdiction in its heads of argument in opposing the appeal. I must hasten to say it is settled that an issue of law can be raised at any stage even for the first time in an appeal.

In this case the court *a quo* in its judgment p 12 stated that the appellant had not established that the court had jurisdiction to entertain the matter. The court *a quo* despite making that ascertainment proceeded to hear the matter on merit and dismissed the appellant’s claim for eviction on merit. The respondent did not object to such proceedings, in fact, both parties adduced evidence on merit. It is important for one to note that in eviction matters the jurisdictional aspects are hinged on the value of the property to the occupier. In this case the eviction sought was from a rural premises, a shop. The value to the occupier was not contentious *vis a vis* the jurisdiction of the court *a quo*. Clearly by proceeding to argue the matter on merit and having a determination on merit the question of jurisdiction was not in contention. The respondent by seeking to rely on jurisdiction on appeal in the circumstances of this case is seeking enforcement of unfairness on the appellant given the matter was decided on merit. See *Muchakaha v Neterburn Mine* 1996 (1) ZLR 153. The appellant has title and right of ownership beyond questioning. The argument that only the Rural District Council of the area had *locus standi* to evict the respondent has no legs on which to stand. This is more so in the face of clear decision and confirmation of lease forms entitling the appellant to the property. The respondent’s right of occupation given the ownership rights of the appellant cannot be stronger than the appellant’s right. The appellant is more than an occupier as he is the owner of the property and has a right to claim his property.

The decision of the court *a quo* was not supported by the evidence adduced. The grounds of appeal as tabled by the appellant are sustainable given the common cause aspects. The matter was decided on merit. The finding of the court *a quo* was not anchored on the evidence adduced before the court. To that extent the appeal has merit and it ought to succeed.

Accordingly the appeal is upheld.

MUNANGATI MANONGWA J agrees _____

Chihambakwe, Mutizwa & Partners, applicant's legal practitioners
Dube Manikai & Hwacha, respondent's legal practitioners