**IN THE HIGH COURT FOR ZAMBIA** 2014/HTA/08

**HOLDEN AT MONGU**

**(CIVIL JURISDICTION)**


**BETWEEN:**

**AKAKULUBELWA LUBASI** **APPELLANT**

**AND**

**KOLWA MAKAYA** **RESPONDENT**

**CORAM** : **Honourable Mr. Justice Mubanga. M. Kondolo, SC**

**FOR THE APPELLANT** : **Mr. Inambao of Messrs Inambao Chipanzhya & Co.**

**FOR THE RESPONDENT** : **Mr. Muyenga of Messrs Muyenga and Associates**

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**J U D G M E N T**

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**AUTHORITIES**

**CASES**

1. **Augustine Kapembwa v Danny Maimbolwa and Attorney-General**
2. **Attorney General v Marcus Kapumba Achiume (1973) Z.R. 1**

This is an Appeal from the Subordinate Court in which the Appellant appealed to the Subordinate Court after being dissatisfied with the decision of the lower court which had ruled against him on a dispute over some fields in Senanga District.

The Subordinate Court held that the Appellant had clearly encroached or crossed over into the Respondent's land from Mutabo Village when he belonged to Lyombo Namayanga Village's land. It was further held that the evidence adduced by the Appellant in support of his appeal was not credible and that the Appendix "A" submitted by the Defence Counsel lacked authenticity therefore, the evidence of the Appellant was scanty, inconclusive, inconsistent and totally irrelevant to the question which the Lower Court was called upon to determine.

With this said the Magistrate upheld the decision of the Lower Court and declared that there was no land occupied by any person(s) or families in between the parties, to say, between Lyombo Namayanga and Mutabo Villages. He further ordered that the Appellant, agents, issues and persons claiming to occupy the land in between Lyombo Namayanga and Mutabo Villages must vacate on or before 31st December, 2011.

Dissatisfied with the Judgment of the Magistrate the Appellant has appealed to this Court advancing the following grounds, namely:

1. *That the Learned Magistrate in the court below erred when he held that the appellant had encroached on the Respondent's land.*
2. *That the Learned Magistrate in the Court below erred when he held that the Respondent owns the land held and occupied by the Appellant.*

When the Appeal came up the Appellant was present but his Counsel was not before Court. The record shows that the that Judgment in the Lower Court was delivered on 16th September, 2011 and the Appellant was granted a Stay of Execution on 16th December 2011 which meant that the Appellant had been enjoying a Stay of Execution for over three and a half years. I ordered that the Appeal should proceed because the record showed that the Appeal had not proceeded on the previous three occasions on account of non-attendance by the Appellant's lawyers.

The Appellant submitted *viva voce* that the Lower Court did not concentrate on his 5 witnesses while the Respondent had no witnesses. He further stated that the Respondent had encroached on his land and has ignored the boundary.

Counsel for the Respondent, Mr. Muyenga, informed the Court that the record was straight forward and that both the Local Court and the Subordinate Court in Senanga made site visits to the disputed land and he was therefore supporting the Judgment.

The Appellant's Counsel Mr. Inambao, did, although not present at the hearing of the Appeal, file in submissions wherein he stated that the boundary is not shared between the Parties but that the boundary between the two parties is shared between Masimbotwe and the Appellant while the Respondent's boundary is further to the south. Counsel went on to state that this evidence was not challenged by the Respondent but the trial Magistrate at J5 refers to it as manufactured and lacking merit. He argued that the Magistrate fell into a grave error when he did not take into account the evidence of Kwabo Mubita when he stated that his land was located in-between the Appellant and Respondents land meaning that the Parties did not share a common boundary.

He further submitted that Akatama Katusi's testimony under cross examination confirmed that the Appellant and the Respondent do not share a boundary and in addition to this, the Respondent's testimony failed to show that he indeed shared a boundary with the Appellant for all he alluded to was that there were no persons in between him and the Appellant and that those who claimed to be were false. Counsel argued that the Magistrate further fell into grave error when he placed weight on the Respondent's testimony that he knew nothing of Mubita, who was in-between him and the Appellant, which was an afterthought.

In support of ground two of the Appeal, Counsel argued that the dispute was that of a shared boundary and ownership of land. He stated that the Respondent in his evidence did state that the Appellant encroached on the boundary from Mutabo to Lyombo. Mr. Inambao further

submitted that the Magistrate erred when he contradicted himself at page J6 in his conclusion that none of the families mentioned were allocated the land located in-between the Parties' land. He further submitted that at page J2 paragraph 3 the Magistrate acknowledged the Appellant's testimony that the first settler on the land was Stanely and that he was a grandfather to the Appellant.

Lastly Counsel submitted that facts raised in the Judgment do not reflect on the record and that the Appendix referred to in the Judgment is not on the record therefore the appeal must be granted or in the alternative the matter be retried on account that the Magistrate took into account issues not presented before him when he delivered the Judgment.

I have considered the record and the submissions of Counsel.

This Appeal is an appeal on facts alone and not law and therefore I am guided by the case of **Augustine Kapembwa v Danny Maimbolwa and Attorney-General**[1] which held that an appellate Court must be slow to interfere with the findings of fact of a lower Court which had the opportunity and advantage of seeing and hearing the witnesses.

Having perused the Judgment I have noted that the Magistrate did, at J3, consider part of the evidence of Mubita Kwabo, Akatama Katusi and the other witnesses called to testify in aid of the Appellant's case. He further considered the evidence of the Respondent and his witness.

I agree with Counsel for the Appellant that the evidence of Mubita Kwabo was not considered. The record at page 11 does show that Mubita Kwabo told the Lower Court that the Parties did not share a common boundary as he was in between their portions of land and this has not been considered in the Judgment. I have also noticed that the Magistrate did not consider the evidence of Sitwala Mufoyi when he said that the Parties did not share a boundary.

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[1] *Augustine Kapembwa v Danny Maimbolwa and Attorney-General (1981) Z.R. 127 (S.C.)*

At page J5 of the Judgment, the Magistrate in analyzing the facts before him, stated that the evidence adduced by the Appellant and his witnesses was inconsistent on the following account:

> *"...to start with, the Appellant's evidence indicates that the Respondent was only the portion of land belonging to Masimbotwe, comparing this piece of evidence to what the Defence Counsel has indicated in the Appendix A in his submissions, two portions of land are in between the purported boundary, further PW4 declined in his testimony that the boundary in question does not start from the mangoes in the plains whereas PW5 said it actually starts from there (Mangoes in the plains)"*

I believe the issue between the Parties was clearly with regard to a boundary as the Magistrate correctly found on J4 at paragraph 4 of his Judgment. However the Appellant alleged that his witnesses' evidence was not taken into consideration. A look at the record shows that that the Magistrate did not take into account most of the evidence relating to the boundary, in particular, the fact, as stated by the Appellant's witnesses, that there was no common boundary between the Appellant and the Respondent. The evidence of PW4 and PW5 which the Magistrate states to have been inconsistent, seems, at pages 13 and 14 of the Record, to be consistent with respect to the testimonies that the Parties did not share a common boundary which evidence was not considered by the Magistrate.

I am at a great loss to understand how he came to a conclusion that all of the witnesses were giving manufactured facts with respect to the boundaries between the Parties, as the evidence on record reflects that the Appellant's witnesses testified to the effect that there were no common boundaries between the Appellant and the Respondent.

Not only did the Magistrate fail to consider the evidence of the Appellant's witnesses aforesaid, but also went on to find, at J5, that they were not credible witnesses because they had not lived on the land long enough to know the boundaries. It is difficult to follow his reasoning as to how

a person living on a piece of land for a certain period of time determines the extent of their knowledge of the boundaries of the land they live or lived on. For example residents of a particular town or place may own land in the outskirts of the areas they live in but that does not mean they are not aware of or are incapable of pointing out the boundaries to their respective pieces of land.

Furthermore, at J5 the Magistrate, having an opportunity to conduct a site visit, the Magistrate arrived at the conclusion that the piece of land purportedly occupied by the Appellant did not fall within the off springs of Masimbotwe or Lyombo Namayongo and as such cast doubt in his mind as to how they families found themselves there. With this visit, he concluded that the piece of evidence was manufactured and lacked merit and that historically none of the families were allocated the land between the parties.

I agree with Counsel for the Appellant that there has been no mention of who was allocating the land or whether this person or authority allocating land was called to testify to that effect. The only mention of the first settler of the Land was from the Plaintiff who stated, at J2, that Stanely, his grandfather, was allocated the land from the Royal Establishment. I have noticed in the Judgment that there is no mention as to whether the Respondent rebutted this evidence or not however, the Magistrate himself found, at J4 paragraph 5, that Stanley was indeed the first settler on the land in issue. Having so found, the Magistrate concluded that the evidence of the Appellant and that of the witnesses, in terms of who occupied the land in issue, was inconsistent or manufactured. This finding raises concerns as to what he considered or how he arrived at the conclusion that none of the families were allocated the land when the Respondent too did not show how he too was allocated the same land.

Further the Magistrate at J6, shows that he only considered the evidence of the Respondent and his witness as being consistent and unchallenged. The Magistrate conclusion comes to me with a sense of shock as to how the Appellant's witnesses' testimonies were inconsistent when the Respondent did not try to shake their evidence at all in cross examination. The evidence

advanced in the Appellant's case was not fully considered but was dismissed on account of inconsistencies, which inconsistencies as considered by the Magistrate are not reflective of the evidence on the Record.

I believe the Magistrate having had the opportunity to receive the evidence of all the witnesses as well conducting a site visit ought to have considered all the evidence in relation to the dispute before him as far as it related to the boundaries. There is no mention as to which witnesses testified at the site to show whether their evidence was similar or not. It would have been of great assistance to the Court to show that the Appellant's witnesses could not show their borders to the land they testified to have owned or lived on.

I do not agree with Counsel for the Appellant that the matter before the Court was only in relation to boundaries and not ownership. In my view, the two issues are inseparable for once ownership is determined the issue of boundaries automatically falls away therefore ownership ought to have been considered and determined for that would have put an end to the dispute immediately.

Despite all these misdirections the Magistrate found the that there was a dispute between the Parties regarding the boundary and that only two villagers had been seriously referred to with regards the boundary in issue, namely Bamutabo and Lyombo Namayanga. The Magistrate further found that the northern side of the land was the Mutabo land while the southern side was that of Lyombo Namayanga village where the Respondent's land was, as the land for Mutabo was inherited from Sitali Mulala. Additionally, his holding at J6 of the Judgment that the Appendix lacked authenticity, which holding I agree with, the Magistrate seemed to have, have relied on the same Appendix in his Judgment, at J4 and J5, to arrive at his finding of fact and this in my view was a grave misdirection, despite his finding of its lack of authenticity.

In light of the foregoing, I find that the Magistrate did misdirect himself as he should have also considered all the evidence relating to the boundaries of the disputed piece of land and not

only that of the Respondent. He did not adequately consider the evidence on Record before arriving at his Judgment which appears to have been decided wholly on the evidence of the Respondent for the reason that the Appellant's evidence and that of his witnesses was inconsistent and manufactured.

As indicated in the **Augustine Kapembwa Case**[2] which I cited earlier, findings of fact must not easily be interfered with but on account of the reasons given above I am forced to undertake this most unpleasant but necessary route and interfere with findings of fact made by a Lower Court "***which on a proper view of the evidence, no trial court acting properly can reasonably make***"[3].

The Judgment of Senanga Subordinate Court dated 2nd December, 2011 is hereby set aside and I order that this matter be retried by a different Magistrate in the Senanga District.

**Dated at Lusaka this** 07th **day of June, 2016**

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**M.M. KONDOLO, SC**
**JUDGE**

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[2] *Augustine Kapembwa v Danny Maimbolwa and Attorney-General (1981) Z.R. 127 (S.C.)*
[3] *Attorney General v Marcus Kapumba Achiume (1973) ZR1*