

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2019/HPA/0036



BETWEEN

IREDY CHISULA

AND

VINCENT MAZOKA

JOHN PHIRI

APPELLANT

1st RESPONDENT

2nd RESPONDENT

Before the Honourable Lady Justice C. Lombe Phiri in Chambers.

For the Appellant: Mr P. Chiteta - National Legal Aid Clinic for Women.

For the Respondents: Mr M. Tembo - Messrs GM Legal Practitioners.

JUDGMENT

CASES REFERRED TO:

1. Nkhata and 4 others v Attorney General 1996 Z.R 124
2. Sithole v State Lotteries Board 1975 Z.R 106
3. Mwiimbu v Habeenzu 1977 Z.R 111
4. Kitwe City Council v William Nguni 2005 ZR 57

LEGISLATION REFERRED TO:

1. Local Court Act, Chapter 29 of the Laws of Zambia
2. Subordinate Court Act Chapter 28 of the Laws of Zambia

1. INTRODUCTION

1.1 This is a matter involving a land dispute whose genesis is in the Local Court. The Appellant in the matter, following her belief that the Respondents had encroached on her land, sued them to the Local Court. At the end of the matter before the Local Court, she was not satisfied with the outcome of the case and decided to appeal to the Subordinate Court. In the like manner she was not satisfied with the judgment of the Subordinate Court so she decided to appeal to the High Court.

1.2 When the matter came up before the Subordinate Court it was heard de novo by the learned Magistrate and a judgment rendered on 7th June 2019. It was stated in the brief Judgment that the matter was essentially one relating to ownership of property. The parties all gave their evidence. Essentially, the evidence of the Appellant was that she bought the land in question sometime in 2010 and it was to the extent of 15 x 20 meters. She produced a letter of offer as proof of ownership. The 1st Defendant in his defence explained how he had acquired the 10 x 20 sized plot. In the like manner the 2nd Respondent also explained how he acquired the shop he now owned. It was admitted that the properties were in close proximity but there was never any encroachment. In its judgment of the Subordinate Court ordered that the plots remain the same and that each party should confine itself to what they currently owned. In essence the claim by the Appellant failed. The learned Magistrate stated that the Appellant had not surmounted the requirement to prove the case to the requisite standard which is on a balance of probabilities.

2. GROUNDS OF APPEAL

2.1 Aggrieved by the Judgment of the Subordinate Court, the Appellant advanced (4) four grounds of appeal couched as follows:

GROUND 1

i. That Court below erred in law and fact when it rendered judgment in the matter herein prior to the conclusion of trial.

GROUND 2

ii. The Court below erred in law and fact when it rendered judgment without giving the parties an opportunity to file submissions to frank their arguments during trial.

GROUND 3

iii. The Court below erred in law and fact when it ignored the findings of the lower court which had conducted a view without undertaking a view itself.

GROUND 4

iv. The Court below erred in law and fact when it gave the Appellant a piece of land measuring 12 x 20 meters despite her contract of sale exhibiting a measurement of 15x 24 meters.

3. HEADS OF ARGUMENT

3.1 APPELLANT'S HEADS OF ARGUMENTS

3.1.1 The Appellant argued the four (4) grounds of appeal together.

3.1.2 The Court's attention was drawn to the case of Nkhata and 4 others v Attorney General ⁽¹⁾ where the Supreme Court of Zambia gave the following guidance:

“A trial judge sitting alone without a jury can only be reversed on questions of fact if (1) the judge erred in accepting evidence, or (2) the judge erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (3) the judge did not take proper advantage of having seen and heard the witnesses, (4) external evidence demonstrates that the judge erred in assessing manner and demeanour of witnesses.”

3.1.3 The Court's attention was further drawn to the case of Sithole v State Lotteries Board ⁽²⁾ where it was observed as follows:

“civil case may be proved by a preponderance of probabilities, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil Court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt a high degree of a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.”

3.1.4 It was submitted that this was a proper case for the Judgment of the Lower Court to be reversed or varied on questions of fact for the following reasons:

- i. The Court erred in accepting evidence on the facts in issue
- ii. The Court erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered this being a scene visit by the Local Court
- iii. The Court did not take proper advantage of having seen and heard the witnesses due to the fact of rendering Judgment prior to conclusion of trial
- iv. External evidence demonstrates that the Court erred in assessing the manner and demeanour of witnesses.

3.2 RESPONDENT'S HEADS OF ARGUMENTS

3.2.1 Under grounds 1 and 2 in response to the Appellant's Heads of Arguments, it was submitted that the issue raised basically addresses whether a judgment devoid of any submissions was a faulty judgment. It was stated that the lower court was on firm ground in rendering a judgment after the parties had closed their cases and made a full assessment and evaluation of the evidence tendered.

- 3.2.2 It was stated that the Record would show that the Appellant and Respondents gave their testimonies upon which, the lower court made its assessment, evaluation and finding. It was submitted that the findings of fact upon which the lower court anchored its judgment were not misapprehended to warrant reversal. The Court was also referred to the case of **Nkhata and 4 others v Attorney General**⁽¹⁾ which details the circumstances in which a Court may reverse a judgment.
- 3.2.3 It was submitted that grounds 1 and 2 lacked merit and should be dismissed.
- 3.2.4 In response to ground 3, it was submitted that the said ground raised an issue of whether the local court's findings and its Judgment could be applied and/or used as the basis to determine a matter in the Subordinate Court.
- 3.2.5 It was submitted that there was no misdirection on the part of the lower court in making its decision without considering the record from the Local Court. Reference was made to **Section 56(1) of the Local Court Act** as well as **Section 58(2) of the Local Court Act**. The Court's attention was also drawn to the case of **Mwiimbu v Habeenzu**⁽³⁾ as follows

“The terms of this section are directory, and mean that in general, the magistrate should re-hear all the evidence. In special circumstances, a magistrate may exercise his discretion to dispense with a re-hearing for example, where all or part of the evidence consists of admitted facts, or where the evidence of one or more

witnesses is purely formal. In any case, where the question of credibility of witnesses is involved their evidence should be taken afresh.”

3.2.6 It was submitted that it was within the discretion of the lower court to hear the matter *de novo* and whether or not to conduct a view. It was stated that there was no basis for the lower court to refer to the findings of the local court and urged this Court to dismiss ground 3 as it lacked merit.

3.2.7 Turning to ground 4 it was submitted that the said ground raised the issue as to whether a contract of sale was a conclusive document to establish extent and land ownership.

3.2.8 It was submitted that the Appellant failed to prove her case and committed a dereliction of duty when she failed to invite to court the person who sold her land, which information would have established and confirmed the extent of the land. It was further submitted that the burden of proof placed the responsibility of establishing a particular fact on its proponent.

3.2.9 It was stated that the lower court was on firm ground when it concluded that the plots should remain as is and that each party should confine themselves to what they had at the moment.

3.2.10 The Court's attention was drawn to **Section 15 of the Subordinate Court Act**, which provides for the administration of law and equity concurrently. It was submitted that the 1st Respondent was the first to acquire a plot, as evidenced by the

documents on record relating to the acquisition, which were dated much earlier than that of the Appellant's, therefore giving the 1st Respondent a superior interest.

3.2.11 It was submitted that the lower court was on firm ground in concluding that the plots were close to each other and none encroached on another's land. The Court was urged to dismiss this ground.

4 HEARING

4.1 At the hearing of the Appeal, the Appellant relied entirely on the heads of argument.

4.2 The Respondent equally relied entirely on the Respondent's heads of arguments and added that in relation to grounds 1 and 2, the case of **Kitwe City Council v William Nguni** ⁽⁴⁾ stated that submissions only aided the trial Judge to arrive at a decision.

5 ANALYSIS

5.1 I have carefully considered all the evidence on the record and the submissions by counsel for both parties to which I am indebted.

5.2 The starting point in this matter is to address the grievance by the Appellant that the learned Magistrate on appeal did not consider the findings of the local court. Now it is common parlance that an appeal from the local court to the subordinate court is held de novo. This means that on appeal the learned Magistrate is mandated to hear the evidence of the parties as though it were a fresh trial. There is no onus on the learned Magistrate to rely on the evidence from the

local courts. It must be pointed out that unlike the Subordinate Courts and the superior courts, the local courts, are not for all intents and purposes courts of record. This issue was aptly addressed in the case of **Clementina Banda Emmanuel Njanje v Boniface Mudimba (2011) ZR Vol 3.** The grounds of appeal therefore, that seek to impeach the judgment of the learned Magistrate on the basis that no reference was made to the proceedings or findings of the Local Court lack merit and are dismissed.

- 5.3 Now the other ground of appeal in this matter relates to a grievance that the Learned Magistrate rendered its judgment before the matter had been concluded. It would appear from the arguments advanced that the Appellant was of the view that the trial of the matter is concluded only when submissions are received from the parties. Now no authority or law is cited to support this proposition. Of course practice is that the Court invites parties to make oral or written submissions at the close of their case in order to clearly state the law upon which they seek the Court to make its decision. It must be understood that in coming to its decision the court is primarily guided by the law as weighed against the facts. The facts of a case are deciphered from the evidence of witnesses that are brought before court hence the rules of evidence in relation to standard of proof and weight to be attached to the evidence that it is adduced. Now it is widely accepted that the submissions that are made on the law are meant only to assist the court. The Court is in no way bound by the arguments and submissions of the parties as it is presumed that the Court knows the law and therefore needs no further instruction on it

by litigants. See the case of Kitwe City Council v William Nguni (supra). In that regard there was no dereliction on the part of the learned Magistrate in not receiving submissions from the parties. That Ground of Appeal lacks merit and is equally dismissed.

5.4 Now there is also a ground attacking the findings of the learned Magistrate with regard ownership of the property. It is stated that she failed to consider a contract of sale that was exhibited. Now the Judgment of the Subordinate Court clearly states that the basis of the judgment was that the 1st Defendant was the one who was on the property first as the evidence showed that he was on the land in 2009, whereas the exhibited offer letter showed that the Appellant came on the land in 2010. It was on this premises that the learned magistrate made a finding. Needless to say that even if there was a contract of sale, that is not a proof of ownership of property. The law clearly prescribes what amounts to ownership of property. No title or certificate of any sort was produced which would have clearly prescribed the extent of the property in question. As submitted by the Respondents, the onus of proving this was on the Appellants, who had brought the matter to court. The learned Magistrate can therefore not be faulted for not speculating and for making what she deemed was a fair and equitable pronouncement. That ground of appeal also fails.

6 CONCLUSION

6.1 All the grounds of appeal having failed on account of the reasons given above, the appeal fails and is dismissed in whole.

6.2 Costs are ordered for the Respondents, to be taxed in default of agreement.

6.3 Leave to appeal is granted.

Delivered at Lusaka this^{25th}.....day of^{APRIL}.....2024.



.....
C. LOMBE PHIRI
JUDGE