MR AND MRS CHIMUZA
versus
OSWALD DZEPASI

HIGH COURT OF ZIMBABWE
MWAYERA & TAGU JJ
HARARE, 31 March 2015 and 27 May 2015

Civil appeal

T Mpofu, for the appellant
G T Mharapara, for the respondent

MWAYERA J: The appellant approached the court expressing disagreement with the Chinhoyi magistrate court judgement wherein the court ordered the appellants to be evicted from house number 14317 Brundish, Chinhoyi.

It is apparent from the record of proceedings that the appellants and the respondent at different times and for different purchase prices purchased the house in question from the seller one Solomon Mukwidza. The scenario envisaged by evidence is that of double sale. The appellant raised 8 grounds of appeal.

a) The learned magistrate erred in holding that the appellants were aware of the dispute between Phiona Moyo and Solomon Mukwidza before cession was effected.
b) The learned magistrate erred in holding that the appellants deliberately ignored the court case that was pending before the Chinhoyi magistrates court between respondent and the seller of the house 14317 Brundish Chinhoyi.
c) The learned magistrate erred in holding that the appellants were aware that house 14317 Brundish, Chinhoyi, had been sold to a third party before taking occupation and making improvements.
d) The learned magistrate erred in holding that the appellants had not extended that house in question from four to seven rooms.
e) The learned magistrate erred in accepting the evidence of the Chamber Secretary of the Municipality of Chinhoyi despite its glaring inconsistencies.

f) The learned magistrate erred in holding that cession of right, title and interest in appellant's names was improperly done, hence was null and void.
g) The learned magistrate erred in holding that they were no appeal circumstances justifying appellants in defeating the eviction proceeding.

At the hearing the applicant counsel raised a legal issue that the judgement was a nullity and on that the trial court's judgement ought to be set aside. It is settled a legal issue may be raised at any stage in an appeal.

The record of proceedings page 9 shows that the matter was heard before magistrate Gayikayi who recorded and heard *viva voce* evidence from witnesses for the plaintiff and defendant respectively. The magistrate left service and joined private practise before attending to writing and delivery of judgement. The parties subsequently agreed that another magistrate peruse the record and come up with judgement. Indeed a magistrate attended to judgement and delivered a judgement which forms subject of this appeal. The legal issue raised is that the judgement by a magistrate who did not preside over the proceedings is a nullity and as such it cannot stand.

Mr *Mharapara* whereas conceding that ordinarily only the presiding magistrate ought to have assessed, analysed and come up with judgement presented argument that in circumstances of this case the judgement was valid. He based his argument on the fact that the appellant is the one who initiated the request for a different magistrate to write and come up with a judgement. The parties agreed and acceded to having the judgement delivered and such it was not a nullity.

The question that begs of answer is whether or not by the agreement of parties would clothe a nullity to be legally binding.

For a concise and precise answer to this question to come out one has to look at the rational or basis of the settled position that the presiding magistrate ought to come up with judgement. It is not in dispute that the trail magistrate in coming up with a judgement has to assess not only the evidence adduced but demeanour. It is a holistic assessment and analysis of evidence which leads the magistrate to choose which story carries the day. Credibility of witnesses is best tested by the person who observes and hears witnesses testify. A new magistrate on simply reading the record may not appreciate

the unwritten aspects such as demeanor and thus might come up with a judgement prejudicial to either of the parties.

Once appreciative of the rationale behind the desire for the presiding magistrate to writes judgment it becomes abundantly clear that an agreement by parties does not have the effect of clothing a nullity to become valid. The fact that parties agree to an illegality does not change the complexion of an illegality to be legal.

I subscribe fully to the sentiments echoed by Bartlet J in *S* v *Likwenga and Ors* 1999(1) ZLR 498 wherein he quoted with approval Gillespie J's reasoning in *S* v *Tsangaiza* 1997 (2) ZLR 47. Both judges where of the opinion that were a magistrate retires or is in capacitated or recuses him/herself or becomes *functus officio* the proceedings are a nullity. The proceedings are deemed abortive and have to be started afresh before a different magistrate. In situation where a magistrate will have transferred or resigned before completing a partly heard matter the correct and expident approach is to utilise administrative remedies of recalling the magistrate to come in and complete the partly heard matters. Also in the case of a resigned or retired magistrate like *in casu* again administrative remedies of recalling and having the individual take oath of office to finalise the partly head matter would cure the anomaly of delay of proceedings starting *de novo*.

Handing over record of proceedings for assessment of evidence and judgement before a new magistrate albeit by consent of the parties does not paint the proceedings a legality. There are obvious prejudices which are occasioned by not having a complete assessment of the matter. It is my considered view that the fact that civil proceedings are party driven does not make them any different from criminal proceedings. The civil court just like the criminal court is duty bound to appreciate full facts, evidence and then assess. The court is the umpire and has to come up with the judgement and this duty is not on the parties to the proceedings.

It is clear therefore that wrong procedure was adopted to come up with a judgement and as such the judgement by a magistrate who did not preside over the hearing is invalid and thus a nullity. Having pointed out that there is no judgement before this court it is therefore not necessary to look into the grounds of appeal for there is strictly speaking nothing before the court since the court *a quo* judgment is a nullity.

In the premises the judgement of the court *a quo* must be set aside.

Accordingly it is ordered that

1. The judgement of the court *a quo* be and is hereby set aside
2. The matter is referred to the trial court for the original presiding magistrate to finalise the matter or in the event that the magistrate is not available for trial *de novo* before another magistrate who has not dealt with the matter.
3. Each party is to bear its costs.

TAGU J agrees ..……..

Mushinga, Mutsvairo & Associates, appellant's legal practitioners
Mtombeni, Mukwesha, Muzawazi & Associates, respondent's legal practitioners