

MIKA CHITSENGA
versus
EDSON GATSI

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 24 May and 6 July 2016

Civil Appeal

Appellant In person
C. Mawadze, for the respondent

MUNANGATI-MANONGWA J: Aggrieved by the court *a quo*'s confirmation of an interim order which restored possession or occupation of land described as "estate Late Normad Gatsi compound" to respondent appellant appealed against the whole judgment of the court *a quo*.

On the 24 May 2016 this court dismissed the appeal as having no merit and ordered that each party bear its own costs.

The background facts to this matter are as follows:

The respondent in his capacity as executor of the estate late Noah Gatsi applied for a spoliation order against the appellant on the basis that appellant had unlawfully occupied 3 hectares of land belonging to the deceased estate. The respondent claimed that he was in peaceful and undisturbed possession of the land until despoiled by the appellant. An interim order was granted.

On the return date the appellant returned in person, without any opposing papers. The court *a quo* entertained the appellant who upon an enquiry responded as follows:

"I am not opposed to the application. I was given this piece of land by Sabhuku Bere. The village head can testify since he is the one with the full knowledge. I am not opposed to the application".

Given the appellant's position that the application was not opposed the court *a quo* confirmed the interim order, with no order as to costs.

In less than two weeks the appellant filed a notice of appeal on the following grounds:

"1. The Court *a quo* erred in granting the spoliation order without hearing oral evidence

from the Village Head who is according to the Tradition Act custodian of the said property.

2. The Court *a quo* misdirected itself in accepting the evidence led on an uncompleted estate of the late Normad Gatsi, without providing the circumstances leading to the said Estate.
3. The Court *a quo* erred in not giving the Appellant any chance to explain himself, but only relied on the evidence led by the respondent's Legal Practitioners.
4. The Court *a quo* misdirected itself by interdicting every Jack and Jimmy from erecting, buildings, putting any structure on the alleged property of the Late Normad Gatsi without probing further.
5. The Court *a quo* shares the same name with Respondent and Appellant feels that it was a family affair and she should have recused herself".

When we heard the appeal the appellant being a self-actor did not submit much in support of the grounds of appeal. He indicated that he had nothing much to say on the issue as he was given land by the village head and the law says the village head has authority to give land. Whilst denying that he did not consent to the order he confirmed he did not file opposing papers. This court enquired from him as to why he did not call the evidence of the village head given that the court *a quo* had given him the opportunity to do so. The answer provided was he did not seek to call the village head but had only referred to him.

It is clear that the court *a quo* proceeded on the basis that the appellant had indicated that he was not opposed to the order sought. The judgment entered was therefore a consent order or granted with the appellants' consent. I find it difficult to comprehend the appellant's initial ground of appeal that the court *a quo* erred in granting the spoliation order without hearing oral evidence from the village head. The court *a quo* had before it an application and the appellant had not filed papers. Despite this, the court *a quo* proceeded to hear the appellant and realising that he is a self-actor it enquired from him his position regarding the case. Apart from referring to the village head, the appellant did not indicate that he wanted to call the village head. Blame can therefore not be put on the court *a quo* as it is not the court's duty to hunt for evidence that supports a litigant's case. This is further borne by the fact that when this court asked the appellant why he did not call the evidence of the village head the appellant's response was not satisfactory. Given the foregoing the appellant's first ground has no merit and thus cannot be sustained.

The second ground in which the appellant alleges that the court misdirected itself "in accepting evidence on an uncompleted estate of the late Normad Gatsi without providing the

circumstances leading to the said estate” is equally without merit. As respondent was seeking spoliation he just needed to prove that he was in peaceful possession of the land and the respondent wrongfully or forcibly interfered with the respondent’s possession. The purpose of the proceedings being meant to protect law and order and discourage persons from taking the law into their own hands. To achieve that, the court restores the position to prior the unlawful act pending the full ventilation of the material rights of each party by a competent court. In that regard there was no need to go into the question whether the estate had been finalised or not.

This ties up with the fourth ground of appeal where the appellant avers that the court *a quo* should have probed further regarding the alleged property of the late Normad Gatsi. The requirements for an interdict having been satisfied, the court had nothing further to ascertain.

Regarding the third ground of appeal, the appellant alleges that the court *a quo* did not give him the “chance to explain himself and only relied on evidence led by the respondent’s legal practitioners”. Nothing could be far from the truth. The record shows that the magistrate in the court *a quo* engaged the appellant and the appellant orally expressed his sentiments. Given that this was an application, the appellant had not filed opposing papers the court *a quo* can only be commended for giving the self-actor the opportunity to make oral submissions when no single paper had been filed on his behalf. In any case, the appellant having indicated that he was not opposed to the application that simply was the end of the matter.

In his last ground of appeal the appellant stated that since the sitting magistrate shared the same name with the respondent this “was a family affair and the magistrate should have recused herself”. Of note is the fact that the appellant never raised any objection of that nature in the court *a quo*.

Most important apart from the bold averment viz the sharing of the same name no averment of bias or vested interest was alleged on the part of the magistrate. The appellant never addressed this court on that aspect. It remains that the allegation was on paper with no evidence that the interests of justice were not served. As stated in *Masedza & Ors v Magistrate Rusape & Anor* 1998 (1) ZLR 36 HC

“there has to be reasonable apprehension of bias, so the test is whether or not in the eyes of a reasonable man the conduct of a presiding officer is likely to compromise attainment of a fair hearing”.

In this case, the conduct of the sitting magistrate was above board, she entertained the

appellant when he was not properly before the court and most crucial her judgment emanates from an admission by the appellant that he was not opposed to the application. Surely where a litigant consents to an order where does bias come in. This ground is the apex of appellant's mischief and is without merit and frivolous.

Regard being made to the facts of the matter and what appears on record, this appeal is frivolous and vexatious. If the appellant felt that what was considered as his consent to judgment was not so, he should have made a separate application for rescission of that judgment. It then would require that he satisfies the requirements for rescission of a judgment by consent¹. This is not what he did. The appellant does not in his appeal refer to the fact that he consented to the judgment conveniently avoiding that part and raising grounds which as stated in the (a foregoing) paragraphs simply have no merit and are frivolous and vexatious.

On the issue of costs, had the appellant been legally represented an order for costs on a higher scale would have been ordered. However, the appellant being a self-actor, not conversant with court procedures, and being under the strong belief that the magistrate court, operates like a village court which could summon the village head on his behalf to buttress his case, this court did not feel inclined to impose the burden of costs on him. In that regard we dismissed the appeal with each party to bear its own costs.

Manase & Manase, respondent's legal practitioners

MWAYERA J: agrees

¹ *Georgias & Another v Standard Chartered Finance Zimbabwe Ltd* ZS (1) 2000 SA 126 2000 (1) SA 126 (ZS)