GILBERT JONGA
versus
MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 21 February 2017, 30 March 2017 and 4 April 2017

Civil Appeal

F Chinwanzimba, for the appellant
N M Muzuva, for the respondent

MWAYERA J: Pursuant to an eviction order, evicting the appellant and all those claiming occupation through him, of the remaining extent of Farm 45 Truno Glendale and Plots 1, 4 and 5 of Dunmaglas Farm the appellant lodged the present appeal. The appellant's grounds of appeal were visibly repetitive and an attempt to adduce evidence. What can be gleaned from them is the attack of the court *a quo*'s decision on the basis that the court did not equate a letter recommending issue of a 99 year lease to an offer letter. The appellant further attacked the eviction order on the basis that the appellant had been occupying the land in question since the beginning of the land reform programme. For purposes of illustrating none compliance with rules by failing to provide clear and conscience grounds of appeal, the grounds as tabled by the appellant are captioned herein.

1. The learned magistrate erred in basing his judgment by ignoring the presence of a letter which came from the department of the Ministry of Lands showing approval of appellant's 99 year lease. If indeed the board which authored that letter is no longer in existence then where did the letter come from? It is a department in the Ministry of Lands. The magistrate should have made a deeper inquiry to that.
2. The learned magistrate further erred by ignoring the fact that there were material disputes to the appellant which required viva voce evidence or a trial and these could only be

resolved by way of application. In particular, with regards to the functioning of the office which authored the letter showing approval of the applicant's 99 year lease. It is indeed the Ministry of Lands which has powers to give land as such the magistrate did not bother to inquire about the authenticity.

3. The learned magistrate misdirected himself in not appreciating the fact that the appellant has been occupying that land since the beginning of the government's land reform programme and could not get an offer letter because he had requested for consideration of the area in order to get one consolidated offer letter. Further he had applied for the 99 year lease and actually got positive response. As such the appellant has a right to benefit like any other Zimbabwean he should not be evicted considering that a legal expectation close.
4. The court *a quo* also misdirected itself by ignoring the fact that when the Government of Zimbabwe embarked on the land reform programme, settlement proceded documentation. People settle first and documentation would follow, the court should have at least made such an enquiry from the respondent. The court failed to recognise that the appellant did not and was waiting for confirmation of his 99 year lease he had applied for which eventually was produced.
5. The court also erred in not realising that it is the respondent in this matter creating confusion by giving land on one hand and taking away with the other hand. Also the magistrate did not consider that it is not the permanent secretary who give land but the Ministry of Lands with all the relevant departments. The other department has issued the appellant with an approval letter to the 99 year lease and the respondent again trying to distance itself against the letter from the Ministry of lands.
6. The court also erred in believing the respondent when her evidence was not supported but just plain assertions. A survey from the Surveyor General's office was done as opposed to what was being alleged by the respondent.
7. The court erred in not realising the board which produced the letter is a department at the Ministry of Lands which deals with those 99 year leases. It is part of the court to view it as something nonexistent would be a misdirection.

As if that was not enough anomaly, the appellant clearly from the nature of appeal, further demonstrates none compliance with the rules by failure to give security for costs and costs for preparation of the record as outlined in the rules of the Magistrates Court Civil Rules, 1980, which regulate appeals to the High Court, Order 31 r 2 (b) (i) and (ii) of the magistrate court rules is instructive. It reads

> "An appeal shall be noted by:-
> (a) delivery of notice and
> (b) unless the court of appeal otherwise directs, giving security for
> (i) the respondent's costs of appeal to the amount of one hundred dollars;
> (ii) the costs of the preparation of a copy of the record to the amount estimated by the clerk of court provided that a clerk of court may, in his discretion accept a written undertaking from the appellant to pay for the costs of the preparation of the record."

In the absence of security being tendered it follows that the notice of appeal on its own does not activate the appeal. There is demonstrable none compliance with rules in this case rendering the appeal defective. GARWE JA in *Econet Wireless (Private) Limited* v *Trust Co Mobile (Proprietary) Limited and Another* SC 43-13 at p 10 of the cyclostyled judgement remarked as follows:

> "The position is now well established that a notice of appeal must comply with the mandatory provisions of the rules and that it does not, it is a nullity and cannot be condoned or amended see *Jensen* v *Acavalos* 1993 (1) ZLR 216"

In the instant case the appellant, in addition to filing grounds of appeal which are not specific but are winding and argumentative did not tender security for costs thereby dealing the appeal a heavy blow for being defective.

Even if one was to stretch the matter and condon the none compliance the facts of the matter do not reveal any misdirection on the part of the court *a quo.* The appellant was not in possession of any offer letter, permit or lease entitling him to occupy the land in question. On the other hand the respondent as the issuing or acquiring authority is responsible in terms of the Constitution and the Land Acquisition Act. The issuing authority successfully sought the eviction of the appellant from Dunmaglass Farm because there was no evidence adduced before the court *a quo* showing that the appellant had authority to occupy the state land in question. A letter recommending that the appellant should be considered for 99 year lease is not a permit, lease or offer letter. Clearly there is no misdirection in the finding of fact and law by the court *a quo.*

The appellant raised a point *in limine* that he court *a quo* had no jurisdiction to entertain the matter. It is settled that a point of law can be raised for the first time in an appeal.

Muchakata v *Netherburn Mire* 1996 (1) ZLR 153 it was stated that:

> "Provided it is not one which is required by a definitive law to be specifically pleaded a point of law which goes to the root of the matter may be raised at any time even for the first time on an appeal for its consideration involving no unfairness to the party against whom it is directed."

See also *Nissan Zimbabwe (Pvt) Ltd* v *Hopith (Pvt) Ltd* 1997 (1) ZLR 569 and *Morobone* v *Bateman* 1918AD 460.

In the present case the court *a quo* was dealing with an eviction and the important consideration is value to the occupier. The land in question was not identified to the court *a quo*. Counsel for the appellant conceded that the area and extent of the land in question was not clear to the *court a quo* and even the appeal court, as the annexure B attached was illegible. One could not therefore seek to rely on the aspect of jurisdiction when value extent and nature of land could not be ascertained. The appellant's speculative assertion on value of the land given for eviction, the jurisdiction of the court depends upon the value to the occupier of the right of occupation whether that right exists or not cannot be sustained.

The question of the jurisdiction of the court *a quo* was improperly raised given the extent and nature of land was not known. This coupled with the defective nature of the appeal and that there is no appeal culminates in one conclusion which is dismissal of the appeal.

Accordingly, the appeal is hereby dismissed with costs.

Mazhande Mazhande Legal Practice, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners