

AARON KUNDIONA  
versus  
MASVINGO COOPERATIVE UNION  
and  
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE  
WAMAMBO J  
MASVINGO, 5,6 and 28 February 2020

**Urgent chamber application**

*P. Chimwanda* for the applicant  
*J. Ruvengo* for the applicant  
No appearance for the 2<sup>nd</sup> respondent

WAMAMBO J: This is an urgent chamber application seeking an interim order in the following terms

- "1. Applicant be and is hereby restored in House No. 493 Masvingo Cooperative Union, Jerera.*
- 2. The second Respondent be and is hereby ordered to restore Applicant and all his belongings back into House No. 493 Masvingo Cooperative Union, Jerera."*

The application is opposed by the first respondent.

The background to the matter is briefly as follows:

First respondent issued summons against the applicant seeking to evict him from, stand 493 Masvingo Cooperative Union, Jerera (here in after called Stand 493). A trial ensued at the Magistrates Court with the result that an eviction order was granted against the applicant. A day after the judgement applicant filed a notice of appeal against the Magistrates judgement.

The 1<sup>st</sup> respondent proceeded to cause a writ of ejectment to be issued which was used to evict applicant from stand 493. Against this background applicant seeks to be restored back to stand 493.

Applicant alleges that he was illegally and unlawfully evicted by second respondent.

Applicant says the second respondent's action are illegal because he alleges that by noting an appeal this effectively froze the Magistrates judgement.

1<sup>st</sup> Respondent is of a contrary view averring that due process was followed. Further that the notice of appeal was not properly noted. He refers to Order 31 of the Magistrates Court (Civil) Rules 2019.

The reason why 1<sup>st</sup> respondent avers that Order 31 was not adhered is because the first respondent as a party was not served with the notice of appeal.

The applicant concedes that the 1<sup>st</sup> respondent as a party was not served with the notice of appeal.

For ease of reference Order 31 (2) of the Magistrates Court (Civil Rules) 2019 reads as follows:

*" (2) An appeal shall be noted by*

- a) The delivery of notice and*
- b) -----"*

Section 5 (i) of the Magistrates Court (Civil) Rules 2019 defines deliver as follows:

*"deliver other than in Order 7 means to file of record with the Clerk of Court and to serve a copy on the opposite party"*

By token of applicant not serving a copy of the notice of appeal on the 1<sup>st</sup> respondent for purposes of this application he did not note an appeal.

Thus the situation advocated for by applicant is untenable. In other words the Magistrates ruling is extant and undisturbed as it has not been appealed against.

The 2<sup>nd</sup> respondent thus properly adhered to and executed a properly obtained Court order.

The application is thus unmeritorious and is dismissed.

To that end I order as follows:

Application is dismissed.

*Makaya and Partners*, applicant's legal practitioner

*Nyawo Ruzive* legal practitioner, respondent's legal practitioner