WEBSTER CUTHBERT MUZARA
versus
SHANE RAYMOND WARTH
and
MINISTRY OF LANDS, WATER, FISHERIES AND RURAL SETTELEMENT

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 01 November 2021 & 7 March 2022

Opposed Application

A Gwezhira, for the applicant
A Dracos, for 1st respondent
T Undenge, for 2nd respondent

WAMAMBO J: The applicant in this matter seeks the following order:

"IT IS ORDERED THAT

1. The first respondent together with any person claiming right of occupation through him be and is hereby evicted from Subdivision 2 of Lot 12 of Lot 15 NRA Mwenezi Masvingo within 48 hours of issue of this order
2. In the event that the first respondent and any person claiming occupation through him refused to vacate the above piece of and, the Sheriff of High Court or his lawful deputy is hereby ordered to remove him and in the event of resistance, he shall enlist the services of Zimbabwe Republic Police to effect execution of this order
3. The respondent to pay costs on an attorney client scale"

The matter at hand is centred on a piece of land Subdivision 2 of Lot 12 of Lot 15 NRA, Mwenezi, Masvingo (hereinafter called the land) that was compulsorily acquired under the Land Reform Programme and leased to the applicant.

The first respondent is the previous owner of the said land. First respondent has refused to vacate the said piece of land resulting in his prosecution on a charge of flouting the Gazetted Land (Consequential Provision Act [*Chapter 20:28]*. He was found guilty and sentenced to a fine. He appealed against that decision and the High Court reserved judgment on the case.

The applicant seeks the eviction of first respondent and consequential relief as more fully set at the beginning of this judgment.

The first respondent is opposed to the application while second respondent is not so opposed.

The first respondent raised a number of points *in limine* which I will deal with presently

First respondent avers that the citation of second respondent is wrong in that a Ministry is not a person and that applicant cited, a non-existent entity. The citation of first respondent as Ministry is different from him being cited correctly as the Minister. I find no prejudice in the wrong citation of Minister as Ministry

I agree though that the citation is defective. However this does not vitiate the application. It is just a technical defect

In *Murenga Edward Chikwamba* v *Matius Mahonde Mukunga and 3 Others* HH 366/13. MATHONSI J (as he then was) said at page 3:

> "Ms Murefu also took the point that the citation of the third respondent is defective in that it is not a legal persona. I agree that the proper person to be cited is the Minister of Local Government and not the Ministry. I am however of the view that the defect is merely technical and cannot be fatal to the application. Moreover the court has the discretion in terms of r 4 (c) to condone a departure from the rules and also to regulate its process. It occurs to me that it would suffice to direct the applicant to amend his papers and cite the Minister."

I have also considered other judgments like *Mudzuri & Another v Ministry of Justice Legal & Parliamentary Affairs & Others* CC 12/15 in which the citation of a Ministry was not an issue. The order sought does not require the Minister or Ministry to perform any act.

On the issue of his *lis alibi pendens* my understanding is that there should be a matter or matters pending on the same cause of action and same parties and if I were to hear this matter there is imminent danger that inconsistent decisions may be reached as a result.

In the heads of argument first respondent at para 16 avers as follows:

> "A consideration of the opposing papers would show that a number of matters are pending before the same parties or their privies in courts of competent jurisdiction in respect of the same subject and cause of action. To avoid unnecessary, prolixity we accordingly adopt and incorporate the points in our opposing papers dealing with this issue"

The matters that first respondent avers are relevant in this regard are Criminal Appeal 218/19 EX CRB Chiredzi 1098/18, (also referred to as CA 218/19). The other 2 matters are said to be Masvingo Magistrates court EV 10/18 and Masvingo HC 202 /18.

CA 218/19 is a criminal appeal which is said to be awaiting judgment in the High Court.

CA 218/19 involves a criminal offence not a civil suit. It involves residing without lawful authority on gazetted land. The matter is not between the same parties. The issue at hand in, that case is a criminal offence. I find that CA 218/19 is not directly relevant to the outcome of this matter. It is also not between the same parties.

The cause of action in Masvingo Magistrates Court' matter EV 10/18 is not substantiated. It is not clear what the subject matter in that matter is. The first respondent who alleges this

point has not availed the relevant documentation in respect of EV 10/18. The court thus is in the dark about the specific cause of action and relief sought in that case. Further to this applicant has availed a notice of withdrawal of the same matter at page 52. In the circumstances I find that this matter has no relevance to this application.

As for Masvingo HC 202/18 little information is availed about the cause of action or relief sought in that matter. There is no relevant documentation to found the basis of the particular matter meeting the requirements that it is a matter which is between the same parties and forming the same subject matter.

Applicant is content to request the Registrar to make available copies of the said record in the body of the opposing affidavit. The opposing affidavit is signed 7 September 2021. The instant matter was heard on 1 November 2021 almost two months later. It is not expected that the Registrar will read opposing affidavits in all cases and respond timeously. If it was necessary applicant could have approached the Registrar's office directly for assistance through various means including phone calls followed by a specific written request before this matter was heard.

On the averments on record I am not convinced that those three (3) matters fall squarely within the realms of *lis pendens alibi*. To that end the point *in limine* of *lis pendens alibi* raised is dismissed. The other point *in limine* raised is material disputes of facts. First respondent identifies the principles dealing with material disputes of fact correctly. See *Masukusa* v *National Foods Limited & Anor* 1983 (1) ZLR 232.

The alleged disputes of fact are that it is unclear whether the property occupied by the first respondent is the same property as that which appears in respect of applicant's offer letter.

I am not convinced that the court cannot reach a ready answer on the papers file. It is not every difference between the versions of the respective parties that will render a matter being determined to carry material disputes of fact.

I find no material disputes of the fact and in turn dismiss this point *in limine*. I then proceed to the merits of the matter.

The applicant's position is rather straight forward as follows. He holds title to subdivision 2 of Lot 12 of Lot 15 of NRA, Mwenezi of Masvingo Province. An offer letter reflecting the same is appended at page 7 of the record. His acceptance of the said offer letter appears at page 11 of the record. To his support is the Acting District Lands Officer's letter dated 16 October 2017.

The said letter instructs first respondent to wind up his business at Lot 12 of Lot 15 of NRA which was compulsory acquired under the Land Reform Programme.

First respondent in turn avers as follows. Applicant has not established the property in question with the "required exactitude". It is not established whether the first respondent is in occupation of the property in question.

Further applicant fails to establish when he lost occupation of the property in question and the circumstances thereof.

The offer letter granted to applicant was issued in terms of the Agricultural Land Settlement Act [*Chapter 20:01*] which does not bestow any power upon the Minister to issuance of offer letters.

I will deal with the above propositions presently. Applicant in the founding affidavit centred on Subdivision 2 of Lot12 of Lot 15 Nuanetsi Ranch, Mwenezi,Masvingo. The offer letter afforded refers to substantially the same piece of land. The offer letter however refers to NRA which I surmise refers to Nuanetsi Ranch. The same piece of land is referred to in same terms in the draft order.

I find that the piece of land is established and referred to by affidavit properly and specifically. The applicant clearly does not go further in his description of the property than the description given on his offer letter which is the official document giving him title.

It is unclear what first respondent means when he says it is not established that first respondent is in occupation of the property. Is first respondent saying he is in occupation of the property in question? If he is not why does he not say so in his opposing affidavit. The closest first respondent comes to meet with this point is when he avers in the opposing affidavit in paragraph 23 that he occupied Mpapa Scheme as approved by Government. The relevance of Mpapa Scheme is unclear when applicant clearly identified the land occupied by first respondent as Subdivision 2 of Lot 12 of Lot 15 of NRA Mwenezi.

In paragraph 10 of the founding affidavit, applicant avers that:

> "First respondent has refused and /or is continuing refusing to vacate the piece of land offered to the applicant by the second respondent to date in deviance *(sic)* of laws of this country."

As to when applicant lost occupation under what circumstances can easily be discerned from the history of the matter as clearly chronicled in the founding affidavit in paragraphs 6-16. Applicant's offer letter reflects that it was granted in terms of the Agricultural Land Settlement Act [*Chapter 20:01*].

Why applicant never took occupation of the land in question seems to be answered by what is contained in the Notice of Appeal the criminal case CA 218/19 in paragraph 1.2 as follows:

> "1.2 The then resident Minister of Masvingo Honourable Hungwe had told the appellant to continue with his farming while the matter is being sorted out and that the gazetting of his land was done in the old dispensation the new dispensation was going to correct the wrong".

What appears above is clearly not proven. Whether or not the then Governor made such assurance cannot be decided at this juncture on the mere say so of first respondent. Even if it were to be true it is not enough that a political who is not even the Minister responsible for land resettlement would give assurances to the extent that he by passes or acts above the powers bestowed upon the responsible Minister. In any case reassurance by a Governor or not it does not justify first respondent remaining on the disputed farm.

The Supreme Court has reiterated the need for an occupier of state land to be in possession of lawful authority thereof.

In *Five Streams Farm (Pvt) Ltd, Frank Thomas Martin, Anne Pearson Martin* v *Francis Pedzana Gudyanga and Minister of Lands and Rural Resettlement* SC 13/16 MALABA DCJ as he then was said the following at page 1.

> "In *CFU and Others* v *Minister of Lands and Others* 2010 (2) ZLR CHIDYAUSIKU CJ writing for the full bench of the Supreme Court said at page 59,
> "Having concluded that the Minister has the legal power or authority to issue on offer letter, a permit or a land settlement lease it follows that the holders of the documents have the legal authority to occupy and use the land allocated to them by the Minister in terms of the offer letter, permit or land settlement lease. The learned Chief Justice went on to state at Page 592G-593A
> "An offer letter issued in terms of the Act is a clear expression by the acquiring authority of the decision as to who should possess or occupy land and exercise the rights of possession or occupation on it. The holders of the offer letters, permits or land settlement leases have the right of occupation and should be assisted by the courts the police and other public officials to assert their rights. The individual applicants, as former owners or occupiers of the acquired land, lost all rights to the acquired land by operation of the law. The lost rights have been acquired by the holder of offer letters, permits or land settlement leases".

Applicant's offer letter does indeed reflect that it was made in terms of the Agricultural Land Settlement Act [*Chapter 20:01*]. In *CFU* v *Minister of Lands and Others (Supra)* at paragraph 6-7. The Supreme Court pronounced itself thus:

> "(6) A permit an offer letter and a land settlement lease are valid legal documents when issued by the acquiring authority in terms of s 2 of the Act and s 8 of the Land Settlement Act. The holder of such permit, offer letter or land settlement lease has the legal right to occupy and use the land allocated to him or her in terms of the permit, offer letter or land settlement lease".

It follows from the above the allocation of land to the applicant through the Land Settlement Act gives him the right to occupy and use the said land. Thus contrary to the assertion by first respondent that applicant's offer letter is invalid it is actually a valid and lawful document. In the light of the above I find that applicant deserves the relief he seeks. Applicant seeks costs on a higher scale. He avers that the efforts by first respondent in resisting the application amounts to abuse of process. That the opposition by the first respondent is meant to delay his eviction from land acquired and offered to applicant.

I am not inclined to saddle the first respondent with punitive costs. It can not be said that he acted *mala fide* by defending his continued occupation. To that end costs are hereby granted on the ordinary scale. The following order is hereby made:

"IT IS ORDERED THAT

1. The first respondent together with any person claiming right of occupation through him be and is hereby evicted from Subdivision 2 of Lot 12 of Lot 15 NRA Mwenezi Masvingo within 48 hours of issue of this order
2. In the event that the first respondent and any person claiming occupation through him refused to vacate the above piece of and, the Sheriff of High Court or his lawful deputy is hereby ordered to remove him and in the event of resistance, he shall enlist the services of Zimbabwe Republic Police to effect execution of this order
3. The respondent to pay costs of this application"

Nyawo-Ruzive Legal Practice, applicant's legal practitioner
Horey Blackbenberg, first respondent's legal practitioner
Civil Division of the Attorney General, second respondents' legal practitioner