LOVEMORE RWAMBIWA
versus
LETWIN KANANGA
and
MINISTER OF LANDS, AGRICULTURE, FISHERIES, WATER
AND RURAL RESETTLEMENT
and
PROVINCIAL MANAGER: ZIMBABWE AND LAND COMMISSION

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 16 May 2022

OPPOSED APPLICATION

Ms *T Vhiriri*, for the applicant
C Chibaya, for the 1st respondent

MUZENDA J: This is an application for a compelling order brought about by the applicant seeking the following relief:

"IT IS ORDERED THAT:

1. Applicant and those claiming possession through him is hereby declared to have peaceful and undisturbed possession of land commonly known as subdivision 10 Merion Farm in Makoni District, Manicaland Province measuring approximately 125.20 hectares.

2. First Respondent and all those acting under her are hereby ordered to abide by the boundaries as established and determined by second and third Respondents, and to vacate, remove and demolish all erected homesteads and other immovable structures from the established legal boundaries of the farm commonly known as Subdivision 10 Merion Farm in Makoni District, Manicaland province within forty-eight hours from the date of this Order.

   In the event that it becomes necessary or expedient, the Sheriff of the Deputy Sheriff is thereby authorised and empowered to attend to the removal of the 1st Respondent and all those claiming occupation through her and to destroy such structures built or erected by the 1st Respondent. Pursuant thereto the Sheriff or Deputy Sheriff is authorised and empowered to enlist the assistance of the Zimbabwe Republic Police Nyazura who are directed to assist the Sheriff or Deputy Sheriff as the case may be so that the provisions of this Order are executed and implemented in full.

3. The 1st Respondent shall pay costs of suit on a legal practitioner-client scale."

The application is opposed by first respondent, second and third respondents indicated that they will abide by the court order, but on the notice filed on their behalf they added "The

Ministry officials carried out a boundary verification exercise in 2021 and found that the first respondent had encroached into the applicant's farm by 284m[1]"

Background

By virtue of an offer letter dated 5 June 2003 applicant was allocated subdivision 10 Merion Farm in Makoni District in Manicaland Province measuring 125.20 hectares. On 19 September 2002 first respondent E. Mukuwapasi (who is now late) was also allocated subdivision 9 of Merion Farm in Makoni District of Manicaland Province, adjacent to the applicant, measuring 75.40 hectares.

There has been a long outstanding boundary dispute between applicant and first respondent which started when first respondent's husband was still alive. Sometime in 2017 during the lifetime of the first respondent's husband the parties decided to resolve the dispute where first respondent's husband was allowed to keep His structures intact where they had been erected on an area measuring 276m x 300m and undertook to release an equal size of land situate in plot 9 further down near the dam to the applicant. This development culminated after applicant had lodged a complaint with the responsible authority, second respondent. On 20 September 2021 second respondent made the following findings:

> "3. Subdivision 9 holder (Mr Mukuwapasi) encroached into plot 10 by 284m from the actual peg.
>
> 4. Structures built on the area encroached by subdivision 9 (Mr Mukuwapasi) are electrified three rooms flat roof (bricks and cement and 1 round hut thatched)"

Applicant states in his founding affidavit that first respondent appropriated almost 15 hectares of his land and threatens to evict him. First respondent disturbs applicant and it is applicant's view that first respondent be compelled to stick to her husband's plot's boundaries, remove her structures and construct them in her own plot.

First respondent opposes the application and raises preliminary points. She challenges the propriety of the form of the application applicant adopted, that applicant did not use Form No. 24 of the High Court Rules. She also impugns how applicant's affidavit was commissioned and prays for the dismissal of the application.

Further first respondent believes that there are material dispute of facts which will make It impossible for this court to resolve the matter on paper without hearing oral evidence. She

[1] Page 50 of the record.

further states that steel pegs along the Harare Mutare Highway between subdivision 8, 9, 10 and 12 were removed but admits that subdivision 9 holder encroached into plot 10 by 284m from the actual peg. To her applicant cannot evict her based on pegs that are not there. She persists on a second pegging.

She raised a third point *in limine* to the effect that applicant used a wrong procedure, he should have used summons than an application. First respondent added that fourth point *in limine* to the effect that applicant's claim for eviction is prescribed and to her a claim for eviction is a debt and ought to have been prosecuted within three (3) years from the time applicant became aware of the encroachment.

On the merits first respondent avers that the land where applicant wants her evicted is state land and applicant has no right to evict her. She reinforces her point that the pegs are central in this matter and in their absence applicant cannot apply for eviction. She denies taking any land belonging to applicant and prays for the dismissal of the application.

Preliminary points

As already summarised above under "background" first respondent has raised four points *in limine* namely that applicant did not use a proper form for the application. Secondly that there are material disputes of fact which are not capable of resolution on paper. Thirdly that applicant should have issued summons instead of a court application and fourthly that the application is prescribed in terms of the Prescription Act. A perusal of first respondent's heads of argument do not deal with all the four preliminary points but fundamentally and sorely centralise on the material disputes of fact. I will assume that the first respondent has abandoned the other three points *in limine*. In any case the first respondent was able to comprehend the application brought by the applicant and proceeded to file her opposing papers satisfactorily. She suffered no prejudice at all by the form of application used by the applicant. To the applicant all facts are not in dispute, that is why he used an application procedure and this preliminary point will best be resolved when the court deals with the question on whether there are material disputes of fact. On prescription land disputes like the one before me the period of prescription is thirty years, I am constrained to agree with first respondent's submission that the nature of relief sought by applicant constitute a "debt". No wonder first respondent did not pursue that argument in her heads.

On the aspect of dispute of facts, it is the argument of first respondent that second respondent, the responsible authority or allocating authority did not exhaustively resolve the

dispute relating to pegs. However parties were advised to return to their original pegs. To first respondent the surveys was obliged to re-peg. First respondent added that it is not clear where the original pegs were located and that issue can only be cleared by calling oral evidence in trial proceedings. First respondent emphasises the salience of pegging in resolving boundary disputes.

In response to the issue of material disputes of facts, applicant disputes that there are disputes which are of a material nature. To the applicant second respondent resolved the boundary dispute between the parties and what is left is for each party to confine in each respective boundaries.

In the matter of *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi*[2] the then learned Judge President stated as follows:

> *"A material dispute of fact arose when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."*

It is trite that the first respondent bears the onus to prove that there are indeed material disputes of fact.[3] In this case first respondent unreservedly concedes in her own papers that the first respondent resolved the boundary dispute and called all parties to remain in the prescribed confines. It is not only applicant and first respondent, but the resolution applied to other plot holders at Merion Farm. In her own affidavit first respondent further acknowledges that her own late husband accepted that he had put up structures in applicant's plot but after negotiation with applicant, first respondent's husbund had agreed to compensate applicant an equal size of land but on a piece of land close to the dam. The second respondent's report confirms presence of the original pegs and beacons used by the surveyors in parcelling out the plots. In any case when second respondent was served with the application papers of this matter, he confirms without hesitation that first respondent has encroached into applicant's plot. Assuming that the matter was on trial, second respondent's officials would come and give oral evidence virtually to the same effect. First respondent does not give this court a hint what type of oral evidence was going to be required other than that first respondent erected a structure in applicant's plot.

I am satisfied that first respondent's preliminary points have no merit and they are all dismissed.

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[2] 2009 (2) ZLR 132 (H) at p. 136 F-G per Makarau JP (as she then was)
[3] *Mago* v *Rusere and anor* (2021) ZWMS v HC 54

On the merits.

As already pointed out in this matter, most facts are common cause

(a) Applicant is a holder of an offer letter over the piece of land and is entitled to use it at the exclusion of all other people[4]

(b) Applicant has a right to protect his rights through the courts.

(c) First respondent patently encroached into applicant's property and constructed structures without any lawful authority nor applicant's permission.

(d) First respondent's predecessor did not regularise the encroachment and hence the structures are illegal.

The applicant has successfully placed evidence before the court to justify the application. The first respondent speaks of compensation as if applicant initially authorised her to put up the buildings. It was up to the first respondent or her late husband to ensure that the buildings were being erected within the stipulated beacons allocated to the first respondent's late husband. Applicant has met all the requirements of a compelling order and he ought to succeed. Consequently the following order is granted.

IT IS ORDERED THAT:

1. Applicant and those claiming possession through him is hereby declared to have peaceful and undisturbed possession of subdivision 10 Merion farm situated in Makoni district in the Province of Manicaland measuring approximately 125,20 hectares
2. First Respondent and all those acting under her are hereby ordered to abide by the boundaries as established and determined by second and third Respondent and first respondent and all those acting under her to vacate, remove and demolish all structures from the established boundaries of subdivision 10 Merion Farm within **fourteen (14) days** from the date of service of this order on her.

   After the expiry of fourteen (14) days and in the event that first respondent had not abided by this order, the Sheriff or his lawful deputy be and is hereby authorised and empowered to attend to the removal of the first respondent and all those claiming occupation through her and further to destroy such structures built or erected by first respondent on respondent's property.
3. First Respondent to pay costs on party and party basis

[4] Commercial Farmer's Union And Others v Minister of Lands and Rural Resettlement and others SC 31/10 per CHIDYAUSIKU CJ

Mafusire Commercial Attorneys, applicant's legal practitioners
Chibaya & Partners, first respondent's legal practitioners
Civil Division of the Attorney- General's Office …