KAMPION TAWURAYI GARIKAYI
and
JAMESON Z.M. CHIVANDIRE
and
GODFREY MBERI
and
CHARLES DENISI
and
JOHN MARK MADZARA

versus

SHERENI FISHER
and
MAJUTA MANUEL
and
KATSANDE GODFREY
and
SIGN LAMECK
and
MHEPO LAZARUS
and
KAZINGIZI MARIA
and
DAWSON GEORGE
and
MANEZHO PETER
and
ANDREW JACOB NYAKABAU
and
JOHN JAJI

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 17 July 2013 & 20 November 2013

Opposed application

C. Takaendesa, for the applicants
H. Chitima, for the respondents

MAFUSIRE J: At the hearing the respondents were now represented. Previously they had filed their papers in person. A number of things had been done wrong. Among others, the notice of opposition had been signed and filed by the first respondent purportedly for and on behalf of the rest of the respondents. The respondents had also filed a fourth set of affidavits without the leave of the court or judge as required by Order 32 r 235 of the Rules of this court. The one affidavit was titled "3RD RESPONDING (sic) AFFIDAVIT". The other affidavits by some of the respondents were all titled "NOTICE OF FILING".

Soon after filing the irregular affidavits aforesaid the third respondent had filed a further document titled "NOTICE OF EXCEPTION". He also purported to represent the rest of the respondents. The document was intended to be an exception to the entire court application. This was on the basis that the fifth applicant was allegedly deceased yet the court application had purported to lump him together with the rest of the applicants. It was also the third respondent who had filed the respondents' heads of argument, again for and on behalf of the rest of the other respondents.

Finally, after assuming agency, the respondents' legal practitioners had proceeded to file respondents' supplementary heads of argument in which there were lengthy allegations of facts and numerous documents that were attached in support. It was chaotic.

At the hearing applicants' counsel applied to have the irregular documents expunged from the record. Respondents' counsel readily conceded. So the documents were expunged.

Respondents' next problem was that a number of them had been barred either for filing papers late or not at all. Respondents 1, 3, 4 and 5 had filed opposing papers seven days out of time. Respondents 2 and 8 had filed no papers at all. None of them applied to uplift the bar. None of them applied for condonation. Respondents' counsel conceded that those respondents had been barred. However, instead of applying for the upliftment of the bar or for condonation, or even a postponement in order for him to do something about the default he made an incredible submission.

Rule 233(3) provides that a respondent who fails to file a notice of opposition and opposing affidavits within the stipulated time is barred. Rule 236(1) then directs that where the respondent has been barred the applicant may set the matter down for hearing on the uncontested roll without notice to the respondent.

Mr *Chitima's* startling submission was that the respondents 1, 2, 3, 4, 5 and 8 might have been barred but that the applicants' could not themselves raise the point because they

had not proceeded to set the matter down on the uncontested roll in accordance with r 236(1)! He expressly declined to do anything about purging his clients' default

For the record, applicants' counsel submitted that he had tried to set the matter down for hearing on the uncontested roll but that the registrar had refused to do so on the basis that there was a notice of opposition on record and that, in any event, some of the respondents' affidavit had been filed on time. However, that the applicants may or may not have set the matter down for hearing on the uncontested roll was besides the point. Respondents 1, 2, 3, 4, 5 and 8 had been barred. They refrained from purging their default. That was the end of the matter. I therefore entered a default judgment against them. I proceeded to hear argument on the merits in respect of respondents 6, 7, 9 and 10. That was on the assumption that the notice of opposition and affidavits in respect of them had been filed timeously. At the end of the hearing I was satisfied that the respondents had no case on the merits. I granted the order sought.

However, as I prepared this judgment I subsequently realised that it was not only the papers for respondents 1, 2, 3, 4, 5 and 8 that had been irregular but also those for the rest of the respondents. As I have mentioned above, there had been only one notice of opposition that had been filed by the first respondent but purportedly for and on behalf of the rest. That was improper. The first respondent was not a legal practitioner. He had no power of attorney from the rest of the respondents. He had no authority to sign process and represent the other respondents in proceedings before this court. That was not the only problem.

The main affidavit on the merits of the opposition was deposed to by the first respondent, Shereni Fisher. Except for respondents 2 and 8 who filed no papers at all the rest of them filed "opposing affidavits" in this format:

"I the undersigned […*name*…] do hereby take oath and state as follows:

1. I am the [1st/…3rd/4th/5th/6th/7th/…/9th/10th] Respondent in this matter and the facts I depose to herein are within my personal knowledge and belief true and correct.

2. I have perused the affidavit of Fisher Shereni and I associate myself fully with the contents thereof and I hereby incorporate the same herein. I hereby adopt the said averments in their entirety, such that they be my own averments."

Thus if first respondent's notice of opposition and affidavit were not properly before the court because he had been barred then there was nothing with which the rest of the respondents could associate. There was nothing for them to incorporate in their own

affidavits. There was nothing for them to adopt. One cannot put something on nothing and expect it to stay there. It will collapse: per LORD DENNING in *McFoy* v *United Africa Co Ltd* [1963] 3 All ER 1169 (PC) at p 1172.

Therefore, although at the end of the hearing I dismissed the opposition by respondents 6, 7, 9 and 10 and granted the application on the merits, it was in reality a default judgment. The matter was in reality unopposed and could have been dealt with on the unopposed roll in terms of r 236 (1).

The reason why it was that the notice of opposition and one set of affidavits were out of time and yet the other set of affidavits, namely for respondents 6, 7, 9 and 10, was within time when these documents had all been filed at the same time giving the same *dies induciae* was simply because the court application had been served on the different respondents on different days.

But having given my decision on the merits in respect of respondents 6, 7, 9 and 10 I set out below my reasons for that decision.

Applicants were beneficiaries of the land reform programme. Each of them had been allocated pieces of land on a farm called Subdivision 5 of Murrayfield in the district of Murehwa, Mashonaland East Province. Each of them was the undisputed holder of an offer letter duly issued by government in terms of the Agricultural Land Settlement Act, *Cap 20:01*. Respondents had been part of an original group of fifty five that had taken occupation of the farm, including the areas allocated to the applicants. The other forty five occupiers had subsequently left. Respondents were refusing to vacate. Applicants sought an order of eviction on the basis of the offer letters. They alleged that the respondents were interfering with their right to occupy the land allocated to them. They also alleged that the respondents were engaging in destructive agricultural practices such as stream bank cultivation that, among other things, was causing siltation to the inland dam which was the only source of water.

It is trite in Zimbabwe that the holder of an offer letter in respect of land acquired for resettlement in terms of the land reform programme is entitled to occupy the land and to use it. He or she is entitled, among other things, to sue for the eviction of anyone interfering with that right unless that other person can prove a superior right of occupation: see *Commercial Farmers' Union & Ors* v *The Minister of Lands and Resettlement & Ors* 2010 (2) ZLR 576 (S).

For refusing to vacate the farm the respondents' relied on an order by this court way back in December 2005. It appears that back then there had been efforts to evict the respondents from the farm. The respondents had been part of the group of fifty five occupiers as I have already mentioned. On 15 December 2005 OMERJEE J had granted an order against what seems to have been an indeterminate or disparate number of respondents. They had been simply cited as Murrayfield Farm Settlers, the Minister of Home Affairs and six others.

The order by OMERJEE J read as follows:

"1. The Applicants be and are hereby permitted to continue residing at Murrayfield Farm **until they are lawfully evicted or resettled**.

2. It is declared that the Applicants' rights to be free from interference with their occupation of Murrayfield farm clearly include the right to farm the land without interfering.

3. The Ministry responsible for Lands shall ensure, within the nature of settlement planned for Murrayfield Farm, that the rights of the Applicants in HC 12712/04 and the rights of holders of valid offer letters are exercised in a manner that ensures peaceful settlement on Murrayfield Farm **pending the final eviction of the Applicants**" (my underlining).

The full circumstances leading to that court order were not explained. For example, were the respondents cited as "Murrayfield Farm Settlers" the same as the applicants in the present matter? What was the cause of action? Was the order granted in default or on the merits? For the respondents, Mr *Chitima* argued that because this court had ordered that the respondents could stay on the farm until they were lawfully evicted or resettled, it was wrong for the applicants to now seek their eviction!

I just failed to appreciate Mr *Chitima's* point. Far from granting them perpetual immunity from eviction, which I doubt any court would do under any circumstances, the order by OMERJEE J actually left it open for the respondents to be evicted someday. That is the plain meaning of the words "… until they are lawfully evicted or resettled" in paragraph 1 of the order; and "… pending the final eviction of the Applicants" in paragraph 3. The application before me was the step towards the "lawful" eviction of the respondents. It is

plain that what gave rise to the order must have been some self-help action to evict the respondents from the farm. OMERJEE J's order was evidently an interdict.

From the above order the respondents could stay put on the farm until they were lawfully evicted "or resettled". It was common cause that the respondents had been offered alternative land elsewhere which however, they had turned down. The respondents admitted this. In my view they had therefore been "resettled" within the meaning of that court order.

The respondents said that they had turned down the alternative land because it was unproductive. In my view, this could hardly be a ground to resist eviction. The two conditions in the order by OMERJEE J had both been fulfilled. The order said nothing about the quality of the alternative land. It could not have been the import of the order that the eviction of the respondents from the farm would be dependent on the respondents' own subjective, partisan and manifestly self-serving assessment of the quality of the alternative land to be offered to them by government.

Mr *Chitima* also submitted that since the order by OMERJEE J related to fifty five applicants, it was incompetent for the applicants in the present matter to single out only the ten respondents and exclude the other forty five. That was quite surprising. Apart from the fact that the other forty five had since vacated, it could hardly be a defence for the respondents to say that either they were sued as one original group or nothing else. Even if I were to accept that the applicants were being selective, which clearly was not the case, it was none of the business of the respondents to choose for the applicants who to sue. Respondents' stance was clearly an abuse of the court process.

It was for the above reasons that I granted the application on the merits. At the end of the hearing I issued an order in terms of the applicants' draft which was in the following terms:

IT IS ORDERED THAT

1. The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th respondents and all those holding and/or claiming right, title and occupation through them shall vacate farm subdivisions 1, 2, 3 4 and 5 Murrayfield farm in Murehwa District of Mashonaland East province within seven (7) days of this order upon them by the Deputy Sheriff.

2. In the event of the respondents failing to vacate the piece of land mentioned in paragraph (1) above within seven (7) days of service as aforesaid, the Deputy Sheriff is hereby ordered to evict the respondents and all those holding and/or claiming right, title and occupation through the respondents from subdivisions 1, 2, 3, 4 and 5 of Murrayfield Farm in Murehwa District of Mashonaland East Province forthwith.
3. The respondents jointly and severally, the one paying the others to be absolved shall pay the costs of this application.

Hangazha & Charamba, legal practitioners for the applicants
Mbidzo Muchadehama & Makoni, legal practitioners for the respondents