

BATSIRAI MAPISA
And
TAVONA MUBVONGODZI
And
MINISTER OF LOCAL GOVERNMENT PUBLIC
WORKS AND NATIONAL HOUSING N.O

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE 26 January 2023 & 15 February 2023

Opposed Application

E. Dondo, for the applicant
T.G Mukwindidza, for the first respondent
No appearance, for the third respondent

BACHI MZAWAZI J:

Introduction

Confronting this court is a dispute between two contestants vying for rights in property stand number 6390, Retreat Waterfalls, Harare. Applicant is seeking an order declaring him the lawful holder of rights in that property with the attendant consequential relief for the ejection of the first respondent and all those occupying through him from the same.

Facts

The common cause facts are that, the applicant has a lease agreement entered into between himself and the second respondent dated the 18th of November 2016 with the 2nd respondent's official stamp indicating the 28th of November, 2016. This was obtained through his membership with Chimoio housing Cooperative, which allocated him the stand in question.

On the other hand, is the first respondent who has a letter dated the 27th of November 2012, on a Samora Machel Cooperative letter head, addressed to 'whom it may concern,' indicating that he had been allocated the same property by Samora Machel Cooperative.

What is also not in dispute is that the applicant is not in occupation of the said property and was never given vacant possession of the same, whereas the first respondent has been residing on the property since 2014.

Of contention however, is the legality of the allocations to either party by their respective Cooperatives. The applicant claims that he has greater title as he is a lease holder with the owners of the land, the second respondent. He argues that the lease agreement is *prima facie* proof of his rights in the property, as well as, an indication that his cooperative had a mandate to allocate him the stand which they did procedurally.

It is also the applicant's case, that the first respondent's Cooperative was not registered as a Cooperative at the time it is claimed to have been allocated stand blocks. Therefore, its subsequent allocations of residential stands before registration had no legal effect.

They also state that the first respondent has not produced any evidence that gives her rights to the stand number 6390, Retreat Waterfalls, therefore without that he is a trespasser and an illegal occupant of the same. It is their further contention that, the forced occupation by the first respondent was an impediment to their fulfilment of a condition in their lease to buy agreement for the construction of a specified structure within a given timeframe.

In addition, they refute that their lease is no longer valid through expiration, as such leases do not expire with effluxion of time more so, when the second respondent has not terminated the lease in terms of clause 15 of the lease agreement. In support of their argument, they cited the cases of *Hunda vs Murauro* 1993 (2) ZLR (S) 401, *Murehwa v Dube* HC1459/19 and *Dube v Murehwa* SC68/21, which they claim is on all fours with the present set of facts.

In response the first respondent, raised two objections, that the applicant has no *locus standi* from two fronts. Firstly, because the lease has expired through the effluxion of the six-year period stipulated therein. Therefore, he has no real rights upon which an application for a declarator is premised on.

Secondly, in respect to the consequential relief sought in the event that the lease is found to be valid, applicant has no real but personal rights emanating from the lease. As such since he has not had vacant possession, he cannot exercise those personal rights against any other person other than the lessor. As it were it is the lessor, in this case, the second respondent, who has the right eject the first respondent.

The first respondent advocates for the referral of the matter to trial as he alleges there are several disputes of fact irresolvable on the papers. To begin with they assert that the documents produced by both parties in support of the allocations of the stand to themselves and their respective housing cooperatives are full of contradictions. Hence, there is need to call *viva voce* evidence especially from the second respondent, to straighten those aspects. The respondent relied on the cases of *Manonose v Tsandukwa & Ivhu Inhaka Housing Cooperative*, HH157/17, *Pedzisa v Chikonyora* 1992 (2) ZLR445(S), amongst several others.

Issues

From the above facts and submissions, the sole issue is whether or not the applicant has made a case for a declaration order?

The parties by consensus agreed that since the preliminary issues hinged on the main submissions they be tackled alongside the merits. It is also evident that the first technical point touches on locus standi which is one of the main ingredients of an application of a declaration of rights in this context.

Analysis

In terms of s14 of the High Court Act, [Chapter;7.06], what needs to be established is whether the applicant is an interested person, with substantial and direct interest in the subject matter, relating to an existing, future or contingent right. Further, the court has a judicious discretion to grant or not the declaratory order. These principles were well outlined in *Johnson v Agricultural Finance Company* 1995(1) ZLR65(S) at p 72E. See also, *Chigovera v minister of Energy and Power development & Anor* SC115/21.

It is crystal clear that by virtue of the lease agreement filed on record which has not been terminated or revoked by the second respondent in terms of clause 15 and 22 of the same. Until then that lease gives him some existing recognised rights in property stand number 6390, Retreat, Waterfalls. Thus, he has real, direct and substantial interest in the matter, as well as the requisite locus standi to bring this action. It does not matter whether the rights are real or personal, at this juncture the fact is he has some rights.

The court is alive to the fact that the area in contention, Retreat farm, Waterfalls has been an epicentre of numerous court battles filtrating to the upper courts. It is also cognisant of the fact that the issue of double allocations and the status of some of the Housing Cooperatives is still

to be determined by the Second respondent who did not bother to participate in this matter so as to shed light on the actual position on the ground. Nevertheless, both parties agree that the renewal and issuance of new leases to the properties are in abeyance pending those investigations and resolutions.

What is clear from the record filed of record is an extant order, by Zhou J in case HC7033/20, on the 14th of June 2020, in Chambers, appearing on pages 92 and 93 of the record, wherein Samora Machel Housing Cooperative the fourth plaintiff. Paragraph 4 of the order, declares as follows;

4. 4th plaintiff and all its members be declared lawful occupiers, holders of rights and interests in and lawful beneficiaries to stand numbers,6400 to 6451 at 315, Retreat Waterfalls.’

If reference is only restricted to the above order of this court, then it is evident that stand number, 6390, Retreat, Waterfalls does not fall within the ambit of those in case HC7033/20. Most of the documents, that make up this court application have no official logos, some have stamps but one cannot tell whether they are excerpts from complete documents which were not filed of record. Therefore, going by the above order, there is nothing on record giving any form of rights to the property in question to the first respondent’s Cooperative or the first respondent himself. See, *Dube v Murehwa & Anor* SC68/21.

Further, the only document produced as emanating from a district lands officer is not even addressed to the first respondent but captioned, ‘to whom it may concern.’ It is obvious that the first respondent has failed to establish the rights upon which he took occupation of stand 6390, Retreat Waterfalls.

As correctly cited by the applicant, the case of *Hundah vs Murauro*,1993(2) ZLR (S) 401, details instances upon which persons claim occupational rights to either Municipal or Central Government land. These are simple tenants under a lease of agreement with the local authority or central government, tenants to buy under an agreement which permits them to take title once the property has been surveyed and full price paid and Owners who graduate from the above category in the fullness of time.

This court cannot belabour nor be constrained by the mud -slinging muddling this whole application, but decide on the glaring straight forward facts that the first respondent has no leg

to stand on given the above analysis. In the absence of a document from the officials and custodians of the land he has nothing. There are no material disputes of facts incapable of resolution on the papers, as already illustrated by the robust approach that this court has taken. There is no need for reference to trial. See, *Zimbabwe Bonded Fibreglass v Peech* 1987(2) ZLR (S) 338 and *Masukusa v National foods Ltd & Another* 1983(1) ZLR,232(S) at 235A, *Eddies Pflugari (Pvt) Ltd v Knowe Residents Association & Anor* SC37/09. In *Muzanenhamo v Officer CID & Others* CCZ 3/13 PATEL JA(as he then was) stated as follows;

“As a general rule in motion proceeding the courts are enjoined to take a robust and common-sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party”

Disposition

It is my finding that, the court is satisfied that there is a lease, emanating from the second respondent which though both parties have not complied with certain provisions of the same, and owing to the suspension of renewal or issuing of new leases that lease stands valid until challenged, retracted or terminated by the second respondent a party to that contract.

In so far as the consequential relief is concerned, the question that comes to the fore is whether or not at law the applicant has demonstrated that he has the right to eject the first respondent from the said premises? In other words, does the applicant, though a lease- to -buy holder, have *the locus standi* to evict the first respondent?

In evaluation, it is not in dispute that the applicant did not get vacant possession because of the first respondent’s unauthorised occupation. In such a scenario, at law, as enunciated in *Mononose v Tsandukwa* HH156/17 states that,

“Although the lessee only acquires a personal right in the property upon entering into a lease agreement, upon taking vacant possession of the property he or she acquires a limited real right to the property for the duration of the lease.’

The same was further extrapolated in the cases of *Gwarada v Johnson & others* HH91/2009 and *Pedzisa v Chikonyora* 1992 (2 ZLR 445 (S) , that a lessee- to -buy who has been given vacant possession of the property has no *locus standi in judicio* to sue to evict an occupant who does not have a better title than him or a trespasser.

In *Pedzisa v Chikonyora* above, it was held, "... Although the respondent had not actually moved into the house, he had acquired control over the unoccupied property. He has thus acquired a real right over the property'.

The key word is unoccupied translating to vacant possession, distinguishably in the present case, the applicant had not taken any form of occupation or vacant possession. It was not rebutted that the first respondent took occupation before the conclusion of the lease agreement.

In contradistinction however, the Appellate court in the case of *Dube v Murehwa Anor* SC68/21, in circumstances similar to those of the applicant herein confirmed the decision of this court granting the consequential relief for ejectment. Likewise guided by this Appellate court's decision the applicant has succeeded in demonstrating that he is entitled to the relief sought.

Accordingly, in the exercise of my discretion judiciously upon the synthesise of the facts and evidence against the backdrop of the law,

It is ordered that,

1. The declaratory order be and is hereby granted as follows;
 - a. Applicant is hereby declared the lawful holder of rights and interests in property known as stand number 6390, Retreat Waterfalls.
 - b. 1st respondent and all those in occupation through him at property known as No. 6390, Retreat Waterfalls, be and hereby ordered to vacate the premises and give vacant possession to the applicant within the next 60 days from the date of this order.
 - c. 1st respondent to pay cost of suit.

Messrs Saunyama, Dondo, Applicant's Legal Practitioners.
Tavona Mubvongodzi, 1st Respondent.