

METHODIST CHURCH IN ZIMBABWE
versus
DAVID KUIMBA
and
MICAH MABIKA
and
TOGETHER AS ONE HOUSING CO-OPERATIVE
and
CITY OF HARARE
and
SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 18 January and 8 February 2023

Opposed Application

E Jera with *P Chivenge*, for the applicant
O Zimbodza, for the 1st and 3rd respondents

TAGU J: This is a court application for the eviction of the 1st and 2nd Respondents and all those claiming occupation through them from Stand Number 24629, Budiriro 4, Harare. The orders being sought are-

- a. The 1st and 2nd Respondents and all those claiming occupation through them be and are hereby ordered to vacate Stand number 24629, Budiriro 4, Harare within seven (7) days from the date of this order'
- b. Should the 1st and 2nd Respondents and all those claiming occupation through them fail to comply with paragraph "a" above, the 5th Respondent be and is hereby directed and authorized to evict them forthwith and demolish any structures effected by them at No. 24629, Budiriro 4, Harare.
- c. The 1st Respondent be and is hereby ordered to pay costs of suit on a client –attorney scale.

BRIEF BACKGROUND

Sometime in 1998 Applicant made an application to the 4th Respondent for a church stand. The application was accepted and a 30 –year lease agreement was entered into between the Applicant and the 4th Respondent on the 13th of August 1998 for stand number 11252 Budiriro 4, Harare, measuring 1370 square meters. Sometime in 2014 the Applicant made another application

for the extension of its stand through the annexure of an adjacent stand 24628 which by that time was vacant and unoccupied. The application was granted by the 4th Respondent after it published a notice in the Newspaper calling for objections, and none were lodged. A new 30 year lease was entered into and the two stands were consolidated under Stand 24629, Budiro 4, Harare, measuring 5115 square metres. In or about 2016 the 1st and 2nd Respondents took occupation of stand 24628 purporting to be members of the 3rd Respondents. All efforts were made to have 1st and 2nd Respondent vacate Stand 24628 without success hence the present court application.

The 1st, 2nd and 3rd Respondents' defence is basically that this matter cannot be dealt with through application procedure since there are material disputes of facts. They said the 3rd Respondent and its members are not in occupation of stand number 24629 but stand number 7171 whose proper description is the Remainder of Gleneagles Farm, now Budiro Township, being a portion of Stand No. 7171, which is meant for residential purposes not a church. They therefore, alleged that the Applicant is occupying a wrong stand and only the 4th Respondent can evict them. Further, they submitted that the 3rd Respondent and its members were given judgment in their favor by the High Court under case number HC 518/16 when 4th Respondent made an attempt to evict them in 2015.

ISSUES FOR DETERMINATION

1. Whether or not there are material disputes of fact,
2. Whether or not the Applicant has established a case for the eviction of the Respondents.

WHETHER OR NOT THERE ARE MATERIAL DISPUTES OF FACTS

As to what constitutes material disputes of facts, the Respondents referred me to the case of *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi* HH 92/09 at p 4 wherein it was stated that:

“A material dispute of fact arises when such material facts put 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.” Further, in *Grain Marketing Board v Mandizha* HH 16/14 CHIGUMBA J at p17 of the judgment stated that,- “put differently, it is my view that, the phrase material dispute of facts, in the application procedure, refers to the untenable position where averments are made in an affidavit, which averments have direct bearing on the outcome of the matter, yet the papers which will be before the court from the founding affidavit, the opposing affidavit, the answering affidavit, the annexures attached, the heads of argument, the parties oral address at the hearing of the matter, leave the court riddled with doubt and uncertainty as to the veracity of the averments, to the veracity of the averments, to the extent that it ought to have been clear to the applicant, at the outset that the court would be unable to come to a conclusive decision, on the merits of the application.”

In casu, the respondents argued that we have a situation where the Respondents are alleging that the portion of land they are in occupation is stand 7171 whose proper description is Remainder of Gleneagles Farm, now Budiro Township, being a portion of stand No. 7171, which is meant for residential purposes and not a church. On the other hand, the applicant is in occupation of stand 24629 which is meant for church purposes. Therefore, *viva voce* evidence is required from experts and the authorities such as the 4th respondent-City of Harare.

The applicant referred to the case of *Douglas Muzanenhamo v Officer in Charge CID Law & Order and Others CCZ 3/13*, where the Constitutional Court held as follows:

“As a general rule in motion proceedings 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.....”

In the present case the applicant submitted that there are no material disputes of facts. It said the 1st to 3rd respondents have simply made bold and generalized averments which are not substantiated by anything. They also relied on the case of *Super Plant Investments (supra)* where MAKARAU JP (as she then was) held that:

“...For the respondents to allege that there was a material dispute of facts he must establish a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence. He must not make a bare denial or allege a dispute.”

The alleged dispute in this case is whether the Applicant is currently in possession of Stand 24629 and whether or not Respondents are in possession of stand 7171. A reading of the approved diagram attached as Annexure “E” to the founding affidavit by the Applicant at p 34 of the record confirms that stand 24629 is actually a subdivision of stand 7171. Further, the Applicant built a security wall along the boundaries of its stand and the 1st and 2nd Respondents are inside that security wall. On the contrary the 1st, 2nds and 3rd Respondents have not shown anything to depict the stand that they are occupying and how different it is from Stand 24629. They do not have any paperwork attached to show any right to occupy the stands they are occupying. On the other hand the Applicant produced a 30 –year lease agreement entered into between the Applicant and the 4th Respondent on the 13th of August 1998 for stand number 11252 Budiro 4, Harare measuring 1370 square meters. Later Applicant applied for extension of its stand through the annexation of an adjacent stand 24628 which by that time was vacant and unoccupied which application was

granted by the 4th Respondent. In due course the stands were consolidated into one stand under Stand 24629, Budiro 4, Hare, measuring 5115 square meters. This new consolidation was given effect by an addendum to the lease agreement which was signed by the Applicant and the 4th Respondent on the 19th of November 2019. *Ex facie*, it appears there are no material disputes of fact. However, the court did not lose sight of the averments made by the Respondents that the 3rd Respondent and its members were given judgment in their favour by the High Court under case number HC 518/16 when 4th Respondent made an attempt to evict them in 2015.

DID CASE HC 518/16 RESOLVE THE ISSUE OF OWNERSHIP IN FAVOUR OF RESPONDENTS?

In case HC 518/16 the City of Harare was being sued by Together as one Housing co-operative when it attempted to evict the Applicant in that case and those claiming occupation through them. The case involved the use, or abuse, by the City of Harare of an archaic clause 18 (2) of Statutory Instrument number 109 of 1979. The clause allows the City of Harare to evict, at short notice, or to demolish structure of, persons whom the City of Harare deem to be on the City of Harare's land without the latter's authority or permission. The court allowed the application on the basis that S.I. 109 of 1979 which the City of Harare was using is ultra vires, and inconsistent with section 2 of the Constitution. But nowhere did the court say the Respondents were in lawful occupation of Stand 7171. The nearest the court dealt with the occupation of the stands is when the court cited an application by the Respondents for un-serviced vacant land in Budiro Township for residential development.

The letter from the City Treasurer to the Respondents dated 25 October 2012 says:

“Reference is made to your letter on the above issue.

Please, be advised that the site depicted on the site plan submitted to this office with your application has already been subdivided to create residential stands following an earlier application. On completion of the remaining town planning process the resultant residential stands will be handed over to the Director of Housing and Community Services for allocation to applicants on the Municipal Housing waiting list in line with Council policy on housing. The allocation of all Municipal residential stands in Harare falls under the purview of the Director of Housing and Community Services.”

In commenting the court in HC 518/16 said at p 2 of the cyclostyled judgment:

“It is not clear from the record if the applicants pursued its application for land with the respondent beyond the City Treasure’s Department. What is clear, though, is that the applicant settled its members on the Remainder of Gleneagles Farm, now Budiriro 4 Township, being a portion of stand N. 7171.”

The court never said the Respondents are in lawful occupation of the land, but confirmed that the Respondents are physically in occupation of the land. Equally, in this case the Respondents failed to produce any documentation to rebut the Applicant’s averments. They failed to adduce any evidence to show that there are material disputes of fact. Theirs is a bold averment not supported by any evidence. I therefore find that there are no material disputes of fact in this matter.

**WHETHER OR NOT APPLICANT HAS ESTABLISHED A CASE FOR
EVICTION OF RESPONDENTS**

The Applicant has established that it is a bona fide lease holder to the property in question. It therefore, has a substantial interest and rights vested in the property. This therefore entitles it to sue for the eviction of the 1st and 2nd Respondents. Silberberg and Schoeman in their book, The Law of Property, 5th Edition, Lexis Butterworths at page 652 had this to say:

“Eviction proceedings may be instituted as soon as the owner or person in charge of property realizes that illegal occupation is taking place or as soon as it comes to his attention that persons are occupying his or her property.”

It is clear that the Applicant being a bona fide holder of a 30-year lease, and was given vacant possession of stand 24629, is a person in charge of the property and has the requisite locus stand to sue for eviction of the 1st and 2nd Respondents. Applicant has established a right to stand 24629. The 1st and 2nd Respondents have dismally failed to show that they have any basis to be occupying stand 24629 and on that basis, they ought to be evicted.

IT IS ORDERED THAT:

- a. The 1st and 2nd respondents and all those claiming occupation through them be and are hereby ordered to vacate stand number 24629, Budiriro 4, Harare within seven (7) days from the date of this order.
- b. Should the 1st and 2nd respondents and all those claiming occupation through them fail to comply with paragraph ‘a’ above, the fifth respondent be and is hereby ordered to evict them forthwith and demolish any structures erected at No. 24629, Budiriro 4, Harare.

- c. The 1st and 2nd respondents be and are hereby ordered to pay costs of suit on a client-attorney scale.

Moyo and Jera, applicant's legal practitioners.

Zimbodza and Associates, First, second and third respondents' legal practitioners.