

APOSTOLIC FAITH MISSION IN ZIMBABWE
versus
SIMON NYAHWEMA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 31 October & 9 November 2022

Opposed Application

A Majachane, for the applicant
BS Nyengera, for the respondent

TAGU J: This is a court application for eviction of the respondent and all those claiming occupation through him from applicant's premises being described as Chizinga Assembly, Chizinga Shopping Centre, Mhondoro which premises the respondent is in unlawful occupation and possession.

Historically and at all material times, applicant was the owner and remains the owner of a mission house and church building at Chizinga Assembly, Chizinga Shopping Centre, Mhondoro. Sometime in 2018 the church faced a leadership dispute which resulted in a legal battle between two factions. During this period the church witnessed a split which saw most of the Pastors either choosing between the two factions or leaving the church altogether. Pastor Kanhukamwe was then stationed at the applicant's Chizinga Assembly in Mhondoro. However, he abandoned the assembly during the height of the legal wrangle which was finally settled under Case Number SC 67/21 in favour of the leadership of Amon Dubie Madawo who is the rightful leader of the applicant. When Pastor Kanhukamwe who was by then a pastor under the respondent but belonging to a dissident group left, he deployed the respondent at the Chizinga Assembly without the authority and consent of the applicant. Respondent is not an employee of the applicant and he does not have a legal relationship with it. Hence the court application to evict him.

The respondent raised a point *in limine* that there are material disputes of facts which cannot be easily solved by way of an application. He said the property in question is community

property for which oral evidence from the responsible authorities being the chiefs, village headmen, community as well as counsellors should be heard first for the court to reach a just decision.

The applicant disputed the existence of dispute of fact. The court was referred to the case of *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 cited with approval in *Vittareal Flats (Pvt) Ltd v Undenge & Ors* 2005 (2) ZLR 176 (H) at 180C-D where it was held that in this regard, the mere allegation of a possible dispute of fact is not conclusive of its existence ...The respondent's defence must be set out clear and cogent details. A mere denial of the applicant's material averments does not suffice.

In the case of *Soffiantini v Mould* 1956 (4) SA 150 it was held that it is necessary to make robust common-sense approach to a dispute on motion as otherwise the effective functioning of the court can be harmed and circumvented by the most simple and blatant strategy. The court must not hesitate to decide an issue of facts on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over fastidious approach to a dispute raised in affidavit.

In the present case it is not disputed that up to 2018 the property in question belonged to the applicant. It is not disputed that from 2018 to 2021 the church faced a leadership dispute which resulted in a legal battle between two factions. It is not disputed that the church witnessed a split. Again it is not disputed that Pastor Kanhukamwe was stationed at the church Assembly in Mhondoro curtesy of the applicant. It has not been disputed that when Pastor Kanhukamwe abandoned the assembly and he deployed the respondent at the Chizinga Assembly without the authority and consent of the applicant. The respondent conceded that he does not have a legal relationship with the applicant and is not utilizing it on behalf of the applicant. The authenticity of a ZESA bill which shows that the property is registered with ZESA and paying utility bills cannot be doubted.

In essence the opposing papers must show a bona fide dispute of fact incapable of resolution without *viva voce* evidence having been heard. It is clear from case law that the respondent must demonstrate a *bona fide* dispute of fact that cannot be resolved on affidavit evidence only and would need trial. However, the respondent made bare denial that the applicant is not the owner and attached papers purportedly from community leader which do not at all serve

as proof of ownership of Chizinga Church. The denial is bare, frivolous and vexatious aimed at frustrating the process and give the respondent more time to continue unlawfully occupying the premises at the prejudice of the applicant. From what is common cause the court is able to determine the matter based on Affidavit evidence placed before it without need of trial since the Court would not need the evidence of a headman, king or chief to determine that the applicant is the owner of the property. I therefore dismiss the point *in limine*.

As to the merit the law is very clear. In the case of *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999 (1) ZLR 262 (H) it was held that:

“indeed the principle of the *Actio rei vindicatio* is that an owner cannot be deprived of his or her property against his or her will. All the owner is required to prove is that he or she is the owner and that the property is in the possession of another at the commencement of the action. Proof of ownership shifts the onus to the possessor to prove a right to retention. See *Jolly v Shannon & Anor* 1998 (1) ZLR 78 (H) at 88A-B.”

In *Zavazava & Anor v Tendere* 2015 (2) ZLR 394 (H) at 398G it was held that the owner of property has a vindicatory right against the whole world. It is a remedy available to the owner whose property is in the possession of another without his or her consent.

Deciphering from a plethora of cases relating to *Actio rei vindicatio*, it can be observed that there are two elements that must be proved for it to be successful that the applicant is the owner of the property in question and that the property is in possession of another at the time of commencement of the action.

In the present case the applicant managed to prove that it is the owner of the property in question. It managed to prove that the respondent took occupation of the property without the owner’s consent. It also proved that the property is in the hands of the respondent. The respondent did not state how he took over the possession of the property. All he could say the property belongs to the local community. The respondent, as it has fully appeared from the papers filed of record used to be a member of the applicant Church and was able to occupy the property by virtue of the membership to the applicant Church. However, it is not disputed that the respondent is no longer part of the applicant as a congregant, Pastor, Agent, employee or any connection whatsoever. He conceded that he does not have any legal relationship with the applicant. Therefore, he is unlawfully occupying the premises as he broke away from the applicant to be part of the splinter group which formed their own church called Apostolic Faith Mission of Zimbabwe. The church is a different entity altogether and should acquire its own property as was observed by this

Honourable Court in the *AFM in Zimbabwe v AFM of Zimbabwe & 7 Ors* HH 269/22 which is very apposite and instructing to the disposition of this matter:

“it is a case of clear misconstruction of events for the Respondents to allege, as they are doing, that they built the civic centre on the basis of which they should be allowed use of the same. The reality of the matter is that they built same when they were one whole body-a complete universtas which manifested itself in the Applicant. The moment the respondent broke away from the Applicant to form their own church as they did after the Supreme Court judgment SC67/21, whatever, they did with the Applicant as one church remains with the [Applicant]. Nothing of it goes with the Respondents. This principle of the law is evident from the statement which is to the effect that a member of the club who breaks away from the club does not take away with him items of the club...”

For these reasons the application will succeed.

IT IS HEREBY ORDERED THAT:

1. That the respondent and all those claiming occupation through him in the premises being described as Chizinga Assembly at Chizinga Shopping Centre, Mhondoro be and is hereby ordered to vacate the said premises within 48 hours (forty eight hours) from the date of this order.
2. The respondent shall pay costs of suit on a legal practitioner-client scale.

Alex F & Associates, applicant’s legal practitioners
Tafirei and Company, respondent’s legal practitioners