LUCIA MADANHIRE
And
EFFORT MUFAMBISI

versus

EPHRAIM CHIRUME

And
PAUL CHIRUME
And
VICTOR CHIRUME
And
JESCA CHIRUME

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 22 March, 2022
Written reasons provided on 29 June 2022

A. Mufari for the applicants
I. Murambasvina, for the respondents

Opposed application

ZISENGWE J: The following are the reasons informing the decision of the judgment I delivered *ex tempore* on 22 March, 2022. The reasons are being provided at the request of the respondents. The dispute primarily related to the right to occupy a certain piece of land referred to as plot 70 Chatsworth estate, Gutu which was allocated by means of a "certificate of occupation" issued by the Ministry of Lands and Rural resettlement to one Simon Chirume. The latter has since passed on leaving behind the 1st applicant as his surviving spouse. The three respondents are Simon Chirume's children, all of whom are majors, from a previous marriage. In

other words, they are the 1st applicant's step children. The 2nd applicant on the other hand is 1st applicant's nephew who was resident on the farm during Simon Chirume's lifetime.

In her founding affidavit the applicant averred that she was married to the late Simon Chirume in terms of the Marriage Act [*Chapter 5:11*] and that she resided with her late husband on the said plot until his demise in 2020. She further averred that in the wake of his death the respondents have basically made her stay on the plot unbearable as they have routinely subjected her to all manner of abuse and threatening to evict her therefrom. According to her the basis of the respondents' threats is that the plot belonging to their (i.e. respondents') late father and that she (i.e. 1st applicant) had no right, claim a tile over the same.

She further averred (although she did not say so in as many words) the the threats to evict her from the plot were based on a document wherein the respondents appointed one amongst their number, namely Ephraim Chirume (the 1st respondent) as the sole beneficiary of the plot. This document which formed the subject matter of the prayer in paragraph 3 of the applicant's draft order was authored by a person identified therein as "Presiding Officer" and reads as follows: -

> **"*Declaration by Relatives***
>
> *We the undersigned, being the members of Simon Chirume family do hereby declare that we were present when* ***Ephraim Chirume*** *(22-008092 N 26) was nominated heir. The nomination was made with our consent. We understand that the heir is to have free use of Farm/Plot 70 Chatsworth Estate, Gutu without any disturbance form us*."

It is common cause that the three respondents made the above declaration and appended their signatures and National Identity numbers thereon.

The 1st applicant averred that the above declaration is a nullity as it purported to exclude her in matters relating to the estate of her late husband which estate as of that moment was yet to be registered. It was on that basis that she and the 2nd applicant sought an order declaring that the respondents' conduct in issuing eviction threats against her as unlawful and that the aforementioned document was a nullity. The terms of the order they sought reads:

> *IT IS ORDERED THAT: -*
>
> *1. The application for a declaratory order be and is hereby granted.*

2. *The respondents' conduct in threatening to evict the 1st applicant from Plot 70 Chatsworth, Gutu be and is hereby declared to be inconsistent with the law and is in infringement of 1st applicant's rights as a surviving spouse and it amounts to property grabbing.*

3. *The documents authored by the respondents on 2 September, 2021 titled "Declaration by the relatives purportedly awarding Plot Number 70 Chatsworth Estate, Gutu to 1st respondent be and is hereby declared null and void and of no force and effect is hereby set aside.*

4. *Consequently, the respondents be and are hereby ordered and directed not to interfere with 1st applicant's rights to occupy Plot 70 Chatsworth, Gutu.*

5. *The respondents be and are hereby ordered and directed not to interfere with 2nd applicant's projects and stay at Plot No 70, Chatsworth Estate, Gutu.*

6. *The respondent shall jointly and severally, the one paying the other, to be absolved, pay applicants' costs on a legal practitioner and client scale.*

The application was opposed by all the three respondents the thrust of whose defence was that the blank form entitled "Declaration by relatives" was availed to them by officials within the Ministry of Lands in the exercise of their statutory duties. More pertinently, the respondents averred in their opposing affidavits that they harbour no ill feelings towards the 1st applicant but that she (i.e. 1st applicant) spurned the overtures made by the deceased's family for her to remain in occupation of the plot in the aftermath of the death of their father; Simon Chirume. According to them, true to her word, the 1st applicant practically deserted the plot on the 16th of January, 2020 barely two days after her husband died.

They indicated that the applicant expressed an unwavering desire to return to her maiden home despite their (i.e. respondents') best efforts to convince her otherwise. They further averred that to their dismay they discovered that the 2nd applicant had lodged an affidavit with the Ministry

of Lands purportedly naming him (i.e. 2nd applicant) as the person to take over the plot in the event of the late Simon Chirume's passing away.

The applicants however raised three points *in limine* which I dismissed. These were;

(1) That the failure by the applicant to cite the Ministry of Lands as the authority responsible for allocating state land rendered the application fatally defective.

(2) That the High Court has no jurisdiction to entertain disputes of this nature given that the sole prerogative of allocating rural land in Zimbabwe lies with the Ministry of Lands and any attempt to entertain such a dispute amounts to a usurpation of the Minister of Lands' powers and responsibilities.

(3) That the applicant should have pursued administrative justice avenues for a resolution of the dispute

This is how I disposed of each of those preliminary points.

The question of the non-joinder of the Ministry of Lands and Rural Resettlement

In dismissing this preliminary point, I pointed out then as I do now, firstly that in terms of rule 32(11) of the High Court Rules, 2021 ("the rules") the failure to join a party who should have otherwise been joined does not render an action or application fatally defective. The said rule reads;

> "*11. No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter*."

That puts paid to the non-joinder argument. More pertinently, however, I pointed out in my *ex tempore* judgment that there was hardly any nexus between the reliefs sought by the applicant against threats of her eviction from the plot with the Ministry of Lands. I further observed in that regard that the applicants were challenging the written representations (via the disputed document) made by the respondents to the Ministry of Lands. Those representations excluded the applicant as the surviving spouse of the late Simon Chirume. That document was not authored, generated or originated by the Ministry of Lands. It would have been inappropriate for the applicants to join the Ministry of Lands solely on the basis that the respondents had submitted that document to it. There was nothing to suggest that the Ministry of Lands had acted on it to the prejudice of the applicants to deem it necessary to join it (i.e. Ministry of Lands) to the proceedings.

Much as the respondents might have wanted to portray the narrative that the impugned document was a creation of the Ministry of Lands, the evidence suggests otherwise. The incontrovertible averments by the 1st applicant were that the respondents in a bid to wrest the plot from the her approached the Ministry of Lands armed with the so called "declaration by relatives" hoping that the Ministry of Lands would act on it and allocate the plot to one of their number namely Ephraim Chirume. I accordingly dismissed the first point in limine for want of merit.

The question of the jurisdiction of the High Court to entertain the application

Here the gist of the respondents' contention is that the High Court cannot purport to usurp the power and functions vested with the Ministry of Lands to allocate rural land. In this regard, the 1st respondent averred as follows in his founding affidavit;

> "*The second point in limine which is equally important relates to the incompetency of the High Court in particular and the courts in general to usurp the powers of the Ministry of Lands and Rural Resettlement in allocating land. As already adverted to above, all State land is vested in this particular Ministry. It allocates land to beneficiaries deemed deserving state land in accordance to it processes of selection and determination. This Honourable Court cannot usurp such authority via a declaratory order*."

This argument conveniently disregards a few important considerations. Firstly that the High Court enjoys inherent jurisdiction to hear and adjudicate disputes between all persons in Zimbabwe. Section 171(1) (a) of the Constitution pointedly provides as follows;

> *171. Jurisdiction of High Court*
>
> *(1) The High Court –*
>
> *(a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe.*

This is a constitutional endorsement of the Common Law position regarding the inherent jurisdiction of the High Court. Save in instances where the jurisdiction is ousted by some other law, the High Court can entertain any dispute between any persons in Zimbabwe. See also section 13 of the High Court, Act [*Chapter 7:06*] which provides as follows;

> *13. Original Civil Jurisdiction*
>
> *Subject to this Act and any other law, the High Court shall have full original jurisdiction over all persons and over all matters within Zimbabwe.*

Commenting on the jurisdiction of the High Court GUVAVA JA in the recent case of *Rutsate* v *Wedzerai & Ors* SC 45/22 commented as follows;

> "*The original jurisdiction of the High Court is unlimited, that is to say, it can hear and determine any civil dispute, whatever the nature of the claim*."

The concept of the inherent jurisdiction of the High Court is so well entrenched that is merits no further discussion. A dispute having arisen between the parties over the conduct of the respondents vis-à-vis the occupation and enjoyment of the plot, it was well within the jurisdiction of the court to entertain the application. To say that the High Court, has as a matter of fact adjudicated over countless cases involving land occupation disputes is an understatement. There is nothing unique about this dispute to deem it to be out to the reach of this court.

Secondly, and related to the above is the fact that the prayer by the applicant can hardly be construed as tantamount to the usurpation of the functions of the Ministry of Lands. All that the applicant sought and did obtain in this regard was a declaration that the conduct of the respondents in threatening to evict her from the plot was a violation of her rights as a surviving spouse of the person who was allocated that piece of land by the Ministry of Lands. The two are separate and distinct. The applicants did not seek an order for the allocation of the plot to them neither did the court make such an order. Accordingly, the second point in *limine* suffered the same fate as the first, it was dismissed.

The question of whether applicant should have pursued administrative remedies as opposed to litigation.

It goes without saying that this point *in limine* dovetails with that of jurisdiction. The respondents were unable to advance any meaningful argument to suggest that the supposed availability of administrative remedies preclude the institution of legal proceedings. In any event one wonders which administrative remedies are available to a surviving spouse to pursue against step children who may be inclined to forcibly evict him/her from a place he/she refers to as home. On the basis of the foregoing, I also dismissed this third and final preliminary point.

On the merits

The requirements for one to succeed in an application for a declaratory order were set out in *RK Footwear Manufacturers (Pvt) Ltd* v *Boka Booksales (Pvt) Ltd* 1986(2) ZLR 209(HC). In that case SANDURA JP (as he then was) stated that there are two basic requirements for the

issuance of a declaratory, namely whether the applicant was an interest party in an existing, future or contingent right or obligation and secondly, whether the case was a proper one for him to exercise his discretion.

In *Family Benefit Society* v *Commissioner for Inland Revenue and Another* 1995 (4) SA 120 (T) VAN DIJKHORST J sets out the legal principles applicable when a declaratory is sought;

1. That he/she is an interested person;
2. That there is a right or obligation which becomes the object of the inquiry;
3. That he/she is approaching the court for what amounts to a legal opinion upon an abstract or academic matter;
4. That there must be interested parties upon which the declaration will be binding; and
5. Considerations of public policy favour the issuance of the declaratur

See also *Eagles Landing Body Corporate* & *Molewa and Others* 2003 (1) SA 412(T); *MDC* v *President of the Republic of Zimbabwe & Ors* HH 28/2007.

In applying the above principles, one finds, as I did, firstly that the 1st applicant is undoubtedly an interested person in relation to the occupation of the plot in question. She derives such interest not only from the fact that she has been so resident thereon during the lifetime of her deceased husband but also by virtue of the provisions of the Agricultural Land Settlement (Permit Terms and Conditions) Regulations 2014, Statutory Instrument 53 of 2014. The said regulations provide in section 13(1) as follows;

"Effect of death of signatory permit holder or surrender of his or her rights under permit

13(1) Upon the death of a signatory permit holder, or the surrender of his or her rights under the permit in accordance with section 17, his or her rights under the permit referred to in section 6 shall –

(a) In the case of monogamous or potentially polygamous marriage where there is an existing or surviving spouse, devolve to the existing or surviving spouse, with consequence that –

(i) The existing spouse or surviving spouse inherits the joint and undivided share in the allocated land of the deceased spouse, and

(ii) That spouse shall thereupon, if he or she was not signatory of the permit, succeed to the primary responsibility of the deceased signatory permit holder for fulfilling the conditions of the permit, including any obligations under the permit to the Minister or to any third party; or

(iii) .....”

This provision was is aimed, *inter alia*, protecting surviving spouses, in situations such as the present where they may find themselves at the mercy of marauding relatives who may be inclined to use force or guile (or both as in the instant case) to deprive them of the occupation of their late spouse's agricultural land allocated to the latter by the Ministry of lands and rural resettlement.

The certificate of occupation issued in favour of the late Simon Chirume meets the definition of permit as provided in section 2 Statutory Instrument 53/2014. As the surviving spouse of the late Simon Chirume, the 1st applicant stands to benefit from section 13 (1) thereof. I was satisfied, therefore, not only that the applicant was an interested person in the context of a declaratory order but also that there was a right or obligation which had become the subject of an inquiry.

With regards to the third requirement of a declaratory order, it goes without saying that the relief she sought was neither purely abstract but stemmed from a well-grounded apprehension of being forcibly evicted from the plot or from having the plot clandestinely allocated to the first respondent through a process which excluded her as the surviving spouse.

The fourth and fifth requirements were also amply satisfied, not least the one based on public policy considerations. Public policy considerations dictate that surviving spouses deserve protection from unscrupulous and dishonest relatives who may be hell bent on wresting property (whether movable or immovable) from such surviving spouse.

The spirited attempt by the respondents to argue that they cannot be deprived of the right to apply to the Ministry of Lands (which is what they ostensibly did using the impugned document entitled declaration by relatives) cannot be sustained. They cannot breathe hot and cold. They can either make such application on their own steam, as it were, without invoking their status as "heirs" of their late father Simon Chirume. The moment they sought to do so they as of necessity needed to include the 1st applicant. As surviving spouse, she had a stake in how the plot was going to devolve in the aftermath of her husband's demise.

I also found from the evidence contained in the parties' affidavits that the respondents had indeed issued threats to evict the 1st applicant contrary to their spirited attempts to suggest that she

had voluntarily relinquished her right to occupy the plot. I found that there was no plausible reason to suggest that she would be resolute in deserting the plot then turn around and claim that she had been hounded therefrom.

It was on the basis of the above that I granted the application subject to an amendment thereto to exclude the 2nd applicant from the reach of the order. His position can hardly be equated to that of the 1st applicant. He happens to be merely a relative of the 1st applicant who was resident on the plot.

The second alteration to the draft order related to costs. There was in my view no justification in awarding costs on the punitive scale as costs on the ordinary scale sufficed.

ZISENGWE J.

Mawire JT & Associates, applicants' legal practitioners
Murambasvina Legal Practice, respondents' legal practitioners