CHITUNGWIZA MUNICIPALITY
versus
TENDAI MAZURU
and
KUDAKWASHE MUNOPFUKUTWA
and
KUDAKWASHE CHIPAMAWANGA
and
INNOCENT MATSENGARWIDZI
and
DOUBT PAPIRO
and
INNOCENT NDENDA
and
JAMES MATANDA
and
PATRICK PONCIANO ZWAWANDA
and
STEPHEN TIDI
and
NYATSIME HOUSING DEVELOPMENT
ASSOCIATION
and
THE MINISTER, MINSITRY OF LOCAL GOVERNMENT,
RURAL AND URBAN DEVELOPMENT
and
THE MINISTER, MINISTRY OF LAND, LAND REFORM
AND RURAL RESETTLEMENT N.O.

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 5 June and 4 September 2013

Urgent Chamber

R. Matsikidze, for the applicant
D. Nkomo, for the (1st to 10th) respondents
Ms *T. Mashiri*, for the 11th and 12th respondents

TAKUVA J: This is an urgent chamber application for an interdict. The facts are as follows:-

The applicant requested for land from the eleventh and twelfth respondents. The request was granted and the applicant allocated the land to 1 3000 applicants on its waiting

list on a pre-service sale basis. The beneficiaries contributed towards the development of the land in terms of the applicant's procedures. A project known as Nyatsime Housing Project Scheme (NHPS) was established in 2005. The development has now reached the stage of sewer pipe connections, water connections and putting of roads.

On 12 May 2013, the first to tenth respondents unilaterally occupied stands claiming that they bought them from the applicant. These respondents indicated that they have now run out of patience as the applicant has not made any progress at all in servicing the stands. The respondents now want to take over the development by committing their resources to facilitate the servicing of these stands. In the long run the tenth respondent, namely Nyatsime Housing Development Association (NHDA) will allocate stands to its members numbering 1 3000. The allocation of these stands is not in accordance with the applicant's record of beneficiaries.

The basis of the application is as follows:-

1. The first to tenth respondents have resolved in a meeting to unlawfully invade the land and settle on it.
2. The applicant has a *prime facie* right as an Urban Council to regulate the development process leading to a systematic handover to beneficiaries in terms of the records kept by the applicant.
3. The first to tenth respondents have unlawfully usurped that role and are now allocating stands to so-called beneficiaries who are not on applicant's records.
4. The applicant will suffer irreparable harm in that the first to tenth respondents' actions cannot be reversed for the following reasons;
    (i) they are constructing structures that will be costly to remove
    (ii) they are occupying stands that do not belong to them in a chaotic manner
    (iii) they are polluting the area and putting the whole of Chitungwiza town into the risk of disease outbreak as there are no ablutions.
    (iv) They are destroying survey works, uprooting pegs and disturbing topographical work that is currently taking place.
    (v) The matter is urgent in that approximately 700 applicants have unlawfully occupied the land without any verification.

The application was opposed on the following grounds;

(A) <u>IN LIMINE</u>*:*

(i) that the applicant has no *locus standi* in that if it sold these stands to beneficiaries, then it is those beneficiaries who should complain and not the applicant.

(ii) that the matter is not urgent in that there are three suburbs under the applicant's jurisdiction that are "subsisting on the same *mordus operandi*".

(B) ON THE MERITS:

(iii) that the respondents have a right to take occupation upon payment of the full purchase price in terms of clause 9 of the agreement

(iv) that the occupation cannot be described as unlawful since all respondents are occupying the stands on the basis that they purchased them from the applicant.

(v) That the applicant has totally failed to service the stands within a reasonable period and the respondents now want to take control of the process to ensure an expeditious conclusion of the process.

Miss *Mashiri* for the eleventh and twelfth respondents submitted that the two are not opposed to the relief sought by the applicant because although there has not been an official handover in terms of a Proclamation by the President, that does not mean that the land has not been handed over to the applicant. According to Morris Dakarai the Chief Lands Officer Acquisition in the Ministry of Land and Rural Resettlement, the land in question is reserved for the purposes of urban expansion by the applicant.

Let me deal with the points *in limine* first. The point that the applicant has no *locus standi* is without merit in my view. The respondents admit that they entered into agreements of sale with the applicant. They have acknowledged the applicant's role and responsibility in setting up an urban dwelling. While citing frustration at the slow pace the stands are being serviced as the driving force behind their unilateral occupation of these stands, they have unequivocally stated that "applicant will still retain authority to approve the developments on the ground and the respondents will always work with the applicant in the process", see para 31 of the first respondent's opposing affidavit. This is a clear admission that the ultimate responsibility of developing and regulating the area lies with the responsible municipal authority which *in casu* is the applicant. Quite clearly therefore, the applicant has *locus standi in judicio*.

As regards urgency, it is common cause that the applicant is responsible for establishing an urban dwelling in the Nyatsime area through the Nyatsime Housing Project Scheme. The applicant has attached proof that it has carried out and continues to carry out

developmental projects in the area. Specifically it was averred that the Department of physical planning in the Ministry of Local Government, Rural and Urban Development approved the layout in terms of s 43 of the Regional Town and Country Planning Act [*Cap 29:12*]. Also, the Surveyor-General has issued survey instructions in respect of 15457 stands.

To date, 15000 stands have been title surveyed at a cost of $2.1 million. The applicant has already awarded tenders for civil works while architectural designs for this project were done and the designer is to be paid $1000-00 for work done. Finally, the applicant is heavily indebted to various companies and individuals due to the implementation of this project. Now, in the midst of all this, the respondents appear and throw spanners into the works by unilaterally occupying stands which have not been fully serviced. The applicant applies for an interdict to stop this chaos and the respondents' answer is that there is no urgency in the application. I find this baffling to say the least because if the applicant does nothing about this conduct, the whole project that was intended to benefit more than 15000 families will be jeopardised by the conduct of the respondents. For these reasons, I find that the matter is urgent.

On the merits, for an application for an interlocutory interdict to succeed, the applicant must establish a *prima facie* right, that irreparable harm is likely to result if the remedy is, not granted, that the balances of convenience is in favour of granting the remedy and that there is no other satisfactory remedy available. Where an urgent application seeks an interdict as interim relief, all the requirements for an interlocutory interdict must be established. See *Mudzengi & Ors* v *Hungwe & Anor* 2001(2) ZLR 179(H).

In *casu,* the applicant has established a *prima facie* right. I say so for the following reasons;

(a) The land was handed out to the applicant by the twelfth respondent for the purpose of urban expansion – see exh 1.

(b) In terms of the Urban Councils Act [*Cap 29:*15] 3rd Schedule, the applicant has the responsibility to control property and its use in the area of its jurisdiction. It is also mandated to regulate the planning, construction and use of buildings and structures under its control. The applicant also has the responsibility over the provision of amenities and facilities such as water, electricity, sewerage, effluent and the removal of refuse and vegetation *inter alia*.

(c) The applicant has a financial and legal interest in the matter.

That irreparable harm is likely to occur if the remedy is not granted is not in doubt. It

is crystal clear that the harm will most likely not limited to the applicant but other stake holders including innocent citizens who may contract communicable diseases if a squatter camp is permitted to replace the establishment of proper housing units. The respondents have admitted that they want to take occupation without indicating how they will ensure that the "residents" get clean water and proper toilets. In my view, they simply want to create a squatter camp which can also be a security threat.

The balance of convenience is clearly in favour of granting the relief in that if it is granted the respondents will not suffer any prejudice in that they will eventually live in a healthy and secure environment. If they are genuine about the delay, then they should consider lawful options of compelling the applicant to expedite the completion of the process. If the order is not granted, the applicant will be inconvenienced more than the respondents and their followers.

Obviously there is no other satisfactory remedy available to the applicant. The applicant should not be encouraged to resort to self-help like what the respondents have done. These are the reasons for the decision to grant a provisional order in favour of the applicant.

Matsikidze & Mucheche, applicant's legal practitioners
Donsa-Nkomo & Mutangi Legal Practitioners, 1st to 10th respondents' legal practitioners
Civil Division of the Attorney-General's Office, 11th and 12th respondents' legal practitioners