

MARY SAKUPWANYA
versus
STUART CHISANGO

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 26 November 2013 and 5 February 2014

Opposed Matter

T. Tanyanyiwa, for the applicant
S. Chisango, in person

NDEWERE J: The applicant was issued with an offer letter by the Ministry of Lands and Rural Resettlement on 12 February 2002, for agricultural purposes being Sub-division 9, of Nil Desperundum in Goromonzi District.

Thereafter, there were some allegations by some officials in the Ministry of Lands that the applicant was not fully utilising her plot and the officials recommended that the plot should be given to another. Indeed, in terms of Clause 7 of the offer letter to the applicant, the Minister of Lands reserved the right to withdraw or change the offer if he deemed it necessary, but the Minister did not withdraw the offer to the applicant.

On 15 October 2008, the Ministry of Lands and Rural Resettlement gave the respondent an offer letter for the same land, Sub-division 9 of Nil Desperundum in Goromonzi District.

On 10 January 2013, the applicant applied to the High Court for a provisional order. The interim relief sought was that the respondent and all those claiming through him or through his authority should be barred from setting foot on Sub-division 9 of Nil Desperundum and that they be interdicted from interfering with the rights of applicant in any way. The Provisional Order was granted on 10 January 2013. On 29 January 2013, the respondent filed a notice of opposition and a counter application. The counter application was for a declaratory order in terms of s 14 of the High Court Act [*Cap 7:06*] to the effect that he was the sole and lawful occupant of Sub-division 9 of Nil Desperundum, entitled to

sole and exclusive occupation of the property and that the applicant be ordered to vacate the property and to refrain from interfering with the counter applicant. The counter application joined the Minister of Lands as second respondent.

On 15 February 2013, the second respondent in the counter application, the Minister of Lands and Rural Resettlement filed a notice of opposition. In an affidavit on behalf of the second respondent, the Resettlement Director confirmed that both the applicant and the respondent were issued with offer letters for the same property, with the applicant having been offered the land in 2002 while the respondent was offered the same land in 2008. He confirmed that the offer letter to the applicant was never withdrawn. His conclusion in the affidavit was that since the applicant in the main application was never served with a withdrawal letter, her claim to the land supercedes that of the respondent who was given an offer letter about six years later. The second respondent also made an undertaking to find the respondent in the main application alternative land.

The applicant in the main application has come back to court seeking confirmation of the Provisional Order which was granted on 10 January 2013.

The applicant started by applying to amend the terms of the final order sought by striking out the words “pending the resolution of the dispute of double allocation by the Ministry of Lands and Rural Resettlement” in para(s) 1 and 2 of the final order in view of the affidavit by a representative of the Ministry of Lands and Rural Resettlement that they will find alternative land for the respondent. The respondent opposed the application for amendment. Initially, the court was inclined to grant the application but since the respondent has not yet been given the alternative land, the court has declined the application for amendment of the terms of the final order.

The respondent in his opposing affidavit argued that the court had no jurisdiction to stop him from setting foot on the disputed land when he holds an offer letter from the Ministry of Lands and Rural Resettlement. That argument is no longer tenable in view of the affidavit from the Director of Resettlement stating that since the first offer letter to the applicant was not withdrawn, it is still valid and it supercedes that of the respondent.

On the other hand, the applicant submitted that the requirements for the confirmation of a Provisional Order are the same as those for granting the Provisional Order. All the applicant needs to show is that:-

- a) she has a *prima facie* right.
- b) she has a well grounded apprehension of irreparable injury.

- c) no ordinary remedy is available .
- d) the balance of convenience favours her.

Applicant submitted that her house which had reached roof level and was valued at \$20 000-00 was destroyed by the respondent previously and that previous attempts to stop the interference were unsuccessful; only the Provisional Order succeeded in stopping the interference by the respondent. Applicant submitted that she feared that if the Provisional Order was discharged, respondent may start interfering with her occupation again.

The submissions by the applicant on the existence of a *prima facie* right, the fear of irreparable harm and the absence of other remedies were not disputed by the respondent. The respondent sought to argue that on the balance of convenience, he had worked on the land more than the applicant. However, when the whole case is looked at in its totality, including the concession by the Ministry of Lands that the applicant's rights supersede those of the respondent, the court has to find in favour of the applicant and confirm the final order in terms of the draft order.

On the other hand, the affidavit by the Director of Resettlement has put a big hole in the respondent's counter-claim. The Director concedes that applicant has prior rights to the land in dispute as the offer to her was never withdrawn. That, indeed, is the correct legal position. The Minister had the power to withdraw the offer to applicant in terms of clause 7 of the offer letter, but he chose not to do so, thus rendering the issuing of an offer letter to the counter-claimant null and void. There is therefore no legal basis for the court to declare the counter-claimant the rightful owner of the disputed land.

Consequently, the counter-claim is dismissed, with costs and the final order sought by the applicant is granted in the following terms:-

1. The Respondent and all those claiming occupation through him and authority from him be and are hereby interdicted from stepping foot on subdivision 9 of Nil Desperandum in Goromonzi District of Mashonaland East Province pending the resolution of the dispute of double allocation by the Ministry of Lands and Rural Resettlement.
2. The Respondent and all those claiming occupation through him and authority from him be and are hereby interdicted from interfering with the rights of the Applicant in the aforesaid property in any way pending the resolution of the dispute of double allocation by the Ministry of Lands and Rural Resettlement.

3. Cost of suit to be borne by the Respondent.”

Messrs Manase and Manase, applicant’s legal practitioners