

DOROTHY MASHANDUDZE
(In her capacity as Executrix Dative to
Estate Late Mistofa Nyamayaro Paradzayi Mashandudze)
versus
KAROI TOWN COUNCIL
and
ZIMTA HOUSING CO-OPERATIVE
and
CHEUKA HOUSING COOPERATIVE
and
MINISTER OF LOCAL GOVERNMENT RURAL AND URBAN DEVELOPMENT
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 26 & 27 October 2015 and 23 March 2016

Civil trial

C Chinyama, for the plaintiff
M Mavunga, for the 1st, 2nd & 3rd defendant

FOROMA J: The plaintiff is the widow and Executrix Dative of the Estate of the Late Mistofa Nyamayaro Paradzayi Mashandudze who died at Hurungwe on 31 January 2004. She was appointed Executrix Dative by the Master of the High Court in terms of Letter of Administration dated 27th April 2006. The late Mashandudze (hereinafter referred to as the deceased) owned a farm in the Karoi area called Chiedza Farm Lot 1 of Glaudia Farm measuring 391.5320 hectares in extent among other assets. Although no evidence was led by the plaintiff as to the deed of transfer identification of the deceased's farm it is common cause between the plaintiff and the first defendant that the deceased had registered title over the said farm.

The plaintiff in her representative capacity sued the first to fifth defendants and those claiming through first to fourth defendants the right to occupy deceased's farm for ejection from the deceased's farm claiming that they were in illegal occupation of the farm since about 2005. The fifth defendant was cited in its capacity as the authority responsible for the

control of all deceased estates in Zimbabwe. Briefly the plaintiff claims that the first defendant unlawfully moved onto the deceased's farm and surveyed stands which it allocated to the second and third defendants' members the bulk of whom are low income government employees on first defendant's housing waiting list. The fourth defendant is alleged to have moved onto the deceased's farm and built a number of housing units under the Garikai/Hlalani Kuhle political programme to house victims of Murambatsvina clean-up operation in Karoi Town. The plaintiff claims that these occupations of the deceased's farm were not authorised either by her as Executrix Dative or by the fifth defendant and were therefore illegal. The first, second and third defendants in their joint plea admitted that the first defendant surveyed and issued out residential stands to third parties without the plaintiff's consent. However the first defendant further pleads that its illegal acts were subsequently ratified by the plaintiff who agreed to sell the farm to the first defendant at open market value. The first defendant further averred that the second and third defendants were allocated land by it and the illegality of the transaction was ratified by the plaintiff who subsequently agreed to sell the farm to the first defendant. Fourth and fifth defendants did not file a pleading but the fifth defendant filed its report in terms of which it indicated that it did not authorise the disposal of deceased's farm. Fourth defendant for reasons not so clear did not file any plea or seek to participate in the matter as will be shown herein below.

It is clear that the real issue for determination is (1) whether the plaintiff condoned or ratified the illegal occupation of deceased's farm by the first, second and third defendants and those claiming through them the right to occupy the said farm by subsequently agreeing to sell the farm to the first defendant. At the pre-trial conference parties agreed upon different issues for trial and these were:

- (1) Whether or not the fourth defendant has at any stage consented to change in land use and subsequent incorporation of this farm into the Greater Karoi.
- (2) Whether or not the first, second and third defendants and all those claiming occupation through them should be evicted from Chiedza Farm Lot 1 of Glaudia Farm forthwith.
- (3) Whether or not there was an agreement between the plaintiff and the first defendant wherein the defendant would provide fair compensation for the farm.
- (4) If so whether or not the plaintiff breached such agreement.
- (5) Whether or not it is against public policy to issue an eviction order in this case

Save for issue number 2 above the rest of the issues as agreed at the pre-trial conference in this court's view do not arise from the pleadings. Depending on the findings made in respect of issue No1. which the court considered as the issue that arises from the pleadings the plaintiff will either succeed or fail. Issue No. 2 as agreed at the pre-trial conference is the same as the issue as determined by the court to arise from the pleadings.

At the trial the plaintiff was the only witness called in support of the plaintiff's case. Her evidence was relatively brief. She testified that after her late husband's death she and her children remained on the farm doing crops and cattle. In 2006 she saw a group of people cutting trees on the deceased's farm and observed a tractor belonging to the first defendant being used by people cutting trees which she believed were first defendant's employees. She approached the first defendant to enquire on who was clearing land on the farm. This was after she had challenged the people that had been clearing the land who had told her that they were part of the Garikai Hlalani Kuhle programme. The first defendant also confirmed what the plaintiff had been told by those clearing the land. She denied that anybody had approached her seeking permission to clear land or occupy the farm. The plaintiff also denied that the farm had been gazetted for acquisition for rural resettlement. No one had approached her intimating any intention to expropriate the farm for urban development. She denied that she had sold the farm or disposed of it in any way neither had its use changed officially from agricultural to urban development. As far as she was aware the fifth defendant had not been approached with a request to acquire the farm. She had neither received nor been offered compensation for the occupation of the farm by the first defendant or anyone else. She therefore regarded the people who had moved onto the farm to be illegally occupying it.

When cross examined the plaintiff maintained her position and insisted that she had neither sold the farm nor was she going back on a deal for the disposal of the farm. It however emerged during cross-examination that during his life time the deceased had disposed of some piece of land to the first defendant for sewage ponds and sewage pipes for which he had been paid in cash and kind i.e. ZW\$100 000, 00 plus a low density residential stand. She however maintained that the farm remained theirs. The plaintiff denied having been offered an alternative farm by the Ministry of Lands. During re-examination the plaintiff's counsel got the plaintiff to confirm that the fourth defendant had not defended her claim for eviction of the fourth defendant and those claiming occupation of the deceased's farm through it. After the plaintiff closed her case the first defendant opened its case by calling one Stella Boni who gave evidence under oath. It is important to note from the outset

that she was not one of the first defendant's witnesses listed in the first defendant's summary of evidence as one of those the first defendant's intended to call at the trial. However the plaintiff did not object to her testifying as the first defendant's witness.

She testified that she was the former Chairperson of the first defendant's Town Council having been a councillor for the period 1998 to 2008. She recalled that when she joined council (first defendant) there was a 5 year development plan which necessitated the expansion of Karoi Town Council's sewerage system. This expansion of the sewerage system entailed construction of new sewer ponds and pipes. The first defendant approached the deceased (Mashandudze) and acquired 26 hectares of Chiedza farm No. 1 of Claudia Farm for which the deceased charged and was paid ZW\$100 000.00 and given a low density residential stand in Flamboyant Suburb as part of the purchase price. The sewage pipes ran along a stream and across a veil to the sewerage ponds on the plaintiff's farm. She claimed that deceased was told by council that at this rate there was a real likelihood that council would eventually expand and extent into his farm which meant his farm would likely be expropriated for urban development. She further testified that the first defendant did not move onto deceased's farm. However some people were moved onto the farm under the Garikayi Hlalani Kuhle programme. She also indicated that the construction section of the fourth defendant and the army moved onto the farm. She further testified that the Governor and Resident Minister for the area (Samkange) came in 2007 and commissioned the Garikai Hlalani Kuhle project and handed over 200 housing units to beneficiaries and gave others surveyed but undeveloped residential stands. The Governor also handed over the project to the first defendant. She disputed that Mrs Mashandudze (the plaintiff) protested against the occupation of the farm. She acknowledged that the plaintiff had approached council to find out what was happening on the farm and the first defendant explained that occupation was in terms of the Garikayi Hlalani /Kuhle programme.

Having realised that the first defendant was now moving onto the deceased's farm as they were embarking on further survey of stands without the plaintiff getting any compensation the first defendant approached the District Administrator with a view to getting an alternative farm to replace deceased's farm which the Garikai Hlalani Kuhle programme was *de facto* converting into urban development. This was however not successful as no alternative farm could be identified which was large enough or acceptable to the plaintiff as a replacement. The witness admitted that plaintiff did not accept or condone the invasion of the deceased's farm. She also testified that the people in occupation of the farm were government

workers and victims of the Murambatsvina evictions (also sometimes referred to as Tsunami).

During cross examination of the witness plaintiff's counsel took issue with the witness testifying on the first defendant's behalf when she had not been formally lined up as a witness and she was adamant that she was requested by the first defendant's council to testify on its behalf as she knew the council procedures for acquiring land for urban development especially peri urban lands. The witness held the view that if the plaintiff had objected to the first defendant taking over the farm for urban development the first defendant could have proceeded to expropriate it. She admitted that during her tenure as caretaker Council Chairman she never came across an agreement for the sale of the farm between the plaintiff and the first defendant. She was however adamant that the first defendant did not take the deceased's farm. Asked as to how the first defendant could have moved onto the farm if it did not acquire it through the fourth defendant MS Boni said the Governor invited it (first defendant) to the commissioning of the Garikai Hlanani Kuhle programme at which he handed over houses built with Garikai Hlanani Kuhle taking one third and the rest being given to the first defendant. The first defendant then proceeded to put up roads and drill boreholes. She accepted that even in the case of expropriation of peri-urban privately owned land council (the first defendant) can only take the land with the consent of the owner which consent was not obtained *in casu*. Ms Boni also testified that there were no documents that she had come across or which she could produce to show that deceased's farm had been lawfully acquired by the government for urban development. When asked as to why the first defendant was resisting the plaintiff's claim for eviction and yet the fourth defendant was not resisting eviction she simply answered that she could not speak on behalf of the fourth defendant.

The first defendant next called one Kaitano the current Chief Executive Officer of the first defendant. In essence his evidence was that the plaintiff approached the first defendant complaining about the occupation of the deceased's farm by the first defendant as this had disrupted their farming activities and their peace generally. He sympathised with their case and he considered that some way should be found for the first defendant to compensate the plaintiff and the deceased estate for the farm the first defendant had taken. He believed that an arrangement had been reached with the plaintiff through the plaintiff's legal practitioners in terms of which some reasonable compensation could be worked out so that she would not lose on account of the first defendant having taken over the farm. The witness conceded that

no actual expropriation took place but steps towards expropriation had been taken i.e application to the fourth defendant for expropriation had been made but expropriation had not yet been approved. In fact the fourth defendant had not responded at all to the application for the expropriation of deceased's farm. He believed that the plaintiff had reneged on the arrangement whereby an agreed valuer would value the land and such valuation would be the basis for the compensation to be given. This according to Mr Kaitano could not be pursued as the first defendant was then surprised that the plaintiff had dragged the first defendant to court. He further testified that the first defendant did not need the entire farm but about 87 hectares only. He also conceded that the first defendant had in fact not purchased the deceased's farm from the plaintiff.

The first defendant closed its case after taking Mr Kaitano's evidence. It did not call the other defendants to give evidence.

During cross-examination the plaintiff's counsel made an issue out of the fourth defendant's decision not to oppose the plaintiff's claim for ejectment but it turned out that the plaintiff had actually not served the fourth and fifth defendant's with the summons. The court directed that the plaintiff serve the fourth defendant and fifth defendant with all the pleadings and pre-trial conference documents even at that late stage in case they might indicate an inclination to participate in the matter even at that late stage. Despite service of process and pleadings as directed by the court the fourth defendant did not indicate an intention to participate in the matter. The fifth defendant however filed its report in terms of which it confirmed that no one had sought or been granted its consent for the disposal of the deceased's farm.

The fourth defendant's indifference could be understood as it had also not responded to an application by the first defendant for expropriation of the deceased's farm for urban development as confirmed by Mr Kaitano in his evidence.

A correct understanding of the pleadings filed in this matter will make it easy to resolve the factual disputes between the parties. The plaintiff's claim in brief is that the four defendants and those claiming through them the right to occupy the deceased farm invaded deceased's farm and are in illegal occupation of same and should therefore be ejected. The plaintiff's undisputed evidence which can be considered as common cause is that :

- (a) the farm belongs to the plaintiff's deceased husband
- (b) neither the first defendant nor the fourth defendant and those that either the first defendant or fourth defendant expressly or impliedly allocated stands on the

deceased's farm obtained the plaintiff or fifth defendant's consent to settle on the deceased's farm

- (c) The Ministry of Lands in the Government of Zimbabwe did not acquire the said farm for rural resettlement or urban development as the farm's deed of transfer remains in the Late MN Mashandudze's name to date. At any rate such acquisition if any was not the basis of defendants' defence to the plaintiff's claim in terms of the plea filed by them.
- (d) The application by first defendant to have the farm expropriated for urban development purposes (expansion of Karoi Town Council) made to the fourth defendant was not granted by the fourth defendant. In fact the fourth defendant did not even respond to it (the said application).
- (e) In the absence of expropriation the issue of reasonable compensation then does not arise.
- (f) The plaintiff did not sell the farm to first defendant.

In the circumstances it is irresistible to find in plaintiff's favour that the plaintiff has proved on a balance of probabilities that the persons occupying the deceased's farm are illegally occupying it.

The first, second and third defendants in response to the plaintiff's claim pleaded as follows:

“4. Ad paragraph 12

It is admitted that 1st defendant surveyed the farm and issued out stands to 3rd parties. The 1st defendant's acts were however retrospectively ratified by the plaintiff by a subsequent agreement to sale the farm to the first defendant at open market value.

5. Ad paragraph 13

Save to State that there is no point in separating third parties referred to in paragraph 12, it is admitted that second and 3rd defendants were allocated land and the legality of the transaction was ratified by the plaintiff who subsequently agreed to sale the farm to the 1st defendant.”

For the sake of completeness para(s) 12 and 13 of the plaintiff's declaration to which the first, second and third defendants pleaded to as above are reproduced herein below:

“Paragraph 12

Round about 2010 the first defendant started surveying the whole farm and towards close of 2011 the first defendant started issuing out stands to 3rd parties notwithstanding the fact that it had received no authority at all to do so from fifth defendant. The alleged allocation of stands and surveying of the whole farm is therefore of no force and effect and in the event that the

first defendant has already sold a portion this farm without legal authority to do so such sale must be declared null and void. The first defendant has also moved onto the farm to carry out surveying purposes. The act by the first defendant and all those claiming right of occupation through it are to say the least unlawful and despite several notices the first defendant has refused, failed or neglected to remove itself and all persons claiming through it from Glaudia Farm.

Paragraph 13

The 1st defendant has also allocated albeit unlawfully, a portion of this farm to Zimta Housing Co-operative, the 2nd defendant and also to Destiny of Africa Network the 3rd defendant and these defendants have also taken up occupation through their members. It is contended that their occupation on the farm is unlawful and they have to be evicted’.

It is clear from the first, second and third defendants plea quoted above that they admit as unlawful their initial occupation of the farm. They however aver that the illegality was purged or regularised by ratification through sale of the farm to first defendant by the plaintiff.

It is for this reason that the issue for determination correctly perceived as indicated above is whether the plaintiff sold the farm to first defendant? If a finding is made in favour of the first defendant namely that the plaintiff sold the farm to the first defendant the first defendant will have established that the first defendant and those claiming through it the right to occupy deceased’s farm had a lawful right to occupy the deceased’s farm and the converse would be true i.e if the plaintiff did not sell the farm to first defendant then the illegal occupation of the farm by the first defendant and those claiming through it the right to occupy the deceased’s farm would continue to be illegal. Both the first defendant’s witnesses i.e. Ms Boni and Mr Kaitano conceded that the plaintiff did not sell the farm to the first defendant. Clearly therefore the first defendant and those claiming the right of occupation through it are illegally occupying the deceased’s farm and are liable to ejectment. The first defendant for reasons unclear did not call any evidence to corroborate that the Garikayi Hlalani Khuhle Programme was handed over to it by Governor Samkange. Although this considerably weakened 1st defendant’s claims it was not surprising as infact its defence as pleaded was not consistent with this version i.e. that Governor Samkange had given it the authority to occupy deceased’s farm.

Before concluding this judgment it is necessary to determine whether the persons who may have occupied the deceased’s farm in terms of the Garikayi Hlalanikuhle programme are in any different position from the first, second and third defendants and those claiming through them the right to occupy the deceased’s farm. It is plaintiff’s case that these people

were settled on the farm notwithstanding that no representations were made whatsoever to take over the farm and pay compensation neither was the fifth defendant's consent had or obtained to change the use of land from agricultural to residential or to dispose of the farm from Estate Late P.M. Mashandudze to any other person. The fact that fourth defendant has not come to the rescue of the beneficiaries of the alleged Garikayi Hlalani Kuhle programme who were settled on the deceased's farm is a clear indication that that programme was not authorised in terms of the legislation that relates to expropriation of land for urban development. These people are therefore not in any different position from those claiming the right to occupy the farm through the first, second, third and fourth defendants.

They too are in illegal occupation of the deceased's farm and liable to be evicted therefrom.

The Law

The legal position is very clear. A person who occupies land without the express or tacit consent of the person in charge (person with legal authority to give permission to a person to enter or reside upon the land in question) or without any right in law to do so is an unlawful occupant – Silberberg and Schoeman's *The Law of Property* 5th ed p 652. Persons in unlawful occupation of property belonging to either the State or a private individual are liable to ejectment provided the owner seeks repossession through due process – *Gordon Charles Spencer and Anor v Minister of Land Reform and Resettlement and Ors* HB-11-10. As the plaintiff has demonstrated that the defendants are in illegal occupation of the deceased's farm the court issues the following order÷

- (1) 1st, 2nd, 3rd and 4th defendants and those claiming the right to occupy deceased's farm through the said defendants be and are hereby ordered to vacate Chiedza Farm Lot 1 of Glaudia Farm registered in the name of the late Mistopha Paradzayi Mashandudze within 14 days of the date of service of this order on the defendants failing which the Sheriff of this court is ordered to eject them and restore vacant possession to the plaintiff.
- (2) That 1st, 2nd, 3rd defendants pay the plaintiff's costs of suit.