(1) SHARON PATRICIA KENNY

And

ESTATE LATE TERENCE MICHAEL KENNY

Versus

KNIGHT NCUBE

(2) KNIGHT NCUBE

Versus

SHARON PATRICIA KENNY

And

ESTATE LATE TERENCE MICHAEL KENNY

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 5 JUNE 2009 AND 22 July 2010

Ms H M Moyo, for applicants under HC 2491/08 and respondents under HC 318/09
S Nkiwane, for the respondent under HC 2491/08 and applicant under HC 318/09

Opposed Applications

NDOU J: These two applications were argued together as they involve the same parties and arose from the same facts.

Under HC 2491/08 the applicants obtained against the respondent a provisional order in the following terms:

"Terms of final order sought

That you show cause to this honourable court why a final order should not be made on the following terms:

1. That the applicants and all farm workers under the applicant who reside at the remaining extent of Lot 1 of Lindmill Farm are hereby declared to have exclusive and undisturbed possession and control of the above described farm.
2. That the respondent, in person or his agents or servants or any person whatsoever acting for or through the respondent be and are hereby permanently restrained from interfering with the applicant's crops or vegetable farming or other farming operation being undertaken by applicant's agents or servants on the remaining extent of Lot 1 of Lindmill Farm.
3. That the respondent pays the costs of this application on an attorney and client scale.

Interim relief granted

Pending the final determination of this mater, the applicants are granted the following relief:

1. That the respondent is hereby ordered to immediately surrender back to applicants or applicants' agents and for servants, the farm's foreman residence or lodgings.
2. That the respondent is herein immediately ordered to vacate any portion of the remaining extent of Lot 1 of Lindmill Farm.
3. That the respondent is immediately interdicted from interfering with any or all farming operations of applicants' being undertaken by the applicants or its agents or servants on the remaining extent of Lot 1 of Lindmill Farm.
4. That the respondent be and is hereby ordered to keep the peace with any or all of applicants' agents, servants found at the remaining extent of Lot 1 of Lindmill Farm, and especially that the respondent is herein interdicted from using insults or threats of any kind against any of the applicants' agents or servants found at the above described farm."

The provisional order was granted by this court on 19 December 2008. On 26 February 2009, under HC 318/09 the respondent instituted his own application for a provisional order against the applicants. He obtained a provisional order in the following terms:

"Terms of the final order sought

1. That all plant and equipment on Lot 1 of Lindmill Farm in Umzingwane District of Matabeleland South Province in extent approximately 35371 hectares escheat [sic] to the State for use by the cross-applicant herein in terms of Government's Land Acquisition Policy.

2. That upon vacation of Lot 1 Lindmill Farm aforesaid respondents and/or their servants, agents, contractors, assigns or successors in title shall not vandalize or make away with plant or equipment or crop or vegetables belonging to the cross-applicant herein situate thereon.
3. That the first respondent in the cross-application pay [sic] the costs of the cross-application and the main application, the latter on the legal practitioner and own client scale.
4. That the failure by the respondent in the main application to file his cross-application simultaneously with the notice of opposition be and is hereby condoned.
5. That the withdrawal of the admission made by the respondent of paragraph 1 of the main applicant's founding affidavit be allowed and that paragraph 1 of his original opposing affidavit be amended by and as appears in paragraph 3 of his supplementary affidavit.
6. That the late filing of respondent's heads of argument be and is hereby condoned.

Terms of interim relief granted

1. That pending the determination of the main application and the cross-application the respondents, their servants, agents, assigns, contractors or successors in title be and are hereby refrained from making away with or vandalizing any and all plants and equipment and the cross-applicant's growing crop or vegetables on Plot 1 Lindmill Farm aforesaid.
2. That as interlocutory relief this chamber cross-application be consolidated and heard together with the main chamber application under case number HC 2491/08 and the same be set down for final determination within ten calendar days after service of this provisional order.
3. That the filing of the supplementary affidavit of the respondent in the main application, together with annexures thereto be and is hereby allowed."

I propose to deal with these applications in turn.

Main application under HC 2491/08

The first issue raised by the applicants is that the disputed land was neither lawfully designated nor acquired by the acquiring authority. The respondent initially furnished inadequate papers to prove such acquisition. However, with the leave of the court given under

HC318/09 *supra*, he provided further documentation to establish that the land in question was lawfully acquired. The respondent produced a copy of the Government Gazette Extraordinary of 1 February 2008 which evinces such acquisition. The notice by the acquiring authority describes the land as "Deed of Transfer 3283/83, registered in the name of Terence Michael Kenny, in respect of certain pieces of land situate in the district of Umzingwane, being Lot 1 of Lindmill, measuring thirty-six comma one six zero zero (36,1600) hectares." Section 5(iii) of Act 1 of 2004 which amends section 8 of principal Act, i.e. Land Acquisition Act [Chapter 20:10] ("the Act") provides that acquisition shall "be by notice in the Gazette specifying,

(a) The land that is being acquired; and
(b) The name of the registered owner of the land."

The above notice meets these requirements. The land was, therefore, lawfully acquired by the acquiring authority. This piece of land was offered to the respondent by offer letter dated 16 September 2008. In the offer letter the land is described as follows:

"2. You are offered subdivision whole of Lot 1 of Lindmill in Umzingwane District of Matabeleland South."

This description sufficiently indicates that the disputed land was offered to the respondent for agricultural purposes.

The respondent's papers evince that the above-mentioned notice was also published in a newspaper on 1 February 2008. The later publication drew criticism from the applicants. There is no legal basis for such criticism. Section 5 of the Act, as amended by Act 1 of 2004 has a proviso to the effect that the publication of acquisition "in the Gazette and in the newspaper circulating in the area where the land is situate, notice to the registered holder of such agricultural land is deemed to have given."

With these findings, it is clear that ownership of this farm vests in the acquiring authority. The applicants are not in lawful occupation of the farm. The applicants do no occupy the land in question by lawful authority, but by defiance of the law and the acquiring authority. This being gazette land, the parties position on the farms is determined by what the law allows the acquiring authority and farmer owner to do on the farm after acquisition – *Ferrera & Anor* v *Nhandara* HC 3995/08 (unreported). Section 3(1) of the Gazetted Land Act provides that

"Subject to this section, no person may hold, use or occupy, gazetted land without lawful authority." In section 2 "lawful authority" is defined as "(a) an offer letter, (b) a permit or (c) a land settlement lease."

The applicants do not hold any of these. As far as the dwelling homestead is concerned, the applicants, through their defiance, would be entitled to be evicted by due process of the law – section 3 of the Gazetted Land (Consequential Provisions) Act [Chapter 20:28]. The applicants, however, have no *locus standi* to challenge acquisition authority's invitee's use and occupation of the farm land as long as it does not interfere with former owner's living quarters – *Airfield Investment* v *Min of Lands, Agriculture & Rural Settlement & Ors* SC 36-04. So I will only confirm the provisional order partially.

The issue of *locus standi* of the applicants should have been raised in the opposing affidavit. Instead the respondent replied to the merits and he cannot raise it now. In any event as a beneficiary 1st applicant has a right to institute the application. In light of the foregoing, the applicants are only entitled to protection in respect of the dwelling house until they are evicted after due process of law. The other prayers sought cannot be confirmed.

Accordingly, the provisional order is confirmed in the following terms:

1. That the respondent is hereby ordered not to interfere with applicant's residence or lodgings in Lot 1 of Lindmill Farm.
2. The respondent is ordered to pay costs of this application on the ordinary scale.

Cross-application under HC 318/09

It is clear that the cross-application seeks to acquire farm equipment by virtue of a court order. This application is clearly misguided. This is so because the acquisition of farm equipment or farm material is governed by the provisions of the Acquisition of Farm Equipment or Material Act [Chapter 18:23].

In terms of this Act, the only person who can acquire such items is the acquiring authority. An individual cannot embark on a self help exercise, even is the farm equipment or material is situated on the farm which he has been allocated.

Section 2 of this Act clearly defines the meaning of and makes a distinction between farm equipment and farm material. Farm equipment, on the one hand, is defined as movable property used for agricultural purposes such as tractors, ploughs, irrigation equipment not embedded in the ground, pumps not permanently attached to the ground amongst other things. Farm material, on the other hand, is defined *inter alia* as seed, fertilizer and pesticides. None of the above distinctions and definitions are given in the order that is sought by the cross-applicant. Consequently the order sought does not have any legal basis as there is no existing law which sanctions the cross-applicant's claim. Sections 4 to 9 of this Act further set out in

detail the provisions for the acquisition of farm equipment and farm material by the state/acquiring authority. In summary the procedure is the following. First, the equipment and material is identified by duly authorized representatives of the acquiring authority who enter the farm with the written authority of the acquiring authority for such purposes and thereafter compile an inventory of items found. Second, after identification, the farm equipment and farm material is then valuated by a duly authorized official. Third, after the valuation process the equipment or material is, subject to an agreement on the value and the purchase of such, then compulsorily acquired and an acquisition order issued. The owner may contest the valuation of the equipment or material.

Significantly, section 10 of this Act provides that any farm equipment or farm material acquired in terms of the Act shall vest in the State for the benefit of the land reform programme. The State is authorized to dispose the property in any manner it deems fit for valuable consideration. The cross-applicant has not shown that any of the above-mentioned procedures have been followed or that he is even authorized by the acquiring authority to make such an application. The cross-applicant has, therefore, not established a clear or *prima facie* right for the final interdict sought.

Accordingly, the cross-application is dismissed with costs on the ordinary scale.

Munjanja & Associates, applicants' legal practitioners
Khumalo & Co Attorneys, respondent's legal practitioners