

KUVIMBANA HOUSING COOPERATIVE

and

DZINGAI NZVENGA

and

MARY GERTRUDE NYAHADA

and

ELPHAS CHONGORE

and

ZACHARIA NYAJENA

and

FANUEL BUKUTA

Versus

ESTATE OF THE LATE WALTER THEODORE AUGUST BAARS

and

THE REGISTRAR OF DEEDS

and

MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS

and

ZVIMBA RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE

BACHI MZAWAZI J

CHINHOYI, 15 September 2023 ,01 January,2024.

Ordinary Chamber Application

BACHI MZAWAZI J: This matter has taken longer than is ordinarily the norm of this court because of unclear legal questions which needed to be addressed. A brief overview of the background of the case is of significance.

Applicants filed two applications with this court on two separate dates. The first one was an application for the registration of title in terms of section 3 as read with section 7 of the Titles Registration and Derelict Lands Act (Chapter 20:20) filed on the 15th of June 2023, under case HC132/23. The second which is the current one is for substituted service of the first application. It has been brought in terms of rule 91 of the 2021, High Court Rules. It was filed on the 28th of July 2023 and the 15th of September 2023 respectively, under case HC168/23.

Central to both applications is an immovable property, a farm known as Subdivision D of Subdivision A of the Rest Farm, Harare measuring 336 meganon. It is currently registered in the name of Estate Walter Theodore August Baars. It is administratively under the fourth respondent, Zvimba Rural District Council.

The 1st applicant is a duly registered cooperative. The Constitution of the cooperative is part of the record though faint and illegible in most sections. There is an indication that the document came into legal operation in 1992 and was amended in 2005.

The second applicant, is the chairperson of the cooperative who has deposed to the founding affidavit through a resolution of the members signed by the secretary. He is also standing in his own capacity. He claims that he was once employed by the beneficiaries of the 1st respondent in 1963 and has been staying on the farm for 43 years.

There is scanty information on the third to the sixth applicants, save that they were at some point in time also residents at the property in issue.

Whist the 1st respondent is the Estate Walter Theodore August Baars, the 2nd to the 4th respondents are cited only in their official capacities.

The brief facts are that, the property in question is claimed to be a *res nullius*, or abandoned property as its owners last stayed on the property in 1980. To date they have accrued levies or land taxes owed to the State through the 4th respondent. This has also been submitted as a sign that the land is derelict.

Applicants claim that the owners of the farm cited herein as the 1st respondent abandoned the farm in 1980 at the advent of the Land reform programme. For unknown reasons this piece of property mysteriously escaped the radar of both the relevant Ministry and the Derelict lands Board. The Board was formed in terms of the Land Acquisition Act [Chapter: 20:10] to specifically investigate, identify and look into derelict land and act in accordance of the provisions of the said Act. As it stands the truth of the matter is that this property remains unacquired by the Government in the face of the allegations that gave rise to this application that it has been abandoned.

Amazingly, the war of liberation was all about land and to address the inequality in agricultural land distribution that prompted the war, amongst other factors. Even to date there

is a scramble for farming land. Even though this land was not acquired did the State as the overall owner of the land not have an interest in the same? Was there no need to join them as a party nevertheless? These are the thoughts that exercised the court's mind necessitating the need of further researches and a judgment.

In casu, the applicants took advantage of the inaction by the relevant land authorities and instituted a claim to have the property registered in their names by virtue of the Titles Registration and Derelict Lands Act (Chapter 20:20). This as an Enactment was specifically enacted to govern all derelict land and transfer of its ownership.

Section 3 of the Act reads, Section 3 of the Registration of Title and Derelict lands Act, Chapter, 20:20 specifies that,

Persons having acquired title to derelict land may apply to High Court to order registration of such title

Any person who, by prescription or by virtue of any contract or transaction or in any other manner, has acquired the just and lawful right to ownership of any immovable property in Zimbabwe registered in the name of any other person and cannot procure the registration of such property in his name in the land register, the register of occupation stands or the register of claims, as the case may be, in the manner and according to the forms for that purpose by law provided, by reason of the death, mental incapacity, insolvency or absence from Zimbabwe of the person in whose name such property stands registered as aforesaid or of any person or persons through or from whom such right has been mediately or immediately derived or owing to any other cause may apply to the High Court to order the registration of the title of such property in his name, in the land register, the register of occupation of stands or the register of claims, as the case may be.

The applicants' claim was based on prescription. They allege that they have stayed on the property long enough to satisfy the period of prescription outlined in the Titles Registration and Derelict Lands Act above. Therefore they are entitled to have the property rights transferred to them. Some of the applicants assert that they have been on the farm for well over 40 years, since 1963.

On the face of their main application, applicants claim that the founding members of the 1st applicant, a duly registered Cooperative, were authorised to stay on the farm in question by the founding members of the 1st respondent and its beneficiaries through their then existing contract of employment. In their founding affidavit they alluded to the fact that the second to the sixth applicant were once all employed by the 1st respondent and its beneficiaries.

A court of law before making a decision is entitled to test the veracity of the averments against evidence and the law. Especially in an ordinary Chamber application based mainly on papers filed on record. The applicants' founding affidavit which is both a statement of the facts and evidence is silent on crucial and material evidence to buttress their claim. There was no evidence that supported the duration of stay of the applicants on the property. There was also no evidence that a diligent search had been done to establish the last known country of origin of the 1st respondent. Substituted service in terms of the cited rules speaks to service within the country. Service in the well-publicized newspaper of this country knowing fairly well that the intended recipients are located in a different country did not make much sense to this court.

There is mention that the beneficiaries of the first respondent left the country in a huff in 1980 at the peak of land acquisition programs to a European destination. The court is alive to the fact that the applicants were careful to state that the European country they returned to is unknown. However, there is nothing that indicates that they approached the lawyers who did the Conveyancing of the property to ascertain that information.

The Trust Deed of the property filed of record, does show that a Mr Blackenberg was the conveyancer who facilitated the transfer of the property from George Elcombe Ltd in the 1940. This law firm is still in existence. The successors in title of this law firm must have the records. Law firms keep records. It could have been a good starting point so as to enable edictal citation in the relevant country.

Section 7 of the Titles Registration and Derelict Lands Act relied upon by the applicants in conjunction with s3, states that, "Every such application shall be laid before one of the judges in chambers, who shall make such order thereon as to him seems fit, and any such judge may order that any matter arising upon any such petition shall be argued and determined by the High Court."

In light of the above section against the backdrop of s3 of the same piece of legislation, this court drew the applicant's attention to the issue of edictal citation and substituted service. Edictal citation is ordered when a defendant is or believed to be outside Zimbabwe and the exact whereabouts are unknown. Whereas substituted services is service through publication in the same jurisdiction or country where the whereabouts of the person in question was residing or lastly known to reside. See, *Amanda Gayle Peters v Macdonald Peters HH453/18*.

The purpose of such service is discernible from the Australian case of *Miscamble v Phillips and Hoeflich* (No,2) [1936 St Rd Qd 272 at 274 cited in *Queensland Construction & Engineering P/L v Wagner* [2011] QDC171, speaking on substituted service summarizing that,“

„The primary object of substituted service, is to bring to the knowledge of the person in respect of whom substituted service is sought the whole proceedings, so that he can take such steps as he thinks proper to protect his interests and rights. It is not proper to substitute service of process in a court of law when there is no belief that the service will bring the proceedings to the knowledge of the person in question or of any person representing his interests.“

The applicants through their legal counsel sought audience with the court which was granted. The above queries were raised in a session which turned out to be a case management session. The 1st applicant disclosed that most of the now over one hundred members of the 1st applicant joined much later and are still joining. They were not resident at the farm at the time of its abandonment or before. There was an admission that most of the original residents of the farm, their descendants or their beneficiaries, had either dispersed, relocated or died.

After the court pointed out what needed to be addressed as already detailed above the session adjourned.

Sometime, in August 2023, the same matter was brought before my sister judge who raised a query through the Registrar of the High. The second application was then placed before this court later in September 2023. In the current application the applicants are seeking leave to serve the respondents through the Herald Newspaper, which is a widely circulating paper, with the main application. They also want to serve a person known as Norest Giwa, who is the person whom they claim was legally left in charge of the property by the 1st respondent“s beneficiaries.

Notably, at this stage the court is only being called upon to grant permission for such service and not delve into the merits. The provisional relief sought in case HC132/23 is yet to be considered. Guidance has also been sought from the case of *Kenya Masenda v Washington Masawi and Chitungwiza Town Council*, HH124/03, which touched on some aspects of just and lawful rights in respect to s3 of the title registration and *Ruigtevlei Farm Labour Tenant Association and Ernest Julius Harbisch and Others* SAFLII12045/19, which addressed issues of what is derelict land amongst others,

Despite the observations made by the court on edictal citation amongst others which may be relevant factors in the determination of the main application, after careful consideration the court finds no justification in denying the application.

Accordingly,

It is hereby ordered that:

1. Applicants are granted leave to serve the chamber application for registration of title in terms of s3 as read with s7 of the Title Registration and Derelict Lands Act[Chapter 20:20] and any other subsequent pleadings under Case Number HC132/23 to the 1st Respondent by way of publication in a widely circulating newspaper in Zimbabwe, namely the Herald, after satisfying themselves from Honey and Blackenberg of the country of origin of the 1st respondent and attaching proof of its non-existence thereafter.
2. Applicants to further serve the chamber application for registration of title in terms of s3 as read with s7 of the Title Registration and Derelict Lands Act[Chapter 20:20] and any other subsequent pleadings under Case Number HC132/23 , to Norest Giwa of Subdivision D subdivision A, of the Rest farm, Harare.
3. No order as to costs.

Ngongoni, Tawodzera and Ngavari & Partners Applicant's Legal Practitioners