MAXWELL KUFAKUNESU CHISVO AND ANOTHER
versus
NELSON PETER AND OTHERS

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 27-28 July 2005 and 1 March 2006

Civil Trial

Mr. Dondo, for the plaintiffs
Mr. Tomana, for the defendants

PATEL J: The plaintiffs in this case seek the ejectment of all the defendants (who are 30 in all), and of all persons claiming title through them, from the property known as Railway Farm 26, in Chegutu.

At the inception of the trial of this matter, the plaintiffs formally withdrew their action against the 31st defendant, namely, the Minister of Lands, Agriculture and Rural Resettlement. Plaintiffs' counsel also sought judgement by default as against those defendants who were not personally present at the trial. However, counsel for the defendants submitted that the 8th defendant, Jeremiah Chikepe, had been appointed and authorised to represent all the defendants in this matter. The Court accordingly ruled that the 8th defendant would represent all the defendants *in casu* and that those defendants who were not present in person were to be excused from attendance at the trial.

<u>Evidence for the Plaintiffs</u>

The 1st plaintiff, Maxwell Chisvo, testified that he purchased the property in dispute from one Wynand Bezuidenhout in terms of an agreement signed on the 2nd of November 1999 (Exhibit 1). He then approached the relevant authorities and obtained a certificate of no present interest dated the 4th of July 2001 (Exhibit 2) as well as a subdivision permit which was issued on the 10th of January 2002

(Exhibit 3). The property was eventually transferred into his name by deed of transfer dated the 19th of July 2002 (Exhibit 4). Thereafter, during the remainder of 2002 and 2003, he invested heavily on the farm by introducing certain infrastructure and equipment as well as 500 head of cattle.

At the end of 2002, the 1st plaintiff was served by the Ministry of Lands with a preliminary notice of intention to acquire the property. Acting on the advice of a senior Ministry official, he applied to the relevant authorities to have the property de-listed from acquisition. On the 18th of October 2002, the Chairman of the Provincial Land Identification Committee recommended that the property be de-listed on the ground that it was “indigenous owned” (see Exhibit 5).

Subsequently, various A1 Scheme settlers arrived on the property during the early part of 2003, without any prior official notification or demarcation of the property by the authorities. He again approached the Ministry of Lands for assistance and a letter was written by the Ministry to the District Administrator on the 5th of February 2003 (Exhibit 6) requesting that the settlers on the property be relocated. This request apparently remained unheeded.

The 1st plaintiff claims that the settlers on the property have destroyed vegetation, slaughtered his cattle and removed fencing from his paddocks and that they also threatened and harassed his employees. These actions have significantly affected his farming activities which are still proceeding – but with great difficulty.

Under cross-examination, the 1st plaintiff claimed that the de-listing of the property had been processed by the Ministry of Lands. However, he was unable to produce or identify any relevant *Gazette* notice de-listing the property. Nor was he able to adduce any other evidence of such de-listing. He also indicated that he was challenging the acquisition of the property before the Administrative Court on the ground that he was an indigenous farmer. Again, he was unable to explain why, despite the property having been de-

listed as alleged, the application for the confirmation of its acquisition was still before the Administrative Court and had not as yet been withdrawn or thrown out by that court.

John Mugadza, who is a director of the 2nd plaintiff, testified that the 2nd plaintiff purchased Lot 4 of Railway Farm from the 1st plaintiff, as a subdivision of Railway Farm 26 after the entire farm had been subdivided. The ownership of this piece of land was transferred to the 2nd plaintiff by deed of transfer dated the 19th of July 2002 (Exhibit 7). Mugadza's evidence in all other respects was similar to the testimony of the plaintiff. However, under cross-examination, he conceded that the A1 settlers would have had to clear vegetation and remove fencing in order to establish and cultivate their own sub-plots. Again, like the 1st plaintiff, he was unable to give any meaningful evidence on the status of the proceedings pending before the Administrative Court apropos the acquisition of the property *in casu* by the State.

Evidence for the Defendants

The 8th defendant, Jeremiah Chikepe, gave evidence on behalf of all the defendants as their duly authorised representative. He testified that in May 2001 a total of 34 A1 settlers went on to the disputed property, having been resettled on the whole of Railway Farm 26 by the District Administrator for Chegutu. All 34 settlers are still present on the property.

Initially, although the entire property had already been demarcated by the authorities, the settlers were not given any letters identifying or confirming their respective holdings. Instead, each settler was allotted his or her individual plot through a system of selecting numbered bottle-tops representing the relevant demarcated plots. Having selected a single bottle-top and identified the relevant plot, each settler than proceeded to the District Administrator to obtain his or her individual letter of confirmation.

As evidence of such allocations, Chikepe produced his own letter of allocation date-stamped the 3rd of October 2001 (Exhibit 8A). He also produced other letters of allocation in respect of other settlers (Exhibit 8B) issued on different dates between 2001 and 2005. Under cross-examination, he explained the differing dates on the basis that some of the original letters of allocation had probably been lost and then replaced by subsequent letters issued to the allottees concerned.

In July 2002, the 1st plaintiff came on to the farm and claimed the entire property. Chikepe then consulted the District Administrator who denied any claim by the 1st plaintiff and confirmed the defendants' settlement on the property. In August 2002, the 1st plaintiff arrived with his equipment and fencing and demarcated two unoccupied plots as paddocks. Chikepe again approached the District Administrator as well as the Chief Lands Officer for Mashonaland West, both of whom acknowledged only the A1 settlements on the property. Subsequently, Chikepe met with a senior official at the Ministry of Lands who advised him that the property had originally been identified and gazetted for acquisition from the former landowner and was to be re-gazetted for acquisition from the 1st plaintiff.

On the 6th of March 2003, the Ministry of Lands served an acquisition order upon the 1st plaintiff in respect of the property in dispute. After the expiration of 90 days, the 1st plaintiff was evicted by the relevant authorities. He then vacated the farm with most of his property, except for his cattle which were left unattended. As the cattle were stray and destructive, Chikepe sought the assistance of the authorities to remove the cattle from the farm. On the 5th of February 2004, the Chief Lands Officer for Mashonaland West wrote a letter to the local police in that connection (see Exhibit 9). This letter also confirmed that the 1st plaintiff and four other companies were served with various notices of acquisition in respect of Railway Farm 26, viz. a section 5 notice on the 8th of November 2002, a

section 8 notice on the 6th of March 2003 and a section 7 notice on the 31st of July 2003. The matters contained in this letter were not questioned or disputed by the plaintiffs in any material respect.

Chikepe further testified that he has not witnessed any slaughtering of cattle on the property as alleged by the plaintiffs and that the cutting of trees and vegetation by the settlers on the farm was necessary in order to clear the land for cultivation. He also confirmed that the plaintiffs were no longer occupying the property and that a caretaker appointed by the State was presently looking after the farmhouses on the property and overseeing the farm as a whole.

The Issues

The issues for determination in this case, by common cause, are as follows:

(a) Whether the plaintiffs' properties *in casu* have been lawfully acquired by the State in accordance with the relevant enabling legislation?

(b) Which of the parties in this matter has the right to lawfully occupy the aforesaid properties?

Acquisition of Agricultural Land for Resettlement

The procedures governing the acquisition of agricultural land for resettlement purposes are presently embodied in Part III of the Land Acquisition Act [*Chapter 20:10*]. To a significant extent, these procedures have been superseded by the provisions of section 16B of the Constitution of Zimbabwe. Section 16B was promulgated and came into force on the 14th of September 2005. In terms of section 16B(2)(a) as read with section 16B(3)(a), all agricultural land that was previously identified for resettlement purposes vested in the State, with full and unchallengeable title therein, with effect from that date.

For present purposes, however, the Court is seized with events which occurred well before the enactment of section 16B of the Constitution and must therefore be guided by the relevant provisions of the Land Acquisition Act. Section 5(1) of the Act requires the acquiring authority to give a preliminary notice of its intention to acquire any land. Section 5(3) enables the acquiring authority to withdraw any such preliminary notice at any time.

Section 8(1) empowers the acquiring authority to issue an acquisition order in respect of any land identified for compulsory acquisition. By virtue of section 8(3), the effect of an acquisition order is to immediately vest title of the land concerned in the acquiring authority, whether or not compensation therefor has been agreed upon, fixed or paid in terms of Part V or VA of the Act.

In terms of section 9(1)(b), the making of an acquisition order constitutes notice in writing to the owner or occupier to vacate the land within 45 days after the order is served upon him and to vacate his living quarters within 90 days of such service.

Where the acquisition of the land is challenged, section 7(1) enjoins the acquiring authority, within 30 days of issuing the acquisition order, to apply to the Administrative Court for an order confirming the acquisition. In terms of section 7(4)(b), the Administrative Court may only confirm the acquisition of rural land if

it is satisfied that the acquisition is reasonably necessary for the utilisation of that land for, *inter alia*, settlement for agricultural or other purposes.

Also pertinent is section 10A(1) of the Act which enables the acquiring authority to revoke an acquisition order within 6 months after making the order. In terms of section 10A(2), such revocation must be effected by notice in the *Gazette*, followed by written notice served on the landowner.

Plaintiffs' Rights

In the present matter, there is clear and uncontroverted evidence that the plaintiffs were duly served with a preliminary notice of intention to acquire in terms of section 5 on the 8th of November 2002. They were then served with a section 8 order acquiring the property on the 6th of March 2003. Thereafter, they received notice of an application for confirmation of the acquisition under section 7 on the 31st of July 2003. Eventually, at some stage in the middle of 2003, the plaintiffs vacated the property with all their equipment and belongings, except for the 1st plaintiff's cattle. The argument that they were indigenous landowners clearly could not in law and did not in fact preclude the compulsory acquisition of their properties for the purposes of the Land Reform Programme.

In any event, the plaintiffs were unable to adduce any evidence whatsoever to show that the preliminary notice of November 2002 had been withdrawn or that the acquisition order made in March 2003 had been revoked. Nor were they able to proffer any evidence pertaining to the application for confirmation pending before the Administrative Court at the time of the trial.

On these facts, it is abundantly and unquestionably clear that the property in question was duly acquired by and vested in the State with effect from the 6th of March 2003. Apart from the right to claim compensation for improvements, the plaintiffs *in casu* have no present title or other enforceable interest in Railway Farm 26 or any

of its subdivisions. That being so, they have neither the necessary substantive right nor the requisite *locus standi* to approach this Court for the ejectment of the defendants or any other persons from the property.

Defendants' Rights

In view of the conclusion that I have reached above, it does not seem necessary to determine the second question as to the rights of the defendants to occupy and remain on the property in question. Nevertheless, for the avoidance of doubt, I deem it necessary to address this point in order to bring this matter to finality.

From the evidence adduced, it is apparent that when the defendants first settled on the farm in May 2001 it still belonged to the former owner and had not at that stage been acquired by the State. Moreover, as they had not been settled on the farm as at the 1st of March 2001, they did not enjoy the protection afforded by section 3 of the Rural Land Occupiers (Protection from Eviction) Act [*Chapter 20:26*] which was promulgated in 2001. Therefore, the legality of their occupation at its inception was clearly questionable. However, they continued to occupy the farm when it was purchased by the plaintiffs in July 2002 and subsequently acquired by the State in March 2003. Thereafter, they have remained in continuous occupation of the property up to the present time.

The evidence before the Court indicates that the defendants were initially settled on the farm by the District Administrator in Chegutu. Each defendant was then given a plot of land and given a letter of allocation in respect of his or her individual holding on the property. These allocations were then subsequently confirmed on different dates both before and after the property was acquired by the State in March 2003. Despite the apparent lack of co-ordination between the central and local officialdom responsible for the allocation of land earmarked for resettlement, it is reasonably clear

that the State's intention from the outset was to allocate the property as a whole to the defendants. Moreover, as appears from the letters of allocation issued after March 2003 as well as the contents of Exhibit 9, which is dated the 5th of February 2004 and which alludes to the A1 settlers as "the legal owners of the plots on Railway Farm 26", there is little doubt that the State has effectively endorsed and authorised the defendants' occupation of the property. I am alive to the fact that the Court was not shown official letters of allocation issued after March 2003 in respect of each and every defendant. Nevertheless, having regard to the 8th defendant's testimony, as amply corroborated by the documentary evidence before the Court, I am satisfied that all the defendants *in casu* are presently the lawful occupiers of their individual holdings at Railway Farm 26.

Clear and Formal Title

What is necessary, at this juncture, is for the State to explicitly acknowledge and regularise the defendants' rights of occupation in some formally acceptable fashion. It is a matter of some concern that after over four years of their having been settled on the property the defendants' rights therein should be susceptible to doubt and unnecessary litigation.

What I perceive to be an essential feature of the Land Reform Programme is the need to formalise the underlying land allocation system. What this requires, amongst other things, is the compilation and maintenance of detailed and readily accessible official records based on legally cognisable title, either by way of lease or occupation permit, which clearly identifies the designated landholder and stipulates the governing terms and conditions of occupation.

The A1 resettlement scheme, in my view, is the very *raison d'être* of Zimbabwe's Land Reform Programme, which was originally conceived and designed to benefit our landless and colonially

dispossessed people. It would, I believe, be quite unforgivable if it were to be unravelled by the vagaries of supine bureaucracy.

Judgement

In the premises, the Court finds that the plaintiffs have no legally enforceable right in Railway Farm 26 entitling them to eject the defendants from the property or any of its subdivisions. Furthermore, the defendants are entitled to occupy and remain on the property as the duly authorised allottees of their respective holdings.

In the result, the plaintiffs' claim for the ejectment of the defendants is dismissed with costs.

Chinamasa, Mudimu & Chinogwenya, plaintiffs' legal practitioners
Muzangaza, Mandaza & Tomana, defendants' legal practitioners