HH 38-2009
HC 08/09
HC 05/09
REF 1397/06
HC 1391/06
HC 1632/05
HC 1818/07
HC 2599/07
HC 2271/08

1. JOHN LANDA NKOMO
versus
LANGTON T MASUNDA

2. LANGTON T MASUNDA
versus
JOHN LANDA NKOMO
and
MESSENGER OF COURT P. ZULU

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 26 January 2009 and 28 January 2009 and 29 January 2009 and 24 March 2009.

Mr Zhou, for the applicant.
Mr Majoko and Mr Hwacha, for the respondent

Opposed Application.

BHUNU J: The two cases before me, that is to say cases number HC 05/09 and HC 08 /09 were consolidated by consent of the parties as they are closely linked and involve the same parties.

The applicant in case N0: HC 08/09 John Landa Nkomo and the respondent Langton T Masunda are both beneficiaries of the Land Reform and Resettlement Scheme Model A2 Programme.

Because of the numerous applications and counter applications relevant to this case it is convenient to refer to the parties by their surnames to avoid confusion.

Mr Nkomo was allocated Lugo Ranch whereas Mr Masunda was allocated Volunteer Farms.47, 48 and 49 being contiguous pieces of land located in the Gwayi Conservancy in Matabeleland North Province. Both pieces of land used to be owned by one farmer prior to the agrarian reform programme. Because of the historical ownership of the land in question by one former owner, the boundaries of the two farms were not clearly defined at the time of allocation of the land to the two beneficiaries thereby giving birth to the current land dispute.

Situate on Lugo Ranch is Jijima Lodge over which the two protagonists are involved in vicious mortal legal battles for ownership and control of the lodge. Despite the initial uncertainties I was made to understand that it is now common cause that Jijima Lodge is in fact located on Lugo Ranch. Thus Mr Nkomo claims ownership and occupation of the Lodge on the basis that it is located on land which has been lawfully allocated to him.

On the other hand Mr Masunda claims ownership and occupation of the Lodge on the basis that the Lodge and its environs was pointed out to him by Ministry of Lands officials as part of the land which was allocated to him in terms of his offer letter. He thus claims occupation of the Lodge on the basis of a claim of right arising from the pointing out of the lodge as belonging to him by ministry officials. He thus took occupation and allegedly carried out extensive renovations on the Lodge at the behest of ministry officials.

It appears to me that the basis of Mr Masunda's claim to occupy Jijima lodge based on a claim of right is grossly misplaced in so far as the concept of claim of right is only recognised as a defence at criminal law and not as a mode of acquiring rights or perpetuating one's illegal occupation of property. The defence is applicable where one commits a crime relying on defective advice given by a government official administering a particular statute as to the true legal position, as happened in the case of *Zemura 1973 (2) ZLR 357*. The defence does not seek to confer any rights on anyone but to excuse an accused person from criminal liability on account of having made a genuine mistake of the law. The defence is an exception to the well known adage that "ignorance of the law is no defence."

Thus the mere fact that ministry officials erroneously pointed out Jijima Lodge as being part of the land allocated to him did not confer any legal right on Mr Masunda to occupy the land to the exclusion of the true owner lawfully allocated the land by the acquiring authority.

In a bid to assert his rights Mr Nkomo instituted action proceedings against Mr Masunda under case number 818/07 seeking to eject Mr Masunda from the disputed lodge. The matter was then set down for hearing before MAKARAU JP at 9:30 am. but Mr Masunda

and his lawyer despite being notified only turned up for the hearing at 10 am. By then Mr Nkomo had already obtained a default order requiring Mr Masunda to vacate Jijima Lodge within 30 days of the Court order.

Mr Masunda and his lawyer became aware of the default order on the same day and they hastily made an application for rescission of default judgment the following day saying that he had made an error in time. He mistakenly thought that the matter had been set down for 10 am instead of 9:30 am. In making the application for rescission of judgment he deliberately omitted to apply for stay of execution assuming that the application for rescission of judgment would automatically suspend execution of the default order.

When the 30 day period stipulated in the default order expired without Mr Masunda vacating the lodge and in the absence of an order staying execution Mr Nkomo issued out a writ of execution on 15 December 2008. Acting upon the writ of execution which was apparently valid on the face of it and whose validity has not been challenged the second respondent, that is to say, the messenger of Court dully ejected Mr Masunda from Jijima lodge on 19 December 2008 in compliance with MAKARAU JP*'s* order of 13 November 2008.

Despite having been served with notice of eviction on 19 December and having been ejected from the premises on the same date the applicant only filed the application for stay of execution and restoration to the lodge on 5 of January 2009. Mr Masunda's conduct in this regard does not exhibit any urgency. A delay of almost a month in the circumstances of this case is wholly inconsistent with urgency, particularly taking into account that Mr Masunda had always known of the likelihood of his ejectment from the premises right from the date of the default order on 13 November 2008.

His complaint is that he was not given due notice by the Messenger of Court before eviction. I take the robust view that this is a matter between him and the Messenger of Court which cannot invalidate Mr Masunda's ejectment from Jijima Lodge. This is so because, the order which forms the basis of his ejection from the premises remains valid and binding on the parties. The Messenger of Court's alleged misdemeanors cannot be visited on Mr. Nkomo who had no control over the way he executed his duties.

Due to Mr Masunda's deleteriousness Mr Nkomo has since taken occupation of the disputed Jijima Lodge and is already operating the lodge. His occupation of the lodge is apparently lawful in that he is occupying immovable property on land lawfully allocated to him by the acquiring authority pursuant to a lawful Court order issued by a competent Court of competent jurisdiction.

Mr Masunda's intended reoccupation and use of the lodge does not seem to be lawful on the face of it. I say so because s 3 (1) of the Gazetted Land Consequential Provisions) Act 20:28 prohibits any one from occupying gazetted land without lawful authority. It provides that:

> "**Occupation of Gazetted land without lawful authority**
>
> (1) Subject to this section, no person may hold, use or occupy Gazetted land without lawful authority."

Lawful authority is defined in section 2 as,

> "l …
> (*a*) an offer letter; or
> (*b*) a permit; or
> (*c*) a land settlement lease;
> and "lawfully authorised" shall be construed accordingly;"

It is common cause that Mr Masunda has no lawful authority in the form of an offer letter, a permit or lease issued in terms of the Act authorizing him to occupy and use Jijima Lodge. That being the case he is prohibited by operation of law to occupy and use the lodge. That being the case, it is highly unlikely and not in the least probable that any reasonable Court would reverse a lawful Court order to enable him to perpetrate an illegality.

The purpose of the Courts is to do justice according to law and not to facilitate its abrogation. The words of MALABA DCJ in the well known case of *Airfield v The Minister of Lands, Agriculture And Rural Resettlement and 4 others SC 36/04 are germane to this case.* In that case the Learned Deputy Chief Justice observed that:

> "An interim interdict as a remedy for the prohibition of unlawful conduct could not be granted for the protection of the illegal activities of the appellant. In other words, the

> appellant wanted the court to grant an order stopping the acquiring authority from acting lawfully so that it could continue to commit an offence in carrying on farming operations illegally."

The mere fact that officials from the ministry of lands may have mistakenly pointed out the lodge as being party of the land allocated to him does not convert itself into an authority for him to occupy the lodge in contravention of the law. The Courts are averse to aiding and abetting Mr Masunda in his bid to occupy Jijima Lodge unlawfully.

Rescission of Judgment Case Number HC 05/09

Mr Masunda's application for rescission of judgment under case number HC 05/09 has to be determined in the light of the above facts and exposition of the law as I understand it. The basic requirements for the application to succeed were laid down way back 60 years ago in the case of *Grant v Plumbers (Pty) Ltd* 1949. In that case BRINK J had occasion to remark that:

> "I am of the opinion that an applicant who claims relief under Rule 43 should comply with the following:
>
> (a) He must give a reasonable explanation of his default. If it appears that his default was willful or that it was due to gross negligence the court should not come to his assistance.
> (b) His explanation must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.
>
> (c) He must show that he has a *bona fide* defence to plaintiff's claim. It is sufficient if he makes a prima facie defence in the sense of setting out averments which if established at a trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce. evidence that the probabilities are actually in his favour. (*Brown v Chapman* 1938 TPD 320 at page 325.

I have no difficult in concluding that Mr Masunda has proffered a reasonable explanation for his default in that his lawyer made a genuine error as to the time the application before MAKARAU JP was to be heard.

As regards Mr Masunda's prospects of success I consider these to be virtually nil. As I have demonstrated above he is in effect seeking the court's indulgence to perpetuate his illegal occupation of Jijima lodge. It is my considered view that no reasonable Court is likely to give him such an order without being seen to be in complicit with his illegal machinations.

Application for dismissal for want of prosecution. Case Number 08/ 09.

The facts in this case establish that Mr. Masunda filed an application in case number 2271/08 on 14 November 2008 seeking the rescission of the default judgment entered by MAKARAU J P. Mr Nkomo filed notice of opposition on 28 November 2008 and served a copy on Mr Masunda's legal practitioners. By the 5th January 2009 more than a month later Mr Masunda had neither filed an answering affidavit nor set the mater down for hearing.
Order 32 Rule 236 provides that:

> Where the respondent has filed a notice of opposition and an opposing affidavit and, within one month thereafter, the applicant has neither filed an answering affidavit nor set down the matter for a hearing, the respondent on notice to the applicant, may either-
>
> (a) set down for hearing in terms of rule 223; or
> (b) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit".

In light of the fact that the applicant has no reasonable prospects of success on the main case number 2271/08, I can perceive no other appropriate order other than the dismissal of this application with costs as provided by Rule 236 (b). **In the result it is accordingly ordered:-**

(1) That in Case Number 05/09 the applicant, Mr Masunda's application for the rescission of default judgment entered against him by MAKARAU J P in case number HC 2271/08 be and is hereby dismissed with costs.

(2) That the respondent having failed to file neither a answering affidavit nor heads of argument in the matter pending under cover

of case number HC227/08, the said Case Number HC 2271/08 be and is hereby dismissed with costs for want of prosecution

Dube – Banda, Nzarayapenga & Partners, applicant's legal practitioners.
Majoko and Majoko, respondent's legal practitioners.