TAFIREYI NYIKADZINO
versus
JOHN CAMERO ASHER
and
THE MINISTER OF LANDS & LAND RESETTLEMENT
and
THE DEPUTY SHERIFF HARARE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 14 October 2011 and 17 October 2011 and 1 February 2012

G N Mlotshwa, for the applicant
B Diza, for the 1st respondent

Urgent Application

BHUNU J: On 12 June 2007 the applicant was issued with an offer letter under the Land reform and Resettlement Programme (Model A2 Phase II) authorizing him to lawfully hold, occupy and use the whole of subdivision 8 of Welston in Harare in the District of Mashonaland East Province approximately 42.07 hectares in extent. The applicant has since taken occupation of that land on the strength of the offer letter.

The first respondent is the former owner of the land in question. Aggrieved by the applicant's conduct in taking occupation of the land he sued and obtained a spoliation order under case number HC 612/09 authorizing him to eject the applicant from the land. Dissatisfied with that judgment the applicant appealed to the Supreme Court under case number SC 43/09.

This court later ruled that the initial judgment being an interlocutory judgment could not be appealed against without leave of the court. As a result no heads of argument were filed with the Supreme Court. On 16 October 2009 the Supreme Court ruled in terms of r 44 of its Rules that the appeal had been abandoned.

Despite that ruling the first respondent did not seek to enforce the spoliation order granted to him by this Court until almost two years later when he issued a writ of

execution. The spoliation order was issued before the Supreme Court had clarified the law in respect of land disputes of this nature. Since then the Supreme Court has clarified the law in the landmark decision of *Commercial Farmers Union & 9 Ors* v *The Minister Of Lands and Rural Resettlement & 6 Ors* SC 31/10. In that case the LEARNED CHIEF JUSTICE had this to say" at pp 21 and 23 of the cyclostyled judgment:

> "On the other hand, s 3 of the Act criminalizes the continued occupation of acquired land by the owners or occupiers of land acquired in terms of s 16 B of the Constitution beyond the prescribed period. The Act is very explicit that failure to vacate the acquired land by the previous owner after the prescribed period is a criminal offence. It is quite clear from the language of s 3 of the Act that the individual applicants as former owners or occupiers of the acquired land have no legal rights of any description in respect of the acquired land once the prescribed period has expired.
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> The holders of the offer letters, permits or land settlement leases have the right of occupation and should be assisted by the courts, the police and other public officials to assert their rights. The individual applicants as former owners or occupiers of acquired land lost all rights to the acquired land by operation of the law The lost rights have been acquired by the holders of offer letters, permits or land settlement leases. Given this legal position it is the holders of offer letters, permits and land settlement leases and not the former owners or occupiers who should be assisted by public officials in the assertion of their rights." (My underlining.)

The applicant now seeks an order staying execution while he seeks leave to appeal out of time. It appears to me that there is merit in this application. On the strength of the law as now articulated by the Supreme Court it would appear that the first respondent may have been divested of any right to own, occupy and use the land in dispute. His intended occupation of the land now constitutes a criminal offence and the court cannot sanction an illegality. That being the case, the application can only succeed. In saying this I am mindful of the first respondent's argument that peri-urban land is not susceptible to compulsory acquisition. That position however, needs to be clarified by the Supreme Court before the first respondent can lawfully occupy the disputed land.

It is accordingly ordered:

1. That the execution of the Provisional Order issued under case number HC612/09 be and is hereby stayed pending an application for leave to appeal out of time to be lodged by the applicant in the Supreme Court in respect of case number HC 1020/09.

2. That such leave to appeal shall be lodged in the Supreme Court within seven days of granting this order.

3. That in the event that such appeal is not lodged within the time-frame aforesaid, this order shall automatically cease to be of any force or effect. With the result that execution of the Provisional Order issued under case number 612/09 shall proceed without the need for further application by the first respondent.

4. That this order shall not be construed as authorizing the first respondent to occupy or use the disputed land without a Court Order as such occupation might constitute an illegality.

5. There shall be no order as to costs, but in the event that execution proceeds pursuant to para 3 above, the applicant shall bear the first respondent's costs on a legal practitioner and client scale in respect of these proceedings and the resultant costs, if any of the subsequent execution aforesaid.

SERVICE OF THE ORDER

That leave be and is hereby granted to the applicant's legal practitioners or the Deputy Sheriff /Messenger of Court to attend to the service of this Order forthwith upon the respondents in accordance with the rules of the High Court of Zimbabwe."

G N Mlotshwa & Company, applicant's legal practitioner
Musunga & Associates, 1st respondent's legal practitioners