

MAXWELL MATSVIMBO SIBANDA
versus
TSANGA TIMBERS
and
RICHARD SAZIYA
and
PARKS & WILDLIFE MANAGEMENT AUTHORITY
OF ZIMBABWE
and
MINISTER OF ENVIRONMENT WATER & CLIMATE
and
MINISTER OF LANDS & RURAL SETTLEMENT

IN THE HIGH COURT OF ZIMBABWE
BHUNU J.
HARARE, 20 September and 9 October

Ms N Masunda, for Applicant
P Charamba, for 1st and 2nd Respondents
W. P Zhangazha, for 3rd Respondent
Ms Saruwaka, 4th and 5th Respondents

BHUNU J: The facts leading to this urgent chamber application are as follows:
Certain property in question, cited as Inyanga Block (Folio No. 6151, Title No. 1813/61) at one time belonged to William Antony Igoe, who sold this property to the Government of Zimbabwe in 1986 resulting in the cancelling of the Deed in terms of the Rural Land Act Chapter 20:18. He however retained certain rights over the transferred land, which were specified in a written agreement that was to expire at the end of a period of 25 years after the transfer. These rights included among others, the right to extract pine from the plantations originally planted by the seller and to mill it. The Applicant later acquired these rights to extract and mill the timber in May 2003. His cutting rights having since been terminated in 2012, the Applicant brought a matter on 28 August 2013 which is yet to be determined regarding the termination of these cutting rights. However, what has spurred this urgent chamber application is that the 1st Respondent has since allocated the cutting rights to 1st and

2nd Respondents who have commenced milling and the Applicant argues that this has unlawfully interfered with his entitlements.

The Applicant seeks a provisional order in the following terms:

FINAL RELIEF SOUGHT

1. The 3rd Respondent is restrained from tendering, offering or otherwise distributing rights to set up a saw mill, harvest, cut or otherwise diminish the timber in the plantation situate at Kairezi known as the remainder of Inyanga Block (folio number 6151) held under title deed number 1863/61 pending final determination of matter number 6975/13.
2. The Applicant is allowed to do everything necessary to nurture the trees in the plantation pending finalisation of matter 6975/13.
3. The Applicant is permitted to remove all timber already felled and sawn by it as at the date of this application.
4. Respondents to pay the costs of this application.

INTERIM RELIEF SOUGHT

Pending determination of this matter, Applicant is granted the following relief:

1. That the 1st and 2nd Respondents cease forthwith from carrying on the activities of cutting, sawing, or removing timber from a plantation situate at Kairezi known as the remainder of Inyanga Block (folio 6151) held under title deed number 1863/61 pending the determination of the matter number 6975/13.

Ms *N Masunda* for the Applicant submitted that the Applicant has applied for a declarator to which the 3rd Respondent has filed an opposition. She further submitted that the 4th and 5th Respondents have not responded and are therefore barred from so doing. Pending the decision of the court, the 1st and 2nd Respondents have begun business which is the subject matter of the dispute. They began business on the 3rd of September 2013 and she stated that Applicant only became aware of this on the 7th of September and as such is seeking a prohibitory interdict pending the case for the declarator which the Applicant has lodged in case 6975/13. She further submitted that the Applicant's equipment and employees are still on the land.

Mr *Zhangazha* for the 3rd Respondent raised the following issues *in limine*.

He submitted that the certificate of urgency was not proper as it was signed by the same legal practitioner as that representing the client. He further submitted that as the problem was declared as a dispute in April 2012, if there was indeed any urgency it should have surfaced then. He argued that given that the 1st Respondent had terminated the cutting rights as way back as April last year, the urgency could not be said to have arisen now. In support of his contention he cited the case of *Kuwarega v Registrar General and Anor* 1998 (1) ZLR 188 at p 193. He also cited s 5 the Rural Land Act to the effect that every encumbrance, servitude shall be extinguished when state land is acquired. He argued that both Applicant and Respondents have submitted documents which clearly indicate that the matter had been the subject of written correspondence between the parties. These documents he opined reveal that the urgency is self-created.

Ms Saruwaka for 4th and 5th Respondents was in agreement with *Mr Zhangazha's* submissions regarding the lack of urgency. She submitted that indeed no notice of opposition had been filed on behalf of her clients.

Mr Charamba for 1st and 2nd Respondents submitted that the Applicant ought to have been aware of the developments on the said property given that as way back as June 28, the 3rd Respondent had flighted a tender process and subsequently advertised in the Manica Post as to who had been awarded the tender. He further argued that the Applicant had not established a clear right in relation to the estate.

In explaining the delay in bringing the matter as an urgent one before the court, counsel for Applicant argued that prior to the 7th of September, no one was cutting trees and therefore there was no urgency in the matter. She further submitted that this urgent application is not premised on a clear right but rather on a prima facie right as detailed in Applicant's assertions in Case 6975/13 which is yet to be determined by the court.

Points in Limine

On the issue raised by *Mr Zhangazha* for the 3rd Respondent that the certificate of urgency is not proper as it has been signed by the same legal practitioner as that representing the applicants, this is not detrimental. He did not labour the issue and admitted to there being different interpretations of the relevant rule. Rule 242 (2) states that where an Applicant is

legally represented in an urgent chamber application, the application must be accompanied by a certificate from a legal practitioner supporting the urgency of the application. It does not state that the legal practitioner must be from a different firm. In favour of such an interpretation of Rule 242 (2) see for example the remarks by Chatukuta J in *Route Tote & Ors vs Sunspun Bananas (Pvt) Ltd* HH27/2010 at p 3.

It appears to me that whether the matter is in fact urgent, is best determined by addressing the issue of whether the Applicant has prima facie rights to the property which need immediate vindication. The Applicant does not dispute the various correspondences with the 1st Respondent, tendered as annexures to the application. Also submitted is Agreement of Sale for “cession of cutting rights” of may 2003 under which he purchased the cutting rights which states as follows in clause 2.

The buyer (at its sole discretion) will be responsible for applying for the renewal of the Lease of Cutting Rights prior to its expiration in 2011.

In October 2011 Applicant wrote to the 3rd Respondent requesting the 3rd Respondent to renew the cutting rights for a period of thirty years, which seems to indicate he was aware that he had no unfettered rights. He received a response in December 2011 to the effect that the 3rd Respondent was not in position to renew the cutting rights. He wrote again in December 2011, essentially pleading his case, to which he received a response that he had been granted permission to collect only his sawn timber and that he would be granted a meeting. Various correspondences largely at the instance of the Applicant to try and get a renewal were made. The 3rd Respondent persistently turned these down with a final letter written on the 28th of August by the 3rd Respondent indicating that as far as they were concerned, they had closed the matter.

The Applicant in his affidavit says the various correspondences took place because he was labouring under a misapprehension that the cutting rights had expired when in fact no transfer of the land had taken place in 1986. It is the substance of these misapprehensions that is yet to be determined under case 6975/13. Suffice it to say from the time that he received the final correspondence dated 28 August 2012 from 3rd Respondent to the effect that the

matter was closed, to August 28, 2013, the Applicant had not seen it fit to take action to protect his perceived rights.

His argument that the urgency has arisen now because the timber is being cut cannot be supported since what has given rise to the activities needs to be looked at from a holistic and contextual point of view. It must have been reasonably foreseeable, judging from the correspondence that the logical outcome of failure to renew the cutting rights by the 3rd Respondent would be that someone else would be given the rights. Mr Zhangazha for the 3rd Respondent cited the case of *Kuvarega* where the late CHATIKOBO J succinctly stated as follows:

What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is urgent if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead line draws near, is not the urgency contemplated by the rules. (p.193)

Once it was made clear to the Applicant that the cutting rights would not be renewed, that is the point at which he should have sought to institute his urgent application. Accordingly I find that the matter is not urgent.

In opposing the claim the 3rd Respondent asked for punitive costs on a 'legal practitioner and client' scale. Such costs are generally not awarded lightly and when they are, the circumstances of each case are carefully taken into account. Their purpose when awarded is to show displeasure at an unwarranted course of action. Regarding the urgency of the matter, in this case the documents submitted by both sides in this application clearly reveal that the assertion of 'urgency' should at the very least, have been made over a year ago. The Respondents are justified in asking for costs on a higher scale for the costs of this urgent application.

The result is that the matter is not urgent.

The applicant is to pay costs on a legal practitioner and client scale.

Messrs Scanlen and Holderness: Applicant's Legal Practitioners
Charamba & Partners: 1st and 2nd Respondents' Legal Practitioners
Chinogwenya and Zhangazha: 3rd Respondent's legal practitioners
Civil Division of Attorney General's Office: for 4th and 5th Respondents.