

TAURAI KARONGA
versus
REVAI DESHA
and
MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS
AND NATIONAL HOUSING N.O

HIGH COURT OF ZIMBABWE
MHURI J
HARARE 16 March & 12 May 2023

Opposed Application

Mr *E Dondo*, for the applicant
Mr *T S Mukwindidza*, for first respondent
No appearance for second respondent

MHURI J: For wanting to be declared the lawful holder of rights, title and interests in the property known as stand number 6387 Retreat Waterfalls Harare, and for first respondent to vacate the said stand to give applicant vacant possession, applicant approached this court in terms of section 14 of the High Court Act [*Chapter 7:06*] (THE ACT) applying for a declaratur.

The basis of this application is that sometime in 2009 applicant joined Chimoyo Housing Cooperative Society (THE COOPERATIVE) with a view to securing a residential stand. As a member of the Cooperative he made monthly subscriptions to the Cooperative. In 2014, applicant was allocated stand number 6387 Retreat Waterfalls (THE STAND) by the Cooperative.

After having been allocated the stand, applicant entered into a lease agreement with second respondent in respect of the stand in July 2016. The lease was a lessee -to-buy.

In 2014, through allocation by her own Cooperative Samora Machel Housing Cooperative first respondent occupied the stand and constructed a structure thereon, asserting that she has competing rights over the stand which rights she derived from her Cooperative.

In summary, applicant avers in his founding affidavit that he and not first respondent has rights to the stand as the Cooperative was given the block of stands ranging from stand 6380 to 6391 in 2008 by second respondent for allocation to its fully paid up beneficiaries. Stand 6387 is amongst the block of stands, and he was allocated the stand.

He is a holder of a lease agreement which lease confers rights on him and is still extant. In terms of the lease he is supposed to develop the stand and eventually obtain title deeds.

He averred that first respondent's reliance on the allocation by the Harare South Housing Cooperative Association Apex Board (THE APEX BOARD) in 2012 is a non-event as the Apex Board at the time had no authority to do so, and that by that time there was no entity called the Samora Machel Housing Cooperative. It only came into existence in 2016. There is nothing to show that first respondent legitimately obtained rights from second respondent as such she has no competing rights at all.

On the basis of the above, applicant's prayer was as stated at the beginning of this judgment, to be declared the lawful holder of rights, title and interests in the stand and for first respondent to be ordered to vacate and give applicant vacant possession of the stand within 10 days of this court's order and for first respondent to pay costs on the higher scale.

To this application, second respondent filed a notice to the effect that it will abide by the court's decision.

First respondent is opposed to the granting of the declaratur. Its position is that applicant has no rights to be declared the lawful holder of rights, title and interests in the stand. He has failed to prove that he was a member of the Cooperative in 2009 as he attached no joining fee receipt. He has competing rights over the stand against applicant. The block of stands 6380-6391 was not allocated to the Cooperative in 2008 as it did not exist by then.

Further, the lease agreement relied on by applicant is defective and a nullity at law, moreover it has expired and has not been renewed. He denies invading the stand and alleged that he lawfully occupied it after being allocated by his Cooperative (Samora Machel Housing Cooperative). He denies that the Apex Board was dissolved prior to August 2012. He also alleged that there are material disputes of fact which cannot be resolved on the papers but by way of *viva voce* evidence.

He prayed that the application be dismissed with costs.

I turn now to consider the application and in so doing applicant urged the court to refer to the record in the matter of *Paul Murehwa v Sibonile Dube and Minister of Local Government Public Works & National Housing* N.O HC 1459/19 which applicant submitted was on all fours with the present one. For this, applicant cited the case of *Netone Cellular (Pvt) Ltd and Anor v Econet Wireless (Pvt) Ltd and Anor* SC 47/18 in which it was held that;

“the court is entitled to refer to its own records that may be relevant to the case before it.”

I have perused the record and read the *ex-tempore* judgment in that matter. As submitted by applicant, indeed that matter in certain respects is on all fours with this one and in that regard I stand persuaded with the remarks and findings therein. Further, it is common cause that the judgment in that matter was confirmed by the Supreme Court (*Sibonile Dube v Paul Murehwa & Anor* SC 68/21).

First respondent raised the issue of applicant’s *locus standi* in this matter. Applicant approached this court in terms of s 14 of the High Court Act. The section reads as follows:-

“14 High Court may determine future or contingent rights.

The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

What is to be established is whether applicant is an interested person, with substantial and direct interest in the matter relating to an existing, future or contingent right. See *Chigovera v Minister of Energy & Power Development and Anor* SC 115/21. Does applicant have substantial and direct interest in this matter? The answer is the affirmative in my view. It is beyond question that land in urban areas belongs to either the local authorities or Central Government hence the reason why invariably in matters such as this one, the Minister of Local Government Public Works is cited as a defendant. This point was clearly made by MCNALLY JA (as he then was) to the effect that;

“it is surely a matter of general common knowledge, at least among lawyers that land in the high density suburbs belong to the local authority or occasionally to the Central government,”

Hundah v Marauro 1993 (2) ZLR 401 (S).

In casu, applicant is a member of the Cooperative. The Cooperative was allocated a block of stands one of which is the stand (6387) which is centre of this dispute by the second

respondent. In the turn of events, applicant entered into a lease agreement with the second respondent in respect of the said stand. The lease provided that applicant erects buildings worth US \$30 000 on the stand consequent upon he would then obtain a title deed over the stand. The said lease is valid, has not yet been cancelled by second respondent nor was it legally challenged in a court of law by first respondent. It is not before this court that first respondent can now challenge the validity of the lease. By virtue of this lease, applicant has direct and substantial interest.

That having been said, it is safely concluded that applicant has *locus standi* to institute these proceedings. First respondent's point is therefore dismissed.

The other point raised by first respondent which I find meritless is that of the existence of material dispute of facts.

In the case of;

Batsirai Mapisa v Tavona Mubvongodzi and Minister of Local Government Public Works & National Housing N.O HH 104/23 when dealing with these points that had been raised in that matter, the learned Judge BACHI- MZAWAZI J had this to say and I associate myself with her remarks,

“in the absence of a document from the officials and custodians of the land he (first respondent) has nothing.

There are no material disputes of facts incapable of resolution on the papers as already illustrated by the robust approach that this court has taken. There is no need for reference to trial.”

When considering the point that there are material disputes of fact which cannot be resolved on affidavits but through *viva voce* evidence adduced in a trial, the Supreme Court and fairly recently the Constitutional Court in Zimbabwe have stated the general rule to wit

“As a general rule in motion proceedings the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party.”

per Patel JA (as he then was) in *Muzanenhamo v Officer in Charge CID Law and Order & Ors* CCZ 3/13

See also *Eddies Pflugari (Pvt) Ltd v Knowe Residents Association & Anor* SC 37/09 cited with approval in the case of *Sibonile Dube v Paul Murehwa (supra)*. Therein the Supreme Court stated;

“the position is now well established that in motion proceedings a court should endeavor to resolve the dispute raised in affidavits without the hearing of evidence.”

In casu, I take a robust common sense approach in view of the documentary evidence submitted by the parties and come to the conclusion that there are no material disputes of facts which cannot be resolved on the papers. As adverted to earlier, applicant is a holder of a lease agreement which has not been revoked or invalidated. The lease agreement is between applicant and second respondent. Applicant’s Cooperative was allocated block of stands of which stand number 6387 is one by the second respondent to whom the land belongs.

Applicant being a member of the Cooperative was allocated the stand in question. On the other hand, first respondent is not a holder of any lease. No explanation is proffered as to why second respondent did not give him a lease as far back as 2014 when he moved onto the stand. He relies on the documents from the Apex Board which was found not to have authority to allocate stands. Further, the allocation by the District Administrator relied upon was found to be of no probative value by the Supreme Court when it confirmed the High Court judgment in the case of *Sibonile Dube v Paul Murehwa (supra)*

Did first respondent have a Registration Certificate at the time? Section 17 of the Societies Act [*Chapter 24:05*] provides;-

“Registration of Societies

1. If the Registrar is satisfied that a Society which has applied for registration complies with the requirements for registration and that its proposed by-laws are in accordance with this Act, he shall register the society and its by-laws.
2. Where the Registrar registers a society he shall-
 - a) enter in the Registrar-
 - (i) the name of the society
and
 - (ii)
 - (iii).....and
 - b) Forward to the society
 - (i) a certificate of registration
 - (ii)
 - (iii).....

- and
c) cause notice of the registration to be published in the gazette.”

Section 19 provides that the Register and Certificates are proof of registration.
(underlining for emphasis)

In this case, there is no provisional registration certificate for first respondent's Cooperative, neither is there a certificate of registration issued in 2012 when the purported allocation of the block of stands was done, neither is there a document purporting to be an extract from or a copy of an entry in the Register or a document in the custody of the Registrar (Section 118 of the Cooperatives Act) that was submitted by first respondent. All he filed is a document from the Secretary for Youth Development and Employment Creation dated 10 February 2011 addressed to whom it may concern stating confirmation of registration and a handwritten letter from the office of the District Administrator addressed to the Registrar of Cooperatives dated July 2014 seeking the processing of the certificate.

According to the Certificate of Registration filed of record, first respondent's Cooperative was registered in 2016 way after the purported allocation of the block of stands whereas applicant's Cooperative was registered in 2003 way before the allocation of the block of stands.

In September 2020, second respondent through a letter addressed to the Criminal Investigation Department of the Zimbabwe Republic Police confirmed that stands 6387, 6384, 6383, 6385 were part of the block of stands allocated to applicant's Cooperative and that applicant among others has, valid lease agreements with second respondent.

All the above having been considered, I find that first respondent has no competing rights against applicant.

Having taken the approach that I did, and found that there are no material disputes of fact that cannot be resolved on the papers filed, I find that applicant is entitled to the declaratur he is seeking.

It is therefore ordered that:

1. The application for a Declaratory Order be and is hereby granted in favour of applicant.

2. Applicant be and is hereby declared the lawful holder of rights, interests in the property known as stand No 6387 Retreat Waterfalls.
3. First respondent and all those in occupation through him at stand No 6387 Retreat Waterfalls vacate the said stand and give applicant vacant possession within 30 days of the date of this Order
4. First respondent to bear costs of suit on the ordinary scale.

Saunyama Dondo, applicant's legal practitioners

Bere Brothers, first respondent's legal practitioners

Civil Division of Attorney General's Office, second respondent's legal practitioners