BRUCE CHARLES ALEXANDER
versus
THE MINISTER OF LANDS, AGRICULTURE, WATER,
FISHERIES AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 14 & 25 July & 31 August 2023

Opposed Application

A Mugiya, for the applicant
T S Musangwa, for the respondent

KATIYO J: The applicant who is a registered owner of a certain piece of land situated in the Mount Hampden Zvimba district of Salisbury, which measures 50 hectares of land and is located in the vicinity of Mount Hampden whose deed title in the year of the Lord 1981 and is in occupation up to date, approached this court seeking the following relief:

"IT IS ORDERED THAT:

1. It is declared that the right ownership of a property called Subdivision H of Kinvarra held under Deed of Title Number 6938/81 lawfully belongs to the Applicant and not the respondent.
2. That the listing and gazetting of the above property by the Respondent in the Government Gazette published on the 6th of April 2012 under general notice 134 of 2012 be and is hereby declared null and void.
3. The Respondent is within seven (7) working days of this order being issued is compelled to issue out the applicant with a certificate of no present interest.
4. There be no order as to costs.

The relief is opposed by the Respondent."

BACKGROUND

The applicant who is a registered owner of the piece of land as described above, some time in 2022 applied to a provincial town planning Mashonaland West for a sub-division permit which application is attached as Annexure B to this paper. In response he was advised that the land had been acquired by the Respondent as per government gazette attached as

Annexure E. A perusal of the second Government Gazette attached as Annexure D shows that the property was acquired for agricultural purposes on the 6th of April 2012 in accordance with section 16B of the amended Zimbabwe 1980 Constitution. It turned out that the same piece of land had been gazetted on the fourth of August 2006 under general notice 203 of 2006. Zvimba rural district council gazetted the Mount Hampden Local Development Plan in terms of Regional Town and Country Planning Act [*Chapter 29:12*]. The plan zoned a total area of 13990 hectares of land as urban land available for industrial, commercial, residential, supportive or incidental structures. The plan came in effect on the first of September 2006. A copy of the said Government Gazette is annexed to the application as "Annexure E" described as subdivision H of Kinvarra and falls under zone 5A which is reserved for general industry. A copy of the map is annexed as F1 and F2.

ARGUMENTS

The applicant argues that the land in question was zoned as urban land for industrial development under zone 5A way back in 2006. The applicant's application was declined on the basis that the government of Zimbabwe had acquired the land on the sixth of April 2012 under s 16B of the old Constitution for agricultural purposes was unprocedural. The applicant invoked s 14 of the High Court Act seeking a declarator arguing that the land could not be expropriated under s 16B for agricultural purposes for it had been gazetted as an urban land in 2006. It is further argued that it is a settled position that under the old constitution and the new constitution s 295 that once land has been acquired for agricultural processes court's jurisdiction is automatically ousted. In the case of *Mike Campbell (Pvt) Ltd & Ors* v *Minister of National Security Responsible for Land, Land Reform and Resettlement & Ors 2008 (1)* ZRL SC 49/07. The court had this to say:

> "By clear and unambiguous language of section 16 B (3) of the Constitution, the legislature in the proper exercise of its powers, has ousted the jurisdiction of the courts of law from any cases in which a challenge of the acquisition of agricultural land secured in terms of section 16 b (2) (a)."

Also see case of *TBIC Investments (Pvt) Ltd & Ors* v *The Minister of Lands and Rural Development & Ors* SC 469/13.

High Court of Harare had an occasion to define what agricultural land is in terms of the constitution in the case of *Vodage Investments Pvt Ltd* v *Toro & Ors* 2015 (1) ZLR 509.

The position was upheld on appeal by Supreme Court under SC 15/17 involving the same parties where Supreme Court held as follows:

> "Agricultural Land means land used or suitable for agriculture it does not include communal lands or land within the boundaries of an urban local authority or within a township, title to urban land does not fall under the same regime as title to agricultural land."

Applicant argues that the respondent has not contested that the land in question was indeed urban land. Submitted that whether or not this court can interfere and declare such acquisition of urban land under s 16 B of the old constitution unlawful. The applicant contends that the question was answered in the case of *Mike Campbell case* (*supra*) where at p 44 E-H the Court put it as follows:

> "Section 16B (3) of the constitution has not however taken away, for the future, the right of access to the remedy of judicial review where the expropriation is on the face of it not in accordance with section b …..if the purported acquisition is on the face of the record not in accordance with the terms of the section 16 (B) of the constitution a court is under duty to uphold the constitution and declare it null and void."

This position finds support in a recent judgement of High Court in case of "*Bowers & Anor* v *Minister of Lands, Agriculture, Fisheries, Water and Rural Settlement and 7 Ors* HH 72/23 where MUTEVEDZI J remarked as follows:

> "Government cannot expropriate land which is not agricultural land under the guise of the land reform program. If it wished to acquire such land it could proceed under its powers of eminent domain which would require it to pay the former owner of the land compensation."

Further in the case of *Carthose Enterprise (Pvt) Ltd* v *Minister of Lands….* HH 442/20 argued that the court upheld an application by the owner of peri-urban land which had been subdivided into stands, residential plots and motels that this was not agricultural land as such the state could not acquire it in terms of s 16B and the acquisition was declared null and void. The same principal was applied in the case of *Adore Gold (Pvt) Ltd* v *Ministry of Lands and Resettlements* HH 44/14. The facts of that case are similar to the present circumstances, argued the applicant. The applicant further avers that in the above case the respondent expropriated urban land by issuing an offer letter to a private individual under the guise of agricultural land, the Court held as follows on p 4 of its judgement:

> "The proclamation incorporating Lot 1A Johannesburg into Norton Town Council area was done in 2002. So, by 2009 when the offer letter was done the property was

> already urban land prior government acquiring it. So indeed, the offer letter which was given to the second respondent in 2009 is null and void because land which had already been proclaimed and gazetted as urban land for urban expansion could not a few years down the line be compulsorily acquired for agricultural purposes covered by the offer letter. And once the offer letter was null and void the offer letter became invalid."

The applicant concludes his arguments by urging this court not to entertain the respondent argument that there are constitutional issues which ousts the court's jurisdiction. In effect what he seeks is a declarator in terms of the High Court Act [*Chapter 7:06*] and not to challenge the validity or invalidity of certain provision of the constitution. He argues that there are no constitutional issues arising before the court for it is merely a procedural irregularity.

On the other hand, the respondent who opposes the application through his acting permanent secretary one Gibson Chijarira argues that the relief being sought is incompetent. Further that the acquisition was through s 16B therefore should have prayed for an order expressly declaring the action unconstitutional. He declined to respond to each and every averment in his heads of argument simply reiterated the position as in his opposing affidavit. He submits that the land was acquired in terms of the constitution therefore the court has no jurisdiction. He cited a case of *Affretair (Pvt) Ltd* v *MK Airlines (Pvt) Ltd (1996(2) 15* (s), where the learned judge of appeal said:

> "The function of judicial review is to scrutinize the administrative action, not to secure a decision of a judge in place of an administrator. As a general principle the courts will not attempt to substitute their own decision for that of the public authority, if an administrative decision is found to be ultra vires the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise would constitute an unwarranted usurpation of the powers entrusted (to the public authority) by the legislature."

The case submitted *supra* is distinguishable from the present case but the principle to be observed is that the court must avoid usurping its powers by substituting an administrative decision. In the case of *Mhanyami Fishing & Transport Cooperative Society Ltd & Ors* v *The Director General Parks and Wildlife Management Authority NO & Ors* HH 99-11, the court dismissed the application on the basis of whether the court could substitute its own decision for that of the administrative functionary. The court held that it could not.

ANALYSIS

From the arguments above it is quite clear that the respondent does not deny that the alleged action was done in the manner complained of. The points *in limine* raised were compounded together with the merits. It is not in dispute that the applicant was and continues to be the occupant of the said piece of land. The applicant has also demonstrated that the said piece of land was gazetted under urban council zoned under zone 5 A (i) which was reserved for general industry as per annexure F1 and F2. Also, that the same land was gazetted in 2012 for agricultural purposes. There is nothing put forward by the respondent to the effect that the 2006 gazetting was reversed or revoked before the 2012 gazetting was put in place. It was argued by the respondent legal practitioners that a gazette is not law but a mere notice, but if this argument is to be followed it would jeopardize the whole purpose for its function. Gazetting is the tool which is generally recognised as a proper notice to the general public for any proclamation of legal instruments or an such action by those vested with the administrative functions. This has been the practice since time immemorial and such any deviation will be a misnomer. In the present application the respondent was at pain to justify his actions. The court having noticed the shortcomings in the respondent's case gave a chance for the parties to find each other. On their return it was quite clear that the respondent's legal practitioners fell short of conceding but seemed to have no mandate to do so. Section 16B (3) (a), a clause which ousted a jurisdiction of the courts in determining issues on land expropriated under land distribution program legal challenges still remain under s 72 as read with s 295 of the 2013 Zimbabwe Constitution. The courts are desirous of protect their constitutional turf of interpreting the law and adjudication of disputes but that should be so in appropriate circumstances. The principle was observed by the supreme court in the case of *Naval Phase Farming (Private) Limited and Others* v *Minister of Lands and Rural Resettlement & Ors* SC 50/18 at p.12 where it remarked that:

> "No ouster provision, no matter how comprehensive can completely exclude the jurisdiction of the courts. The courts, the world over are inclined to interpret ouster clauses narrowly so that it has been said that nothing short of abolishing the court altogether can prevent them from exercising some aspects of review jurisdiction."

In the case of *Mike Campbell supra* where MALABA JA (now CJ) as he then was remarked that:

> "By the clear and unambiguous language of s 16B(3) of the Constitution the Legislature, in the proper exercise of its powers, has ousted the jurisdiction of courts of law from any of the cases, in which a challenge to the acquisition of agricultural land secured in terms of s 16B(2)

> (a) of the old Constitution could have been sought. The right to protection of law for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away. The ouster provision is limited, in effect, to providing protection from judicial process to the acquisition of agricultural land identified in a notice published in the Gazette in terms ofs16B(2)(a). An acquisition of the land referred to in s 16B (2)(a) would be a lawful acquisition. By a fundamental law the Legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded."

My understanding of the above is that once agricultural land has been lawfully acquired no challenge to that acquisition may be brought to a court of law. The question which must be asked is what constitutes unlawful acquisition of such land to give power to a court to review the acquisition. This was again answered in the Campbell case on pp 44 E-H as follows:

> "Section 16B (3) of the Constitution has not however taken away, for the future, the right of access to the remedy of judicial review in a case where the expropriation is, on the face of the record, not in terms of s 16B(2)(a). This is because the principle behind s 16B (3) and s 16B (2) (a) is that the acquisition must be on the authority of law. The question whether an expropriation is in terms of s 16B(2)(a) of the Constitution and therefore an acquisition within the meaning of that law is a jurisdictional question to be determined by the exercise of judicial power. The duty of a court of law is to uphold the Constitution and the law of the land. If the purported acquisition is, on the face of the record, not in accordance with the terms of s 16B(2)(a) of the Constitution a court is under a duty to uphold the Constitution and declare it null and void. By no device can the Legislature withdraw from the determination by a court of justice the question whether the state of facts on the existence of which it provided that the acquisition of agricultural land must depend, existed in a particular case as required by the provisions of s 16B(2)(a) of the Constitution."

In the *Naval case* cited *supra* the learned judge CHIGUMBA J grappled with a question of to what extent judicial review of expropriated land should go. She acknowledged the existence on one hand of judicial review in narrow sense as confined to scrutinizing procedural propriety in terms of courts general ground of review such as absence of jurisdiction, bias and gross irregularity in the proceedings or decision complained of and other judicial review in the wider sense extending to oversight on whether in the acquisition process the set of facts which constitute a lawful expropriation existed, she chose to leave the debate open. Under certain circumstances s 295 of the present Constitution one is entitled to compensation but the present scenario does not fall under this category. The land use in question had been gazetted for another purpose other than for agriculture. Therefore, it was no longer an agricultural land unless the gazetting had been reversed. There was a gazette in

place which was still extant and for the respondent to act otherwise it became unprocedural. This is a clear case where the court can openly exercise its jurisdiction power of review as submitted to by the applicant. This was not agricultural land. As demonstrated by the various annexures attached to this application. There is every reason to believe that the respondent when he so acted, he either forgot or there was an oversight of an existence of previous gazetting. If this scenario were to be allowed to prevail then the administrative function of authorities will be open to chaos. As submitted by the applicant there are no constitutional issues to be considered in this present scenario but a merely administrative irregularity. In other words, it's not a question of law but a question of fact to be rectified. It is also a courts observation that the respondent should have simply conceded and rectified the error by withdrawing the later gazetting of the same land. This case is totally different from the other land acquired under the previous s 16B of the old Constitution as replaced by the current Constitution. There was no need for the applicant to pray for compensation because this is not the category where issues of compensation should be determined.

CONCLUSION

Having considered the analysis as above this court is persuaded by the applicant's arguments. There is no tangible argument put forward by the respondent. A mere perusal of the respondent affidavit and heads of argument clearly demonstrates absence of defence on their opposition. It was opposed for the sake of opposing. So, in the final analysis the court comes to the conclusion that the application succeeds to the extent that the position reverts back to status of 2006 when the land was put under General Notice 3 of 2006 as subsequently gazetted under Zvimba Rural District Council. To that end having perused the papers filed before me and hearing counsels it is ordered that:

1. The listing and gazetting of the above property by the respondent in the government gazette published on the 6th of April 2012 under General Notice 134 of 2012 be and is hereby declared null and void.
2. There be no order to costs.

Mugiya and Muvhami Law Chambers, applicant's legal practitioners
Civil Division of the Attorney-General's Office, respondent's legal practitioners