

BRUMFORD SERVICES PRIVATE LIMITED
versus
WILLARD RUFU
and
SAMSON MUTSAGONDO
and
TIRIVEPANO HOUSING COOPERATIVE
and
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 9 August 2023 & 8 April 2024

Opposed Application

A Mbotshwa, for the applicant
M Mutema, for the 1st respondent-3rd respondents

MUSITHU J: This is an application for summary judgment in terms of which the applicant seeks relief set out in the draft order as follows:

“IT IS ORDERED THAT:

1. The 1st and 2nd Respondents and all those claiming occupation through 3rd Respondent be and are hereby evicted from stand 5098 Saturday Retreat, Southlea Park, Harare.
2. The Sheriff of Zimbabwe be and is hereby authorized and empowered to demolish any illegal structure erected on stand 5098 Saturday Retreat, Southlea Park, Harare.
3. Costs of suit.”

The application was opposed by the first to the third respondents.

BACKGROUND

The applicant is a holder of a lease agreement with the fourth respondent in respect of Stand number 5098 Saturday Retreat, Harare (the property). The applicant has been paying rentals to the fourth respondent in terms of that agreement. The applicant claims that the first and second respondents, who are members of the third respondent invaded the property and built structures thereon. This was done without the permission of the applicant and the fourth respondent. The applicant has instituted eviction proceedings against the respondents which proceedings have been defended. The applicant believes that the respondents have no *bonafide* defence to its claim hence the present application for summary judgment.

The Applicant's Case

The applicant claims title to the property based on a lease agreement it signed with the fourth respondent on the 13th of March 2020. That lease agreement is still extant, and the applicant continues to pay monthly rentals for the property to the fourth respondent. The property was zoned as industrial land and that position was made clear in a letter dated 31 August 2022 from the then Minister of Local Government and Public Works, Mr Ignatius Chombo. The respondents could not therefore seek to occupy industrial land as if it was residential land.

The respondents lacked a *bonafide* defence to the claim and they had only defended the eviction proceedings to stall their eviction from the property. The respondents had no legal documentation that gave them the right to occupy the property. The fourth respondent had not backed up their claims to be lawful allottees of the property. It is for this reason that the applicant prayed for a summary judgment.

The Respondents' Case

The first and second respondents claimed ownership of the property through the third respondent who was allocated that same piece of land in 2005. They claimed to have been in possession of that property since 2005 and were not aware that it had been converted to industrial use as alleged by the applicant. That conversion of land use was an illegality at law since it was done without their knowledge. The respondents' right to stay on the property was premised on an offer letter issued to the housing cooperative, and they could not be evicted from the said stand because they had a clear right to be in occupation.

The Submissions

Mr Mutema for the first to third respondents raised a preliminary point. He argued that there were material disputes of fact that could not be disposed of on the papers. They needed to be ventilated through *viva voce* evidence at trial. *Mr Mutema* argued that the property in dispute was allocated to the first to third respondents by the fourth respondent contrary to the position taken by the applicant that it was the lawful allottee of the property. This dispute of fact can only be determined if the matter went to trial. The respondents attached several correspondences between the housing cooperative and the fourth respondent as the basis for their possession of the land in question.

In response *Mr Mbotshwa* for the applicant dismissed the preliminary point as a mere delaying tactic. He argued that there were no disputes of fact that needed ventilation at trial. The evidence attached by the respondent alluded to a different property altogether so there

was no dispute as to which piece of land the applicant owned, and which piece of land was allocated to the respondents. The offer letter submitted by the respondents in support of their case entitled them to possession of a different property to the one in dispute.

After hearing submissions by counsel and in consideration of the evidence at hand, the court determined that there was no merit in the objection. The offer letter tendered by the respondents in support of their claim was not specific to the property in dispute. It was not specific on the property that the respondent had possessory rights. In short, it was open ended and of no relevance to the dispute.

In contrast, the applicant produced several documentations that supported its position. There is a lease agreement signed between the applicant and the first respondent signed on 7 September 2020. That lease agreement is specific to the property in dispute. It is for a four-year tenure. There is also an internal memorandum from the City of Harare which confirms that the property in question was zoned for industrial purposes. Then there was also a letter generated from the office of the Deputy Minister of Local Government and Public Works. It also confirmed that the property in dispute was approved and zoned as industrial and not residential land.

It is for the foregoing reasons that the court dismissed the preliminary point for lack of merit. There is no factual dispute herein which is incapable of resolution on the papers.

The merits

Summary judgment is an extra-ordinary remedy as it often deprives a litigant who is desirous of defending an action, the opportunity to do so having regard to the *audi alteram partem* rule. Be that as it may, the remedy of summary judgment has always been granted by the courts to a plaintiff that possesses an unassailable claim.¹ This is one such case. The first to third respondents have no *bonafide* defence to the applicant's claim. The preliminary point that they raised concerning the existence of material disputes of fact was in fact tied to the merits of the case. This is because in order to determine that point, the court had to consider the evidence placed before it. It is the same evidence that the court must relate to in order to dispose of the merits of this application.

It is clear from the documentary evidence before the court that the applicant was allocated the property in dispute through a lease agreement signed with the fourth respondent. The first to third respondents' own papers are not specific to the property that they were

¹ Per MATHONSI JA in *Rosemary Bastin v Kufa John Madzima (In his capacity as the executor of the Estate Late Marimo Masawi Madzima)* SC 37/20

allocated. Their basis of their claim to the property in dispute is rather obscure. No connection to the property has been set out in the papers. Nothing was placed before the Court to justify any claim or entitlement to the property by any of the three respondents.

The first to third respondents have no legal basis to occupy the property in dispute. The court is persuaded by the applicant's contention that it would be a waste of time for the matter to go through all the motions of a trial when there is clearly no plausible defence on the merits. In an application of this nature, a respondent is required to set out a *bonafide* defence with sufficient clarity and completeness to enable the Court to decide whether there is a triable issue. The first to third respondents have not done so herein. Their case does not meet the necessary threshold to persuade the court to find that there exists a triable issue that warrants a referral of the matter to trial. The court determines that there is merit in the application and it ought to succeed.

Resultantly it is ordered as follows:

1. The first and second respondents and all those claiming occupation through the third respondent be and are hereby ordered to vacate stand 5098 Saturday Retreat, Southlea Park, Harare.
2. The Sheriff of Zimbabwe be and is hereby authorized and empowered to demolish any illegal structures erected on stand 5098 Saturday Retreat, Southlea Park, Harare.
3. The first, second and third respondents shall bear the applicant's costs of suit.

R Chibaya Law Chambers, applicant's legal practitioners
Masango Seda, first to third respondents' legal practitioners