

NDAUCHIRE KAPFIDZE
Versus
ISAIAH HOKONYA
And
CHARLES MASESE
And
CLAUDE KACHOKOLO
And
MINISTER OF LANDS, AGRICULTURE, FISHERIES,
WATER, CLIMATE AND RURAL DEVELOPMENT

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI, 29 June to 10 July 2023

J. R. Tsivama, for the Plaintiff
T. Chikosha for the 1st, 2nd and 3rd Defendants
Machingauta, for the 4th Defendant

BACHI MZAWAZI J: In a disturbing but not surprising turn of events, the 4th defendant, who is the responsible authority in the offer and distribution of acquired and procedurally gazetted land, issued two separate individual offer letters in respect to two lots or plots in Munemi Extension Zvimba, Mashonaland West. Apparently, this seems clear and straight forward, as each offer letter holder is entitled to the piece of property described in its official document. Interestingly, as has been the norm, tradition or pattern, officials from the 4th defendant did not dance to the dictates of the contents of the individual offer letters but proceeded to physically doubly allocate to two parties subdivision 2 Munemi Extension Zvimba, Mashonaland West.

The common cause facts are that the plaintiff was the first person to be offered subdivision 2 Munemi Extension Zvimba, Mashonaland West in 2002. Notably, he is a valid offer letter holder. It is indisputable that there is no evidence of the withdrawal nor the intention to withdraw, let alone communication or proof of communication of the same or the said offer letter that was placed on record. Substantively, the plaintiff's offer letter is extant. It has also not been challenged that the plaintiff has invested heavily on this piece of property.

On the other hand, the 1st defendant, does have a valid offer letter, issued in 2013, but in respect to subdivision 1 Munemi Extension Zvimba, Mashonaland West. He however, claims to have been allocated plot number subdivision two by the 4th defendant. He, further

assets that his offer letter was wrongly printed number 1 instead of number 2 which mistake has been acknowledged by the 4th defendant pending the rectification of their records. The 1st defendant moved onto subdivision two and also invested extensively amidst protests and several legal and administrative wrangles with the applicant as evidenced by the voluminous record before this court, culminating in the present lawsuit.

Plaintiff issued summons commencing action, seeking the ejection of the defendants and all those who occupy through him. Of note, the 2nd and 3rd defendants are related to the 1st and have been in occupation of the said farm on his behalf.

The key player, the 4th defendant did not bother to participate in the legal action even after several efforts by this court to rope them in so that they clear the air or clarify the situation. As such, the matter sailed to the pre-trial conference stage where the parties then present agreed to proceed by way of a stated case. This was necessitated by the fact that all the background facts as alluded to herein were not in dispute serve for the legal question of eviction against the history of the case.

At the commencement of the hearing the court enquired as to the need to rope in the 4th defendant who had created the mess in the first place for their input. An application was made by both parties representing the plaintiff and the defendant to incorporate the 4th defendant and condone their non-filing of pleadings. An order to that effect was granted and the 4th defendant was directed to procedurally, join into the proceedings by making the necessary applications and through the filing of the necessary or essential pleadings.

It is, at that stage that the 4th defendant decided to engage the parties to see whether they could map the way forward and clean their mess amicably. Several adjournments were made to accommodate the peaceful and amicable resolution of the dispute so as to have a win-win situation on all the parties involved.

However, even though the 4th defendant's legal representatives tried to offer alternative solutions to the dispute, they failed to break through the hierarchy within their offices resulting in yet another dead lock.

As had been agreed by all the parties that, if nothing positive transpired on the last agreed date, the court should proceed to make a determination on a point of law raised in the statement of agreed facts, the 4th defendants stated that they will abide by the court's decision.

This is the court's determination. As has been noted the matter comes as a special case on stated facts. The laws pertaining to stated cases are well established. The court need not digress to any other extraneous evidence or facts outside the scope of those agreed to by the parties. See, *Leathout Investments (Private) Limited-v-Muvirimi & Anor SC60/21*.

Rule 52 of the 2021, High Court rules elaborately provides for special cases. It details what a special case is and the procedures accompanying such proceedings. In terms of rule 52(6), upon the argument of such a case, the court and the parties shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial.

In that regard, of guidance are the case of *Kunonga-v-The Church of the Province of Central Africa SC25/17* and *Leathout Investments (Private) Limited-v-Muvirimi above*, which dealt at length on the parameters of stated cases,

Thus, the only decisive issue that arises from the agreed point of law is whether or not given the prevailing set of facts, the plaintiff can eject the defendants and all those who claim occupation through him?

On evaluation, it is not in question that the 1st defendant is a valid offer letter holder of subdivision 1 Munemi Extension, Zvimba, Mashonaland West, but in occupation of subdivision 2 Munemi Extension, Zvimba belonging to plaintiff as appears in both their offer letters. Cognisance has also been made of the pecuniary interests of the 1st defendant in the improvements he made on that portion of the land.

In casu, for the plaintiff to succeed in evicting the defendants he is obliged to prove firstly, his entitlement, right or ownership to the contested property. Secondly, that the defendants are in unlawful occupation or possession of the same. These principles found expression in several case authorities amongst them, *Chetty v Naidoo* 1974(3) SA. *Savanhu v Hwange Colliery Company SC8/15*, *Nyahora v CFI Holdings (PTY)LTD SC81/14*.

What can be discerned from the facts of this case is that the plaintiff by virtue of the extant offer letter in his possession he has some degree of rights and ownership of the contested piece of land. This *is albeit*, that the real ownership rights are vested in the fourth defendant.

In *Gwarada-v-Johnson & Ors HH91-09*, the court enunciated that:

“If an offer letter does not constitute a lease, it seems to me that it offers a right to occupy at the pleasure of the owner of the land, that is the government of Zimbabwe”

See, *Tafireyi Nyikadzino-v-John Camero & Ors HH 25-12*.

Clearly, from the papers filed of record, by virtue of the offer letter each party holds, that party has lawful authority to occupy the part of the farm allocated to him.

In terms of s3 (1) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] no person may hold, use or occupy Gazetted land without lawful authority. Lawful authority is defined as an offer letter, a permit or a land settlement lease in the Act, Chapter 20:28.

Commercial Farmers Union & Ors-v-The Minister of Lands and Rural Resettlement & 6 Ors SC 31/00 recognises the rights of valid offer letter holders as follows;

‘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 farm owners or occupiers of acquired land lost all rights the acquired land by operation of the law. The lost rights have been acquired by the holders of offer letters, permits or land resettlement leases. Given this legal position it is the offer letter holder.....who should be assisted by public officials in the assertion of their rights.

It is my considered conclusion that given the above exposition of the law, the 1st defendant has authority over subdivision 1, Munemi Extension Zvimba Mashonaland West, as clearly delineated in his offer letter. He has no legal authority to reside or occupy subdivision 2, Munemi Extension Zvimba Mashonaland West. In actual fact, he is an illegal occupier of that area. As such, the plaintiff has every right and authority to evict the defendants premised on his offer letter.

There is a contention that the plaintiff’s offer letter was withdrawn. No evidence was placed before the court to support that averment as has previously been stated. In the absence of evidence it remains a bare allegation. It is now settled law that notices of withdrawals or intention to withdraw offer letters should be communicated to the respective interested parties or holders of such offer letters. Had this position been true, the 4th defendant would not have taken pains to try to resettle either one of the parties. Further, it is absurd that the 4th defendant had failed to simply rectify the alleged clerical numerical error for ten years down the line. As it stands there is no evidence that the plaintiff’s offer letter was withdrawn. It stands as the only offer letter in respect to subdivision 2 Munemi Extension Zvimba Mashonaland West. It is also trite to note that this case has gone as far as the Lands Commission Forum, which ruled in favour of the plaintiff.

This court is alive to the defendant’s predicament that he acted on the faith and directions of the 4th defendant that, the land in question pointed to him was vacant at the time of his

occupation. That being the so, what is defeatist to his case is that his offer letter issued by the same defendant indicates that he was not allocated subdivision 2 but subdivision 1 of the area in issue. In addition, the 1st defendant is well versed with the wrangle between himself and the plaintiff, that has seen several court applications and letters to and from the 4th defendant's office. Nevertheless, from 2013 to date even after every interested player has been notified of the dispute and has been involved one way or the other in an attempt to settle the dispute, no correction was made to the 1st defendant's offer letter.

Further, several court orders and directions were issued by this court to the 4th defendants to enable them to assist in straightening the actual status quo of the rights of the parties to avail.

Justice Bhunu (as he then was), in the case of *John Landa-v-Langton T. Masunda* HH 38-09 made observed as follows;

“The mere fact that officials from the Ministry of Lands may have mistakenly pointed out the lodge as being part of the land allocated to him does not convert itself into an authority for him to occupy the lodge in contravention of the law.”

Disposition

That being the case, Courts work with evidence that would have been placed before them. In rendition, the 1st defendant has no lawful authority over subdivision 2 of Munemi Extension, Zvimba but subdivision 1. Since, the plaintiff is regarded at law as having lawful authority to occupy that portion specified in his offer letter, he has the authority to evict anyone who does not have any lawful right thereto.

In the above case of *John Landa-v-Langton*, it was held that, if one has no lawful authority to occupy the piece of land then he is prohibited by the operation of the law to occupy the same.

For finality of litigation, I am of the view that the plaintiff is recognised as a lawful occupier of the land in question by virtue of the offer letter. The offer letter gives him rights to eject any trespassers even though the ultimate overbearing rights over all gazetted land vests with the 4th defendant. Accordingly, the plaintiff has the right to evict any unlawful occupier, which inevitably includes all the defendants and those who claim occupation through them through the courts of competent jurisdiction

Resultantly it is ordered that:

- a) The plaintiff is the lawful occupier of subdivision 2 of Munemi Extension, Zvimba Mashonaland West Province.

- b) An order for the eviction of the defendants and all those who occupy through them from subdivision 2 of Munemi Extension, Zvimba Mashonaland West Province by the plaintiff, within the next 21 days is hereby granted.
- c) Cost in the cause.

Messrs Sawyer and Mkushi for the plaintiff

R. Murambasvina Chambers for the 1st, 2nd and 3rd defendants

The Civil Division of the Attorney General's Office