

JERIPHANOS MUGAVIRI
versus
AUSTIN MURANGWANA ZVOMA

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 14 & 21 November & 12 February 2014

Civil appeal

Appellant in person
T. P. Kawonde, for the respondent

TAKUVA J: This is an appeal against the decision of a magistrate evicting the appellant and anyone claiming through him from Lot 2 of Kilworth, Zvimba District in Mashonaland West Province. A synthesis of the grounds of appeal is as follows:

- (a) that the lower court erred by entertaining an application for eviction when s11 (1) (b) (iii) of the Magistrates' Court Act expressly states that ejection shall be by way of an action.
- (b) that the lower court failed to note that respondent being a beneficiary to state land, had no right to eject another beneficiary.
- (c) that the lower court erred at law by failing to uphold the offer letter given in favour of respondent could not oust appellant's official letter of settlement on the land in question.
- (d) that the issue was *res judicata* after respondent withdrew case No. 260/10 in which the High Court under case No. CIV (A) 423/11 ordered to be heard *de novo*.

The appeal was opposed on the following grounds:

- (a) that appellant has no legal rights over the land in question in that any rights he may have had prior to acquisition by the state were extinguished.

- (b) that appellant cannot lawfully challenge any acquisition of land done in terms of s 16B (2) (a) (iii) of the Constitution of Zimbabwe.
- (c) that in terms of s 3 (2) of the Gazetted Land (Consequential Provisions) Act [*Cap 20:28*], the appellant as a former occupier of gazetted land shall cease to occupy it within a certain period.
- (d) that by continuing to occupy the land, appellant is committing a criminal offence in terms of s 3 (3) of [*Cap 20:28*].
- (e) that s 11 (1) (b) (iii) of the Magistrates' Court Act is inapplicable.

The facts of this matter are common cause. Briefly they are as follows; On 8 May 2006, the District Administrator, Zvimba District issued a letter to the appellant. The letter reads;

“This minute serves to confirm that JERIPHANOS MUGAVIRI I.D. Number 32-053835227 was officially allocated land at Kilworth II farm plot number 04 under resettlement programme.”

On 27 October 2006, the Government of Zimbabwe acquired a piece of land being Lot 2 of Kilworth measuring two hundred and seventy four comma zero nine one three zero (274,09130) hectares. Subsequently, on 8 November 2006, the Ministry of Land Reform and Resettlement addressed an offer letter to the respondent under the Model A2 Scheme. The offer letter related to the entire farm area of Lot 2 Kilworth Estate.

Respondent discovered that prior to his occupation of the farm the District Administrator had allowed ten families to settle on a section of Lot 2 Kilworth Estate. The Zvimba District Lands Committee decided to relocate the 10 famers to Sunnyside Central Farm. Nine of those farmers left but appellant refused to relocate. Effectively, the decision of the Zvimba District Lands Committee amounted to a withdrawal of the original letter and its replacement with a new offer letter in respect of Sunnyside Central Farm.

Frustrated by appellant's refusal to vacate the farm, respondent instituted proceedings by way of an application for eviction in the Magistrates' Court. The application was granted. The magistrate in his ruling reasoned as follows:

“Whereas the applicant is the holder of the offer letter for Lot 2 Kilworth Estate acquired in terms of section 16B (2)(a)(iii) of the Constitution of Zimbabwe, the respondent has none except an official letter from the District Administrator which is not an offer letter,

per se. Respondent has therefore no legal basis to remain at the property ...” (my emphasis)

In my view the court *a quo* did not err at all in so reasoning as I shall demonstrate shortly. Despite the numerous grounds of appeal, the sole issue crystallises to; what are the legal consequences of land acquisition by the state on the parties? In order to answer this question it is necessary to examine the law as enshrined in the relevant statutes. Section 16B (2) (a) (iii) provides as follows:

“16B Agricultural land acquired for resettlement and other purposes

(1) In this section;

“Acquiring authority” means the Minister responsible for lands or any other Minister whom the President may appoint as an acquiring authority for the purposes of this section;

“Appointed day” means the date of commencement of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005.

(2) Notwithstanding anything contained in this Chapter

(a) All agricultural land

(iii) that is identified in terms of this section by the acquiring authority after the appointed day in the Gazette or Gazette Extraordinary for whatever purpose, including but not limited to

A. settlement for agricultural or other purposes; or

B. the purposes of land re-organisation, forestry, environmental conservation or the utilization of wildlife or other natural resources; or

C. The relocation of persons dispossessed in consequence of the utilization of land for a purpose referred to in subparagraph A or B;

Is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (iii) with effect from the date it is identified in the manner specified in that paragraph.” (my emphasis)

Quite clearly from the above provisions, the state becomes the owner of acquired land from the date of publication in the gazette. *In casu*, the state acquired ownership rights on the 27th of October 2006. The respondent acquired rights on 8 November 2006 when the land was offered to him by the Minister of State for National Security, Lands, Land Reform and Resettlement in the President’s office. On the other hand, the appellant certainly did not acquire any lawful rights of occupation in that at the time his “permit” or whatever “authority” was given to him, the land had not yet been lawfully acquired by the State. Therefore, unfortunately, the

appellant did not acquire any legal rights on 8 May 2006 as the District Administrator's Office did not have any lawful rights to pass on to the appellant.

The letter issued to the appellant was not issued pursuant to gazette land. It was not issued by the relevant Minister. It does not require the appellant to accept or reject the offer. It was not given in terms of section 8 of the Agricultural Land Resettlement Act [*Cap 20:01*]. In short, it is not an offer letter as defined in s 2(1) of the Gazetted Land (Consequential Provisions) Act [*Cap 20:28*]. It also does not fit into the definition of a "land resettlement permit" in the same Act.

The appellant who admits occupying the land during the "land invasion" was employed by the former white commercial farmer as a builder. He used to occupy what he referred to as a "bungalow" before the farm was gazetted. Consequently, the appellant is a former occupier of gazette land whose rights are prescribed by section 3 of the Gazetted Land (Consequential Provisions) Act *supra*. The section states:

"3. Occupation of Gazetted land without lawful authority

- (1) Subject to this section, no person may hold, use or occupy Gazetted land without lawful authority.
- (2) Every former owner or occupier of Gazetted land –
 - (b) Referred to in paragraph (b) of the definition of "Gazetted land" in section 2(1) shall cease to occupy, hold or use that land forty-five days after the date when the land is identified in accordance with section 16B(2)(a)(iii) of the Constitution, unless the owner or occupier is lawfully authorized to occupy, hold or use that land ...".

As regards *res judicata*, it is clear that the appellant does not understand what it means in that when a matter is referred to the court *a quo* for proceedings to commence *de novo*, the issue of *res judicata* does not arise and cannot be available to a party as a defence in that there are no two actions to talk about as the original action was set aside – see Herbstein & Van Winsen: *The Civil Practice of the Supreme Court of South Africa* 4 ed by Van Winsen, Cilliers and Loots at p 249 and *O'Shea v Chiunda* 1999(1) ZLR 333 (S).

Similarly the raising of the provisions of s 11(1) (b) (iii) of the Magistrates' Court Act is as a result of a misreading of the section. It is totally inapplicable. In any case, if the criticism's epicenter is that the court *a quo* should not have dealt with the matter as a court application, the magistrate's explanation that where there are no material disputes of fact in a matter involving eviction, a party may be allowed to proceed by way of a court application rather than by way of

summons, is a sound explanation. In any case even on this point, it has not been shown that the choice of which procedure to follow prejudiced the appellant in any form. It has not been argued that there are disputes of fact in this matter.

In the circumstances, the appeal is devoid of merit and is dismissed.

Musakwa J I Agree: _____

Kawonde and Company , respondent's legal practitioners