

SHYLETT MUSEENZI  
versus  
MAURICE PAUTA MUSEENZI  
and  
BLESSING MUREYANI  
and  
MELODY MWAUEYANI

HIGH COURT OF ZIMBABWE  
MUZENDA J  
MUTARE, 19 June 2023

### **Opposed Application**

Ms *F Zendera*, for the applicant  
Mr *S Chikamhi*, for the respondents

MUZENDA J: The applicant approached this court looking for the following as reflected on the draft order sought:

**“IT IS HEREBY ORDERED THAT,**

1. *The sale of communal land held by the Museenzi family through the children of the late Kabumhe Museenzi and Prisca Museenzi in Chitakatira, Chigodora by the 1<sup>st</sup> respondent is illegal as well as a nullity.*
2. *The land sales made by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents of the communal land held by the Museenzi family through the children of the late Kabumhe Museenzi and Prisca Museenzi in Chitakatira, Chigodora are all a legal nullity and are hereby set aside.*
3. *The 2<sup>nd</sup> and 3<sup>rd</sup> respondents and all thos claiming occupation through them are ordered to immediately vacate the Museenzi family land they acquired illegally from the 1<sup>st</sup> respondent.*
4. *The 1<sup>st</sup> respondent’s purported surrender of portions of communal land held by the Museenzi family through the children of the late Kabumhe Museenzi and Prisca Museenzi in Chitakatira, Chigodora to the headman or other village leader is hereby set aside.*
5. *The Sheriff of the High Court is hereby ordered to carry out the judgment of the court in this matter.*
6. *1<sup>st</sup> respondent to pay the costs of suit on a legal practitioner – client scale.”*

### **FACTS**

The first respondent and applicant are blood brother and blood sister. Their parents are deceased. The parents used to stay in the communal area. The applicant alleges in her affidavit

that the first respondent has sold part of the land reserved for their late parents to second and third respondents. Out of four plots, the first respondent sold 2 and the equal number remains. When the first respondent disposed of such land his other siblings were not consulted. The first respondent allegedly sold 8 acres to second respondent and 2.5 acres to third respondent. The applicant is moving the court to declare those sales a nullity and also order the eviction of second and third respondents.

According to applicant she and her other siblings have an equal right to inherit their late parents' land, whether they are married or not. She admits, however, that the land belongs to the state and entrusted to the District Administrator in consultation with the traditional leaders.

The applicant added in her papers that the matter was once heard by Acting Chief Zimunya, but the Acting Chief did not provide the applicant with a judgment, though the Acting Chief ruled in applicant's favour.

In opposition, the first respondent raised various *points in limine*. First he stated that the Acting Chief Zimunya dealt with the matter in 2017 and ruled that the allocation of land to second and third respondents was lawfully allocated to them, not by the first respondent but by the village head and headman, hence the matter is *res judicata*. The second point was that applicant does not have the requisite authority to represent the majority of other siblings of the Museenzi family. She does not own any land left by the late parents and that she should claim land where she is married. The third preliminary point is that the application is prescribed hence the applicant cannot claim eviction of the second and third respondents. The third respondent was allocated land in 2005 and third respondent was settled in 2015 after the passing on of her husband. The fourth objection raised by the first respondent is that there are material disputes of facts, incapable of resolution on paper. Among such disputed facts, is the location of the land in dispute. The land in dispute is situated in Gwidibira and Nehwangura villages and also that applicant can hardly correctly describe her late mother's particulars. The fifth point *in limine* was that applicant used forged papers. The sixth point is that the order sought by the applicant was defective for lack of precision and that it is too wide and the location of the area is in doubt. The seventh point is that there is a fatal non-joinder of the village heads Nehwangura and Gwidibira who allocated the pieces of land and such a non-joinder goes to the root of the application. The first respondent prays for the upholding of the preliminary points with costs.

On merits the first respondent stated that when the parents died the land was shared between him and his brother. The first respondent's late father during his life time allowed the

second respondent's father and mother to stay on the piece of land. The third respondent was allowed to take occupation by the village head with the consent of the first respondent. The sisters are all married and Christine Mukumba stays with her husband. The first respondent denies that the parents' land was occupied by the whole family and that there is no rural land in Chitakatira but in Gwidibira Village. The first respondent added that Acting Chief Zimunya dealt with the matter and ruled that the allocation of land lies in the domain of community leaders who allocate it as they deem appropriate. The first respondent prays for the dismissal of applicant's application with punitive costs.

The second respondent in opposing the application stated that she was allocated land by the village head in consultation with the first respondent in 2012 and since then has been paying levies to the local authority and attached receipts to that effect. She sees no legal basis for applicant to seek her eviction from that piece of land.

The third respondent in her opposing papers states that the village had allocated land to her in 2005 and since then she has been paying levy to the Rural District Council. She equally sees no legal basis why she should be evicted from the place she is occupying. She wants the application to be dismissed.

#### Points *in limine*

a) **Whether the matter is *res judicata*?**

The first respondent submitted that the issue of the land dispute was dealt with by the Chief who resolved it. The applicant concedes to that aspect although she counter argued that the chief with-held his decision. She added that the matters are different. Before this court she is seeking a declaratur which a chief cannot grant. Both parties cited case law authorities on the law of *res judicata* in their heads and for a party to succeed with this special defence it has ***to establish that the same parties are involved, it is about the same cause of action and the same relief is being sought***. The first two elements are not contentious, the parties are identical and its same cause of action. The only difference is the interpretation of the nature of relief sought by the applicant especially the consequential relief. If the chief had ruled in favour of the applicant, the result would have been the removal of second and third respondents from the piece of land in dispute. In other words the consequences would be a reallocation of second and third respondent, which is effectively the very relief being sought by the applicant. When the applicant approached the chief, this is precisely what she sought as a relief. I

am satisfied that the respondents have managed to establish facts that establish the defence of *res judicata*. The applicant should get the outcome of the matter heard by the Acting Chief Zimunya, than to approach another court and stat the same matter all over again. I will uphold the preliminary point.

Having ruled on the first preliminary matter on *res judicata*, the remaining preliminary issues become academic and basically there will be no need to deal with same.

Accordingly it is ordered as follows:

- 1. *The Respondent's preliminary point on res judicata is upheld.***
- 2. *The application is struck off.***
- 3. *The applicant to pay costs of suit on legal practitioner – client scale.***

*Matsika Legal Practitioners*, applicant's legal practitioners

*Chikamhi Mareanadzo Legal Practitioners*, respondent's legal practitioners