

MANUEL JOHN
versus
SIKHOLIWE NCUBE
and
THE EPWORTH LOCAL BOARD

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 10 September 2019 and 25 September 2019

Opposed Application

N. Mugiya, for the applicant
T Machiridza with E Choga for the 1st respondent
No appearance for the 2nd respondent

CHIKOWERO J: This is an application for a declaratory order.

The draft order

The original order sought, in addition to punitive costs, is this;

- “1. The applicant be and is hereby declared to be the lawful owner and possessor of stand number 17257 Ward 7, Epworth.
2. The 1st respondent is barred from accessing stand number 17257 Ward 7 Epworth without the express consent of the applicant.”

The Parties

I will call the parties “Manuel”, “Ncube” and “the Board” respectively.

The applicant’s case

It is simple and straightforward.

In 2009 Manuel applied, to the Board, for a residential piece of land.

On a date not disclosed in the papers, the Board allocated to him the rights and interest in stand 17257 Ward 7 Epworth.

Copy of the application for allocation is annexed to the founding affidavit. So is the letter of 23 November 2017. The latter is addressed to the Officer In Charge of the Zimbabwe Republic

Police, Epworth. Its author is the Town Clerk of the Board. It confirms that the rights and interest in Stand 17257 Ward 7 Epworth were allocated to Manuel, and that the police should assist, by all means necessary, as some unruly elements in the community were disrupting Manuel's construction activities.

A site plan was also attached positioning the piece of land in question in relation to others.

Manuel states that although the Board handed over control of the piece of land to him in 2016 he has not been able to access it to date. This was occasioned by Ncube taking over possession of the land in question. Ncube is said to have claimed that her own political party effected the allocation to her.

Thereafter, Ncube commenced vegetable farming on the contested piece of land. That is in addition to barring Manuel from accessing that piece of land since 2016.

Thus aggrieved, Manuel filed the present application on 19 February 2019.

First respondent's case

Manuel has kept back material facts, says Ncube.

The full and correct facts are these.

Ncube and others have been in occupation of pieces of land situate in Ward 7, Epworth since the late 1980s and early 1990s.

To everybody's amazement, the Board then allocated rights and interest in pieces of land already so occupied to Manuel and others.

Ncube has been in lawful occupation of the piece of land under contestation since 1994. She has been paying monthly service charges to the Board, which allocated to her the rights and interest in that land.

In 2001 the Board gave her the allocation card for that piece of land, a letter confirming such allocation and the site plan. These three documents were not attached to Ncube's opposing affidavit. Further, despite the opposing affidavit indicating that proof of payment of monthly service charges was annexed thereto, this in fact was not the case.

Essentially, Ncube states that the declaratur sought is unlawful. The Board's allocation of rights and interest to Manuel was illegal. This because the former allocated to the latter rights and interest in the very same piece of land on which Ncube's home stands.

Finally, 3 pieces of legal history were not divulged by Manuel. Firstly, on the very same facts and evidence, the Magistrates Court dismissed Manuel's application for an interdict against Ncube. A copy of the application was annexed to the opposing affidavit. In addition to costs, the following order was sought:

- “1. Respondent be and is hereby interdicted from cultivating, digging and obstructing applicant from developing Stand number 17257 Ward 7, Epworth, Harare upon sight of this order.”

Neither did Manuel disclose that there is an extant order of this court relevant to this application. On 26 September 2017 this court granted a consent order. It falls under the name *Tineyi Chimuteka v Epworth Local Board, Hasman Shadaya, Zalerie Makari and Minister of Local Government Public Works and National Housing* HC 8586/17. The order prohibits the respondents from demolishing homes and reallocating to new settlers the stands in Wards 6 and 7 Epworth pending the determination of case number HC 7827/18.

Tineyi Chimuteke v Epworth Local Board and Minister of Local Government Public Works and National Housing HC 7827/18 is a pending opposed court application for leave to institute a class action relating to the alleged demolition of homes and re-pegging of stands in Wards 6 and 7 of Epworth, Harare.

Finally, so says Ncube in her affidavit, Manuel lost at the criminal court, as he did with the application for an interdict, on the basis that the Board ought not to have allocated rights and interest to Manuel on a piece of land already occupied by herself.

Material Dispute of Fact

At the hearing it became common cause that Ncube has occupied the piece of land in question since 1994.

That is a period of twenty-five years.

It also was common cause that the land in question is situate in Ward 7, Epworth, Harare.

That is one of the wards in respect of which the prohibitory interdict was issued, albeit without Manuel and Ncube being parties thereto.

In responding to my query why Manuel had not issued an eviction summons against Ncube, rather than instituting the present application, Mr *Mugiya* commendably conceded that the dispute over the rights and interest in the piece of land in question needed to be resolved first.

I understand him to mean that it would be premature to institute summons for eviction while the dispute over the rights and interest in the land in question remained live.

I do not know why the application for an interdict failed. Apart from the application itself, the record of those proceedings was not placed before me. But what is important for my purposes is that Manuel and Ncube were fighting legal battles in August 2018, when that application was filed, over this very piece of land.

The police report by Manuel, under Zimbabwe Republic Police Epworth CR 44/11/17 is to the same effect. That was in 2017. It is buttressed by the Town Clerk's letter of 23 September 2017.

To his credit, Manuel himself confessed in his founding affidavit that he has been prevented from accessing the land in question since 2016.

The pending court application for leave to institute a class action and the prohibitory interdict constitute independent evidence that there are issues related to the Board's re-pegging and reallocation of rights and interest in land situate in Wards 6 and 7, Epworth, Harare. Apparently, 2 groups of settlers claim to hold the rights and interest over the same pieces of land. In respect of the stand in question, Ncube falls into the category of "old settlers" while her opponent belongs to the set of "new settlers."

That the Board chose not to file any papers, despite having been served with copy of the application, means that it ignited a fight between Manuel and Ncube but then chose not to assist in resolving that battle.

I accept that Ncube was in error in not attaching documentary evidence to buttress her position that the Board allocated to her rights and interest in the land in question in 1994.

Despite her shortcoming in this regard I entertain not the slightest doubt that there exists a material dispute of fact, not capable of resolution on the papers, even by resorting to a robust approach, militating against the granting of the declaratory relief sought. The history of this dispute and the common cause facts bear this out.

There is need for this matter to be referred to trial to enable further evidence to be led, and tested under cross-examination, before the court can definitely dispose of this matter. This is a matter crying out for resolution on the merits, but only after the leading of further evidence.

I have looked at *Johnson v Agricultural Finance Corporation* 1995 (1) ZLR 65 (S), *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S) and *Ndlovu v Ndlovu and Another* 2013 (1) 110 (H). *Prima facie*, Manuel appears to have been procedurally correct in seeking declaratory relief.

But he was not correct in seeking such a remedy through a court application. The parties are no strangers to each other's throat in so far as this dispute is concerned. Manuel should therefore have known that there was a material dispute of fact incapable of resolution on the papers see *Shereni v Moyo* 1989 (2) ZLR 148 (S).

THE CONSTITUTIONAL PERSPECTIVE

This is not a constitutional matter. However, there are constitutional rights, values and principles which have informed my decision.

The relevant provisions of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 are these.

The preamble reads in relevant part:

“PREAMBLE

We the people of Zimbabwe

United in our diversity by our common desire for freedom, justice....

Recognising the need to entrench democracy...and the rule of law,

Reaffirming our commitment to upholding and defending fundamental human rights and freedoms,

...

Cherishing ...equality,...justice

...

Resolve .by the tennets of this Constitution to commit ourselves to build a united, just and prosperous nation, founded on values of transparency, equality,...fairness....” (underlined for emphasis)

Access to adequate shelter, set out in s 28 is one of the national objectives under *Chapter* 2 of the Constitution.

Section 69 (1), (2) and (3) provide for the right to a fair hearing. The right to a fair hearing is a fundamental human right and freedom.

Also relevant are ss 46 and 74.

The latter section reads:

“74 Freedom from arbitrary eviction

No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.” (emphasis mine)

Cutting across all the constitutional provisions referred to are the following values and principles: fairness of a hearing and the obligation on the court to dispense justice. To do that, a court of law must be alive, in the circumstances of this matter, to the location of shelter as a fundamental human right and freedom. To be able to administer justice there must be a fair hearing, also in the sense of litigants truly accessing not only the court but justice. I would have denied justice were I to determine the application on the materially disputed factual conspectus evident on the record. It is clear that the effect of granting the declaratory order would be to render Ncube defenceless to an eviction suit. I am unable to promote such a state of affairs in the face of the contestation over the parties’ rights and interest over the piece of land in question.

That factual dispute must first of all be resolved. Once resolved, it will in turn resolve the legal issue of whether the declaratur ought to be granted.

I record that the declaratur sought does not relate to ownership. That was abandoned in argument. So was para 2 of the draft order.

Disposition

In the result, I order that:

1. The matter is referred to trial.
2. The notice of the application and founding affidavit shall stand as the summons and the declaration.
3. The notice of opposition and opposing affidavit shall stand as the notice of entry of appearance to defend and the plea.
4. The answering affidavit shall stand as the replication.
5. Discovery shall be made and a pre-trial conference held in accordance with the High Court Rules, 1971
6. The costs of the application shall be costs in the trial.