

ROBERT MAFU & 54 OTHERS

Versus

**AGRICULTURAL & RURAL DEVELOPMENT AUTHORITY
(ARDA)**

And

TREK PETROLEUM

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 29 SEPTEMBER & 6 OCTOBER 2016

Urgent Chamber Application

K. Ngwenya for applicants
F. Museta for 1st respondent
R. Mushoriwa for 2nd respondent

MAKONESE J: The applicants reside at Matankeni, Zwehamba and Mahetshe Villages, under Chief Nyangazonke communal hands. The applicants own homesteads in an area adjacent to land belonging to 1st respondent. Their farming and grazing area naturally borders the land owned by 1st respondent. Applicants complain that 1st respondent is encroaching on their farming and grazing land. This is denied by 1st respondent who avers that none of the applicants' homesteads have been destroyed or affected by the 1st respondent. The respondents contend that the matter that has been brought under a certificate of urgency is not urgent at all and there are material disputes of facts which can only be resolved in a trial.

The applicants seek an interim order in the following terms:

- “1. That pending confirmation or discharge of this provisional order applicant be and is hereby ordered to immediately cease evicting, demolishing and/or interfering with the applicants' homesteads, farming and grazing land, and to immediately restore applicants to their occupation and possession of their homesteads, farming and grazing land.

2. In the event of the respondents failing to restore applicants to their occupation and possession of their homesteads, farming and grazing land, the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorized to restore applicants to occupation and possession of their homesteads, farming and grazing land.

The respondents raised the following points *in limine*:

1. The application is not urgent

The respondents contend that the certificate of urgency does not mention one word on how and when the urgency arose. It argued that a document certifying urgency must itself disclose urgency, that is to say, the date when the cause of complainant arose and the time difference between such date and the date when action was eventually taken. These averments are evidently absent from the certificate of urgency and for that reason the certificate of urgency is fatally defective. The applicant alleges in the founding affidavit of Robert Mafu that the alleged cause of complaint arose on 5th September 2016. The applicants allege that a bulldozer and various earthmoving equipment had been demolishing their dwelling structures since the 5th of September 2016. No explanation has been advanced as to why no action has been taken to seek this court's intervention if those allegations are true. It seems to me that the applicants' in action seems to suggest that the demolitions never occurred at all. The photographs annexed to the applicants' papers do not show any demolished buildings or structures. They do not show any movable properties strewn all over the place.

Mr *K. Ngwenya* appearing for the applicants seems to have disclosed the real nature of the dispute when he commenced his submissions by stating that the respondents have encroached on to the applicants' grazing lands. I hold the view that the applicants have not established urgency at all. If the need to act had arisen on 5th September 2016, one who have expected the applicants to spring into action at that stage. The applicants chose to wait and file the application at their pleasure and at the time of their choosing. This is not the urgency contemplated by the Rules. See the case of *Kuvarega v Registrar General & Anor* 1988 (1) ZLR 188.

2. Material disputes of fact

The second preliminary point taken by the respondents is that the courts will not grant an order on application where there are material disputes of facts. The applicants allege that their houses and property have been destroyed and that they have been evicted or have been threatened with such eviction. The court has been given the benefit of pictorial evidence of the situation obtaining on the ground by the applicants. An examination of the pictures attached to the application does not depict any destruction of any dwelling structure as alleged by the applicants. It is my view, that if any house, home or property had been destroyed there would be evidence of debris, furniture, scattered or strewn all over the place. The respondents contend that the allegations of demolitions of property are a fabrication designed to create urgency. 1st respondent avers out that it owns a certain piece of land adjacent to the communal land where the applicants reside. The piece of land measures 1 000 hectares in extent.

1st respondent contends that none of the applicants reside in the area owned by the 1st respondent. There is only one single homestead which is situated close to the boundary of the estate owned by 1st respondent. This property has not been damaged or destroyed. The dispute of fact lies on two grounds. The first is that respondents deny destruction of any property or eviction of any form. The second is that there are no homesteads within the estate boundaries of land owned by 1st respondent. The nature of these disputes is exacerbated by what appears to be very scant information in the founding papers. The applicants all seem to allege that they were evicted or have their property destroyed. None of the applicants alleges with any degree of specificity the exact nature of property damaged as claimed or stated. There is clearly a material dispute of fact which cannot be resolved on the papers.

See the case of *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219 (HC) where the court stated at page 221 as follows:-

“It is necessary to discharge the too – oft recurring practice whereby applicants who know or should know, as was the case with the applicant in this matter, that real and substantial disputes of fact will or likely to arise on the papers, nevertheless resort to application proceeding on the basis that, at the worst, they can count on the court to stand over the matter for trial”.

On these two preliminary points the court is satisfied that application does not pass, firstly the test of urgency and secondly there are material disputes of fact which the applicants reasonably foresaw and which cannot be settled without leading oral evidence.

On the merits

Assuming that the applicants were to establish that the matter is urgent and that there are no material disputes of fact, the applicants have not in my view, established that they are entitled to the relief they seek. Applicants have not proved the requirements for an interdict. The applicants should at the very least show a *prima facie* right. They have not done so. Their allegation of occupation is not supported on the papers placed before the court. The applicants have not established that 1st respondent has encroached on to the land they occupy. The applicants must allege and prove the nature of their title or right therein. Bold and unsubstantiated allegations of evictions and demolitions of property have only been made. The applicants have not shown injury actually committed or reasonably apprehended. Their photographs show no injury committed at all. The requirements for the granting of an interdict are well established in our law. See the cases of *Setlego v Setlego* 1914 AD, and *Flame Lily Investment Company v Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378.

In the result, I am satisfied that this application is ill-conceived and is not well grounded.

I accordingly, dismiss the application with costs.

Messrs T. J. Mabhikwa & Partners, applicants’ legal practitioners
G.N. Mlotshwa & Company, 1st respondent’s legal practitioners
Mushoriwa Pasi Corporate Attorneys, 2nd respondent’s legal practitioners