TATENDA TEMBANI
and
KUDZAI GARANEWAKO
versus
JEMITIAS MAKOMBE
and
ANNIE MUVUTI
and
CITY OF HARARE
and
ADDMORE NHEKAIRO NO
and
LYDIA MARUFU

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE 13 November 2024 & 17 January 2025

**Urgent Chamber Application**

Mr *R. T Mutero*, for the applicants
Ms *E.V Khumalo*, for the first & 2nd respondents
Mr *R Zinhema*, for the third & 4th respondents

MUCHAWA J : This is an urgent chamber application for interdictory relief. The terms of the provisional order sought are as follows:

"TERMS OF FINAL ORDER SOUGHT
That you show cause to the Honourable Court why a final order should not be made in the following terms: -

1. The application be and is hereby granted.
2. The provisional order issued by this court on .....be and is hereby confirmed.
3. The offer letters authored by the 3rd and 4th respondents in the first and second respondents' favour in respect of stands 41625 and 41626 Mount Pleasant be and are hereby set aside.
4. The agreement of sale entered into between the 3rd respondents dated 24 July 2024 be and is hereby set aside.
5. The deed of settlement under HC 6265/21 be and is hereby set aside.
6. It is declared that the actions of the 3rd and 4th respondents of offering the first and second respondents stands 41625 and 41626 Mount Pleasant are null and void, of no force and affect
7. It is declared that the agreement of sale between the 3rd respondent and the 1st and 2nd respondents is null and void, of no force and effect.
8. The 3rd respondent shall pay costs of suit on an attorney and client scale.

INTERIM RELIEF GRANTED
Pending determination of this matter/ return date, the applicant is granted the following relief –

1. The first and second respondents be and are hereby interdicted from erecting developments on / developing stands 41625 and 41626 Mount Pleasant"

**The Parties**

The applicants are male adults who are each acting in their own capacities. The first respondent is a male adult sued in his own capacity whilst the second respondent is a female adult sued in her own capacity too. The two are husband and wife.

The third respondent is the City of Harare, an urban council constituted in terms of the Urban Councils Act.

The fourth respondent, Addmore Nhekairo is an officer of the third respondent and is cited in his official capacity as the one whose conduct is impugned herein.

The fifth respondent is cited as it is averred that the present matter will have a bearing on matter HC 6265/21 in which she participated.

**Background Facts**

At the core of the dispute between the parties is the following letter which was directed to the first and second applicant on 18 August 2013 and authored by the fourth respondent. I reproduce it below:

"RECOMMENDATION FOR THE OFFER OF STAND NUMBER 41626 DEPICTED ON LAYOUT PLAN NUMBER TP 2F/ WR /03/15 IN MT PLEASANT TOWNSHIP HARARE: TATENDA TEMBABI, ID NO 59 – 052418 K 42

> Subject to compliance with item 3 of the Education Health, Housing and Community Services and Licensing Committee Meeting Minutes dated 26 August 2019, be advised that I have recommended you for the offer of Stand Number 41626 depicted on Layout Plan Number TP 2F/ WR/O3/15 in Mt Pleasant Township.
> I will revert back to you, once Council passes a resolution on this matter and after compliance with the due process in terms of section 152 of the Urban Councils Act [*Chapter 29:15*]"

A similar letter was directed to the second applicant with the necessary amendments to his details and for stand number 41625.

On the contrary, the first and second respondents rely on offer letters, agreements of sale and a statement of verification from the third respondent confirming their rights to the stand. The initial discovery of the double "allocation" of the stands is said to have occurred in or about March 2024 when the first and second respondents took occupation by installing a cabin and a water tank. The applicants inserted a fence and sunk a borehole.

The matter came to a head in July 2014 when the first and second respondent's cabin was destroyed and they lodged a report with the police in July 2024 for malicious damage to property. The applicants however aver that the first and second respondent's

cabin was only erected in July 2024 and they removed it thinking it was the work of an invader.

The dispute was taken before the fourth respondent who, in an attempt to resolve the issue, offered to identify additional stands.

It is the applicant's statement that they were spurred into action by the first and second respondent's actions on 16 October 2024, of delivering construction material and starting preparatory work on stand 41625.

The applicants claim to have incurred expenses in opening an access road to the stands, clearing the stands, getting 2 boreholes surveyed and drilled, erecting fences, engaging architects to design the intended developments and erecting cabins.

After the current application was filed, the parties sought two postponements with a view to reach settlement. Unfortunately, there was no meeting of the minds. The parties then resolved that I should determine the matter on the papers. This is my decision therefore.

I start with the points *in limine* raised by the respondents and will only proceed to the merits if this fails. The points are as follows:

a. Whether Applicants have *locus standi in judicio*

b. Whether the matter is urgent

c. Whether Applicants approached the court with dirty hands

d. Whether Applicants are forum shopping

e. Whether Applicants are abusing court process

I start off with the point of urgency as it might very well dispose of the matter without the need to proceed to the other points.

**Whether the matter is urgent**

It is the first respondent's case that this matter is not urgent and it is not true that the need to act arose on 16 October 2024 as the applicants were aware of first and second respondent's claim to the land as far back as July 2024 when a report to the police was made and documents in support of this were offered such as the offer letter, a deed of settlement and an agreement of sale. These were in fact produced by the applicants.

It is averred that the whole application is aimed at attacking the decision of the third and fourth respondents in allocating the stands they should not have waited for the developments to start but should have pursued appropriate review procedures.

Furthermore, it is stated that there is no irreparable harm warranting the hearing of the matter on an urgent basis. It is prayed that the matter be dismissed with costs on a legal practitioner client scale.

The third respondent also buttresses that the matter is not urgent as the dispute arose in July 2024. Paragraphs 18 to 22 of the founding affidavit are referred to. On the other hand, the applicants argue that the matter is indeed urgent as the need to act arose on 16 October 2024 when construction began.

It is conceded that the parties once had a dispute over the land and third and fourth respondents undertook to resolve it. Such dispute is said to be pending resolution as the third respondent's officials undertook to provide alternative stands. Because the resolution is still pending the building developments by first and second respondents are said to mark the need to act which arose on 16 October 2024.

The question of lawful possession or otherwise, is said to be irrelevant at this stage and it will fall for resolution on the return day. It is prayed that the point *in limine* should be dismissed.

The test to for urgency is set out aptly by MAFUSIRE J in *Mushore* v *Mbanga* HH 38/16, He says:

> "On urgency the parties seemed *ad idem* that the court looks at the issue objectively, rather than subjectively. They were *ad idem* that the two paramount considerations were (i) "time" and (ii) "consequences."
>
> By "time" was meant the need to act promptly where there has been an apprehension of harm. One cannot wait for the day of reckoning to arrive before one takes action. That was the *dicta* in *Kuvarega* v *Registrar General & Anor* which has stood and been followed in numerous other cases.....
>
> By "consequences" was meant the effect of a failure to act promptly when harm is apprehended. It also means the effect of, or the consequences that would be suffered if a court declined to hear the matter on an urgent basis. If the prejudice would be irreplaceable then the matter should be deemed urgent. Put another way, if the remedy that the court could eventually grant possibly in ordinary motion proceedings would effectively be a *brutum fulmen* because it was too late then the matter could be urgent."

*In casu* it is clear from the founding affidavit that the initial apprehension of harm occurred on 24 July 2024 when the first and second respondents reported a case of malicious damage to property at Marlborough Police Station when their cabin was destroyed at the instance of the applicants. The first respondent produced an offer letter dated 15 July 2024. The terms of the offer letter were as follows:

"RE: ALLOCATION OF STAND NUMBER 41625 AND 41626 DEPICTED ON LAYOUT PLAN NUMBER
TP 2F/ WR/03/15 IW MT PLEASANT TOWNSHIP
I refer to the above subject matter.

> Subject to compliance with the terms of the Deed of Settlement by Consent between yourselves and the City on Harare as recorded under High Court Order No Hc 3679/20, I hereby offer you two unserviced residential stand Numbers 41625 and 41626 depicted on Layout Plan Number TP 2 /WR/O3/15 In Mt Pleasant Township. The allocation is in full and final settlement of the dispute on stand Number 877 Helensvale Township Subject to rationalization of stand sizes, and the applicable values thereof. Further take note that the allocations are subject to compliance with section 152 of the Urban Councils Act [*Chapter 29 :15*]"

The recommendations of the offer of the same stands relied on by the applicants, in the face of the first and second respondents' unequivocal offer letter should have invoked an apprehension of harm in the applicants.

The Deed of Settlement referred to in the offer letter was issued out on 22 April 2024 and is indeed an order of the High Court. The matter was between the fifth respondent and first and second respondents and third respondent. The essence of the order was that the two stands 41625 and 41626 Mt Pleasant which had been allocated to fifth respondent were in full and final settlement of the dispute between the parties. Furthermore, the third respondent accepted and authorized the fifth respondent to transfer and cede all her rights to first and second respondents in the stands in dispute. The third respondent and fifth respondent were to effect the cession to the first and second respondent within 7 days of the date of signing the deed of settlement. The deed of settlement was duly signed on 28 March 2024.

In light of the above deed of settlement, the agreement of sale dated 22 July 2024 by the third respondent on the one part, and 23 July 2024 by the first and second respondent, on the other and date stamped 24 July 2024, should not have come as a surprise.

Why would the applicants sit on their laurels and hope the third and fourth respondents would solve this when the scales were, on the face of it, heavily tilted in favour of the first and second respondent as theirs was only a recommendation for the offer of the same stands?

There was nothing at law stopping the applicants from enforcing their rights by approaching the court. They elected to approach the fourth respondent for a meeting and were content to wait for the fourth respondent to resolve the issue. Paragraph 22 of the founding affidavit is telling. They continued to wait even when it was clear to them that the fourth respondent was being evasive. This was for a good two and a half months from 29 July 2024 until 16 October 2024, when the first second respondents were commencing building.

It is my firm belief that the applicants waited for the imminent arrival of the day of reckoning. Theirs is the urgency cautioned against in *Kuvarega v Registrar General & Anor* 1998(1) ZLR 188. It is urgency that stems from the deliberate or careless abstention from action until the deadline draws near. Both the certificate of urgency and the founding affidavit

do not satisfactorily explain the non-timeous action. This is so as the applicants continue to refer to their recommendations for an offer of the stand, as offer letters and make it appear as though they held the same offer letters. I have already demonstrated that this is not so.

On "consequences" what would be suffered if the court declined to hear the matter on an urgent basis? Is it irreplaceable? Here are applicants who, on the strength of a recommendation to offer stands went ahead and invested some money towards opening of an access road, clearing the stands, siting and drilling of boreholes, fencing and erecting cabins. They say the consequence of not hearing and determining the matter now would be to effectively award the stands to first and second respondents.

On the other hand, the respondents argue that the applicants have a plethora of remedies available to them mainly against the third and fourth respondent which can still be enforced. It is also telling that in the meeting of 29 July 2024, the fourth respondent undertook to identify other replacement stands. The two times that the matter was postponed before me, the parties met and the third respondent reiterated the proposal to offer two stands which were still being serviced. Any other losses can be resolved through an appropriate claim for damages.
It is therefore my conviction that the applicants do not pass the test of urgency on the two rungs of "time" and "consequences."

Though costs were prayed for on the legal practitioners and client scale, these were not motivated for adequately on the papers before me, on this point *in limine* on urgency. Costs on a higher scale are only awarded in exceptional circumstances. I will therefore award costs on the ordinary scale.

Consequently, it is my finding that this matter is not urgent and I uphold the point in limine and order as follows:

> "The application be and is hereby struck from the roll of urgent applications with costs on the following scale."

*Maposa and Ndomene*, applicants' legal practitioners
*Mhishi Nkomo Legal Practice*, first and second respondent's legal practitioners
*Gambe Law Group*, third respondent's legal practitioners