

MINISTER OF DEFENCE

Versus

RANGARIRAI GUNDA

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 6 AND 19 MAY 2011 AND 30 JUNE 2011

I Chihuri for applicant
J P Mtizwa for respondent

Opposed Court Application

KAMOCHA J: The respondent in this matter is the widow of the late Brigadier General Paul Armstrong Gunda – “Gunda” who passed away on 21 June 2007. At the time of his passing on Gunda was the Commander of 1 Brigade in Bulawayo. By virtue of being the Commander of 1 Brigade he and his family were entitled to occupy a residential property known as number 14 Lawley Road, Suburbs, Bulawayo. The house is listed at the Army Headquarters as one of the army’s “reserved houses”. This particular house is only reserved for any senior army officer who is appointed Commander 1 Brigade and has been so occupied for instance by such commanders as Brigadier General Mugova, Brigadier General Sango and Brigadier General Zingoni before the late Brigadier General Paul Armstrong Gunda took occupation of it from 2004 to 2007 when he passed on.

After her husband passed away on 21 June 2007, the respondent and her children had the right to remain in the house for a period of one month in terms of the army regulations. Section 2 paragraph 01107 of Chapter 2 of the Quartermaster General standing orders provides that:-

“When a member of the regular force who is in occupation of government quarters dies, his/her dependents may be permitted to remain in occupation of these premises for a period not exceeding one month after his/her death, provided that the dependants will be responsible for both water and electricity charges raised.”

The respondent’s right to lawfully occupy the house should have ended on 31 July 2007 according to the above regulations. For some unexplained reasons the applicant did not seek to evict the respondent at the expiration of the one month. Instead the notice to vacate was only issued after a period of 15 months. The deponent to the applicant’s affidavit took the stance that the Ministry of Defence was under no obligation to explain the inordinate delay to

the respondent. That attitude is wrong and unfortunate. It is the inordinate delay to evict the respondent which led her to believe that what she may have heard about government houses being offered to sitting tenants may have applied to her late husband when he was still alive. Hence her resistance to vacate the property when requested to do so belatedly without any explanation proffered.

A notice to vacate was addressed to her on 20 October 2008 from Army Headquarters and reads in part:-

“Mrs Rangarirai Gunda
Headquarters 1 Brigade Married Quarters
House Number 14 Lawley Road
Suburbs
Bulawayo

20 October 2008

Dear Mrs Rangarirai Gunda

Notice to vacate government quarters at Headquarters 1 Brigade Married Quarters

Notice is hereby given in terms of paragraph 01107 of section 2 of Chapter 2 of the Quartermaster General Standing Orders for you to vacate Married Quarters at number 14 Lawley Road. ...”

The respondent refused to vacate the premises prompting the Zimbabwe National Army hereinafter referred to as “the army” instituting proceedings in the Magistrates’ Court, Bulawayo seeking her eviction and all those claiming the right of occupation through her, from the premises within 7 days of the order being granted.

The learned magistrate who presided over the matter had this to say in his ruling:

“Ruling

This is an application for eviction, with the applicant, the Zimbabwe National Army, seeking to evict the widow of the late Brigadier General Paul Armstrong Gunda, Rangarirai Tatenda Gunda from house number 14 Lawley Avenue, Suburbs, Bulawayo.

However, during the trial the matter took a different turn. Instead of the litigants arguing over eviction they started arguing over the ownership of the property. As matters stand, it has to be determined who the owner of that house is in order to deal with eviction. It has to be clear who should evict who.

Therefore, this court cannot deal with the determination of the ownership of the property, namely 14 Lawley Avenue, Suburbs, Bulawayo. The litigants will have to approach the High Court for that as this is a lower court which has no jurisdiction to decide matter of ownership of that kind of property.

As such, this application is dismissed for want of jurisdiction, with no order as to costs.”

What is clear from the above ruling of the learned magistrate is that the issue of eviction was not finalized by that court as the parties seemed to have abandoned it when the defendant argued that that court lacked jurisdiction to handle a matter like that. According to the ruling it seems the argument had shifted to the ownership of the property. Having felt that that court lacked jurisdiction to deal with the matter the learned magistrate advised the parties to approach this court for redress. The court accordingly dismissed the application for want of jurisdiction.

The issue of the eviction of the respondent remained undetermined by the court. In the result, the point *in limine* raised by the defendant to the effect that the matter was *res judicata* is without foundation and must be rejected.

The next point raised *in limine* was that the applicant had allegedly adopted a wrong procedure by proceeding by way of court application when he was aware that there were serious disputes of fact which could not be resolved on the papers. The respondent contended that her late husband was given an offer to purchase the property by the army but that contention was vehemently disputed by the army. She further asserted that the applicant was aware that in the magistrate’s court witnesses, including herself and those from the army were called to testify and disputes became clear. She concluded that the applicant was well aware of the existence of the disputes of fact and should have proceeded by way of action so that *viva voce* evidence could be adduced to resolve the dispute.

On the other hand the applicant’s contention was that the respondent merely claimed that her late husband was promised the house in question without laying any foundation for her claim. She produced no evidence on the papers showing that indeed such promise was made to her late husband.

There is merit in that submission. The respondent does not state who exactly in the army made that promise and when and where it was made. She has stated that witnesses testified in the magistrate’s court but chose not to take the court in her confidence by stating whether or not those witnesses confirmed her story that her late husband had been promised the sale of the house. Her story remains a bald and unsubstantiated assertion. There are no facts to support her story. It is not enough to merely allege disputes of facts without demonstrating to the court the disputed facts by, for instance, producing a letter offering the

property for sale to the late husband of the respondent or by averments in her affidavit to the effect that at a meeting between her late husband and a named officer or officers of the army held on such and such date, at such and such place her late husband was offered the sale of the house. Her claim that there are serious disputes of fact is without merit and must fail.

The respondent also sought to rely on the fact that certain officers in similar ranks to her late husband in the army were offered to buy government houses they were occupying as sitting tenants. There was indeed such a government policy. All government houses approved for disposal had to be valued by a government valuer. Thereafter an offer letter would be issued to the sitting tenant who would either accept or decline the offer. The policy was in place for ten years – starting from about 1993 until the disposal of government houses was suspended in 2003.

The house in question is a reserved house which required the consent of the Ministry of Defence to its disposal communicated to the Ministry of Local Government, Public Works and National Housing.

The respondent's late husband received no offer letter to buy that particular house. She did not claim that he had. In the absence of proof that her late husband was actually offered to buy the house her claim remains a mere speculation. The mere fact that other officers were indeed offered to buy government houses as sitting tenants does not necessarily mean that the offer was also extended to her late husband. The policy in the army was to retain reserved houses in major towns and cities for use by it. This particular house is reserved for any senior army officer who is appointed Commander 1 Brigade.

The information about the disposal of government houses is contained in documents filed of record produced through the answering affidavit. If the respondent had wished to rebut that information she would have sought leave of this court to file further affidavits in rebuttal in terms of Rule 235 of the rules of court. She did not do that.

The respondent sought to raise the issue of non-joinder of the executor of her late husband. She contended that in the event the court holds that the house be transferred into her late husband's inventory of assets after it is purchased by her the need to join the executor would arise. This court has, however, found that she had failed to demonstrate that her late husband had been given the option to purchase the premises. The house remains government property. This point *in limine* is also without foundation and suffers the same fate like the others.

On the merits this court was called upon to determine whether or not the respondent's husband was promised by the applicant to purchase the house. The issue was adequately covered *supra* under the point *in limine*, whether or not applicant had adopted the correct

procedure. I held the view that in the absence of proof to buy the premises her claim remains as speculation and wishful thinking.

The respondent properly conceded that she was not the owner of the house and had no lease agreement entitling her to stay at the house. She is not an employee of the army. It is common ground that her entitlement to stay at the house should have terminated at the end of July 2007 at the latest. This court holds that she had no entitlement to continue staying there thereafter. She must vacate the premises. In the result I would issue the following order.

It is ordered that:-

1. Respondent vacate the premises at number 14 Lawley Road, Suburbs, Bulawayo within 10 days of this order;
2. In the event that respondent refuses to vacate the said premises within the period specified in (1) above the Deputy Sheriff of this court is hereby empowered to evict her; and
3. Respondent shall bear the cost of suit on a party and party scale.

Civil Division of the Attorney-General's Office, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners respondent's legal practitioners