

**Zakeyo Mereki  
Versus  
Bell In (Pvt) Ltd  
And  
The Deputy Sheriff Harare (N.O)**

HIGH COURT OF ZIMBABWE  
BHUNU J  
HARARE, 5 and 7 December 2005

**Urgent Chamber Application**

Mr *Chikumbirike*, for the applicant  
Mr *Paul*, for the respondent

BHUNU J: The applicant is a beneficiary under the government land reform programme (Phase (1) Model A2 Scheme. He has produced an offer letter dated 2 October 2003 duly signed by the then Minister of Lands Agriculture and Rural Resettlement Dr J.M. Made the then acquiring authority in terms of which he was offered subdivision 1 of Arden Estate in Zvimba District of Mashonaland west Province.

Following the recent Constitutional Amendment number 17 which had the effect of government lawfully acquiring the land in question the applicant was again reoffered the same piece of land by an offer letter dated 10<sup>th</sup> November 2005 duly signed by the current acquiring authority D N E Mutasa the Minister of State for National Security, Lands, Land Reform and Resettlement in the Presidents Office. The offer letter requires him to take occupation of the offered land within 30 days.

On the 15<sup>th</sup> of September 2005 the applicant took up occupation of the land in terms of the renewed offer letter.

The 1<sup>st</sup> respondent being, the former owner of the disputed land however took exception to the occupation and obtained a provisional order in default of appearance evicting the applicant from the disputed land and interdicting him from interfering with the 1<sup>st</sup> respondent's farming operations.

Before that order had been served on the applicant he lodged this counter application seeking a provisional order baring service of the earlier provisional order and declaring him to be the rightful occupier of the land in dispute, the eviction of 1<sup>st</sup> respondent and costs at the higher scale.

The 1<sup>st</sup> respondent has objected to the application complaining that the applicant is in contempt of court. he should not be heard until he has purged his contempt. I am unable to accept that the applicant is in contempt of court because at the time of hearing he had not been served with the court order in question. In my view without knowledge of

the specific court order one cannot be held to be in contempt because contempt of court is a wilful and deliberate act.

Counsel for the 1<sup>st</sup> respondent has also taken another objection that the matter is now *res judicata*.

A perusal of the interim order which the 1<sup>st</sup> respondent obtained against the applicant shows that he did not get a declaratory order.

What he did get was an eviction order and an interdict barring him from interfering with the 1<sup>st</sup> respondent's operations.

This is a rather tricky situation but I take the robust view that once the question of the declarator which is still a live issue between the parties is determined in favour of the applicant then, the interim orders obtained against the applicant will automatically cease to apply.

I take that view because the interim order was merely meant to facilitate ascertainment of who the lawful occupier is. It is however competent to suspend an interim relief granted under an earlier provisional order as happened in the case of *Ndlovu vs Cowbells Farm (Pvt) Ltd* HB 14-03 (HC 33-03).

In that case a Land Resettlement Committee had awarded the applicant a part of respondent's farm. The respondent obtained a provisional order issued in default of appearance ordering the applicant to vacate the farm and pending confirmation of the order to cease farming operations on the farm. The applicant then launched an application seeking suspension of the provisional order. The application found favour with NDOU J and he granted the application suspending the earlier provisional order.

The net effect of the applicant's request in paragraph 1 of the interim relief sought is to suspend the earlier provisional order granted under case number HC 5821/05. That being the case the question of *res judicata* does not arise. The only issue which arises is whether the applicant has laid out a proper basis upon which the earlier order may be suspended.

The facts of this case are on all fours with the case of *Andrew Nyoni Chirikure and Others vs Kenmast Farming (Pvt) Ltd and Others* HH 106-05.

After surveying a number of authorities UCHENA J in a well reasoned and instructive judgment came to the conclusion that:

1. Reissued offer letters after the promulgation of the constitutional amendment number 17 are valid.

2. That the coming into effect of the Constitutional Amendment No. 17 does not interrupt the running of the notice period issued in terms of section 8(1) of the Land Acquisition Act, [*Chapter 20: 10*].

This is what the learned judge had to say at page 16:

"In my view the coming into force of the Constitutional Amendment Act and its taking over from section 8(1) order does not interrupt the notice period.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents should therefore have wound their operations within 45 days on the 29<sup>th</sup> July 2005 and vacated the farm by the 90<sup>th</sup> day after service of the section 8(1) order."

I am in respectful agreement with that observation. In this case the 1<sup>st</sup> respondent was issued with a section 8(1) order on the 29<sup>th</sup> July 2005. The required statutory 90 days notice period has since expired. He ought to have vacated the farm long back at the expiration of the 90 days period. That being the case the applicant is entitled to occupy the land without let or hindrance. He has therefore established an existing right upon which the earlier provisional order under case number HC 5821/05 may be suspended. It is necessary to suspend the earlier provisional order because the offer letter requires the applicant to take occupation of the disputed land within 30 days failure of which he risks the offer being withdrawn.

Although the applicant is entitled to occupy the land he is not entitled to evict the former owner that is the 1<sup>st</sup> respondent because he does not own the land and has not at any stage acquired vacant possession.

It is now settled law that a lessee who has not acquired vacant possession cannot evict anyone from the property. It is the owner who is entitled to evict. The net result is that the applicant is entitled to lawfully occupy the land. His occupation of the land is not unlawful. It is however the prerogative of the acquiring authority to evict the 1<sup>st</sup> respondent.

In terms of the section 8(1) order the 1<sup>st</sup> respondent is now confined to the farm house and cannot lawfully carryout farming operations on the farm. Having ceased to be the lawful owner and occupier of the land there is no basis upon which it can lawfully evict the lawful occupier.

The 1<sup>st</sup> respondent had an arguable case. There is no basis for punitive costs.

In the premises it is ordered as follows:

#### **TERMS OF RELIEF MADE**

1. that the 2<sup>nd</sup> respondent be and is hereby ordered to suspend service of the order Annexure 'C' on the applicant.
2. That the applicant be and is hereby entitled to remain in occupation of subdivision 1 of Arden Estate in Zvimba District of Mashonaland West Province until the final determination of this matter and to carry on all farming activities which he was engaged in or intended to engage in consequent upon his right to occupation in terms of annexure 'A' the letter dated the 10<sup>th</sup> of November 2005 From the acquiring authority.

**TERMS OF ORDER SOUGHT**

1. that the applicant be and is hereby declared to be the rightful occupier of No. 1 Arden Estate in Zvimba District of Mashonaland West Province in terms of the offer letter Annexure 'A' dated 10<sup>th</sup> of November 2005.
2. That the 1<sup>st</sup> respondent be and is hereby ordered to cease occupation of the subdivision 1 of Arden Estate in Zvimba District of Mashonaland West Province.
3. That the 1<sup>st</sup> respondent pay the costs of this application.

**Service of the provisional order**

Applicant's legal practitioners are hereby authorised to effect service.

*Chikumbirike and Associates*, the applicant's legal practitioners.

*Wintertons*, the 1<sup>st</sup> respondent's legal practitioners.