CHARLES CHAMISA
and
WINFRED MACHARA
versus
LANDBERRY TRADING PRIVATE LIMITED
and
ZIVANAI MUKONORI
and
PROSPER MUKONORI
and
ZVIMBA RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE, 19 December 2022 and 2 February, 2022

OPPOSED APPLICATION

W. Nyakudanga, for the applicants
C. Mukundwa, for the respondents

BACHI MZAWAZI J: This is an opposed application for the upliftment of a bar in terms of the R39(4)(a) of the High Court Rules 2021 arising from the applicant's failure to serve the other party their notice of appearance to defend timeously.

THE FACTS

The facts are that, on 28 June 2021, the first respondent caused summons to be issued against the applicants and others, in case number HC 3460/21 which were subsequently served on 15 July 2021. Upon receipt of the summons, the applicants on 28 July 2021, consequently entered an appearance to defend but failed to serve the first respondent as stipulated by the rules. As a matter of courtesy, on 2 September 2021, the first respondent reminded the applicants telephonically of the need to serve on them. They failed to take heed and to serve the said court process. Only to react a day after having been informed by the first respondents, of the bar which had come into operation in terms of R 20(6) of the High Court Rules, on 16 September 2021. Irrespective of the bar, applicants, on 17 September, 2021, then served the appearance to defend on the respondents whilst simultaneously making the current application for the upliftment of the bar.

APPLICANT'S CASE

It is the applicant's case that they were not in wilful default. They argue that the disruptions caused by the closure of the courts, due to the Covid 19 pandemic, led the support staff in the applicant's legal practitioner's office to misplace, as well as forget to serve the other party the document in question. The applicants assert that since business was not operating normally, a skeletal staff manned their legal practitioner's offices where the documents where served. Coincidentally, their legal practitioner of record fell ill during that period as evidenced by the medical documents filed herein. Applicants contend that their failure to serve in time taken within the backdrop of the extraordinary times and conditions under which the business environment was under siege, a nine day lapse was neither wilful nor inordinate. In addition they propagate that they have reasonable prospects of success in the merits of their main case as they are genuine occupiers of State land. It is their contention that their main ground of attack in the main case is on the first respondent's status in respect of the farm in question as they believe it is questionable. As such they will be challenging their right to evict them. In this regard they submit that they should be allowed an opportunity to have their day in court and argue on the merits.

RESPONDENT'S CASE

Counteracting the applicant's argument, the first respondent's submits that, the application should be dismissed with costs as the applicants' reasons for the delay are not cogent and are unpalatable, for three persons in the same Law Firm cannot, unisonly fail to serve the court process by giving flimsy excuses. They further contend that the applicants have no prospects of success as they have no defence on the merits. Citing the cases of *Selk Enterprises (Pvt) Ltd* v *Chimenya and Others and K MAuctions (Pvt) Ltd* v *Samuel and another* SC 15/12, the first respondent's counsel, Mr *Mukundwa* argues, that the explanation tendered by applicant reveals gross negligence and amounts to wilful default as such should not be condoned. It is the first respondent's further submission that they have attached sufficient evidence illustrating their legal entitlement to the land and the importance of this matter to them as opposed to the applicants who have no legal basis for their continued occupation on the property in question.

ANALYISIS, FACTS, LAW AND EVIDENCE.

It is settled law that for an application of this nature to succeed, the party seeking the upliftment of a bar must satisfy one or more of five key essential elements. These may be considered individually or cumulatively depending on the circumstances of every case, as a case may be disposed by any one of them or a combination. These requirements have been pronounced in several cases including *Terera* v *Lock And Others* SC 93/21, *Bessie Maheya* v *Independent Africa Church* SC -58-07. *Mukotakwa* v *Zimbabwe Transport Co-Op Society* Ltd HH 245-92 *Dewa* v *Nyathi* HB 84/04, *Bishi* v *Secretary for Education*1989 (2) ZLR 240 HC

In the case of *KM Auctions (Pvt) Ltd* v *Adanesh Samuel & Anor* SC 15-12 they are systematically categorised as follows:

a) The degree of non-compliance
b) The explanation thereof
c) The prospects of success
d) The importance of the case
e) The respondent's interests in the finality of the court judgement or convenience by the court.

The Degree of Non Compliance and the Explanation Thereof

For the purpose of this case the above requirements have been narrowed down to the first three which have also been translated to issues under consideration. It is not in dispute that the appearance to defend was subsequently served nine days off the mark. A perusal of the governing rules, r 20(6) of the High Court Rules 2021 requires that a notice of appearance to defend to be served on the Plaintiff within seven days from the day of entry. In the present case it was served nine days out of that stated period. In light of the circumstances of this case, given the Covid 19 climate under which the business and courts were operating in, I am of the view that nine days was not an inordinate delay. See *Dzvairo* v *Kango Products* SC 35/17 and *Musiyarira* v *Rufaro Marketing* SC/05

Unchallenged medical evidence has been placed before this court supporting that the central figure in that office was down with some ailment. Under the Covid 19 circumstances the lack of coordination of the support staff in the said office is excusable. Guided by the observations in the case of *Forestry Commission* v *Moyo* 1997 (1) 254(5) I am satisfied with

the explanation tendered by the applicants on this point and find their explanation reasonable and excusable.

CHITAKUNYE J, (as he then was) in *Glickmate Enterprises (Pvt) Ltd* v A*louvine (Pvt) Ltd* HH 127/20 noted that, "an explanation for the default must be reasonable and acceptable. It must not be an affront to the intelligence of the court.

The prospects of Success

Having concluded that the explanation of the default is reasonable and acceptable it is important to consider whether the applicants have prospects of success on the merits. Inevitably this calls for the examination of the applicants' defence in the main case. In *Thokozani Khumalo v Mafurirano DS* HB 11/2004 NDOU J commented that:

"The party seeking relief must present a reasonable and acceptable explanation for his default and that on the merits that a party has a bonafide defence which prima facie carries some prospect of success."

In casu, it is common cause that the applicants are being evicted from the farm or land they are settled on. In terms of the law the defender to an action of *rei vindicatio* has the defence of estoppel or right of retention open to them. The legal principles on estoppel and right of retention are pronounced in the cases of *Mashava* v *Standard Bank of South Africa Ltd 1998(1)ZLR436(S), Chetty* v *Naidoo 1974 (3)* SA at A-C and *Jolly* v *Shannon and Anor 1998(1)* ZLR 78(H) at 88A-B, respectively, and amongst several others .

Evidently, from the record and submissions made *viva voce,* the applicants capitalised on the Land invasion programme or Land Acquisition and resettlement schemes era and moved onto the land in question as "invaders" (to borrow from applicants counsel terminology). However, the applicants both in their papers filed of record and their oral submissions failed to provide proof or any right or title to the land in question. In her opening address, counsel for the applicant admitted that the applicants were invaders under the misapprehension that they can settle on any state land without authorization by the state. There is an abundance of authority clearly outlining that, for one to stay or occupy State land they need to have some proof that their stay is authorised, in the form of an offer letter, permit lease or some official document thereof. Since the stakes were very high, applicants, instead of bald assertions, should have placed the court into their confidence by producing or attaching evidence in any form authorising them to stay on the land in dispute. See, *Commercial Farmers Union & Others*

v *Minister of Lands and Rural Settlement & Others* SC31-2010 *at p* 23.and S*igudu* v *Minister of Lands & another* HC 10915/11.

In the case of, *Associated Newspapers of Zimbabwe Limited* v *The Minister of State for Information and Publicity and others* SC 20/03 commenting on the Gazzetted Lands (Consequential Provisions Act) [*Chapter 20:28*] making statutory reference to offer letters, it was further emphasised that:

> "If the former owner or occupier continues in occupation in open defiance of the law, no court of law has jurisdiction to authorise the continued use or possession of the acquired land.''

In contrast the respondents have produced a trail of paper evidence in the form of official correspondence and receipts chronicling the transfer of the State land to the Rural Local Authority, the applications for the change of use of land eventuating to the letters supporting the ownership of their right of entitlement to the property in issue. Initially, before the documentary evidence had been placed before this court, the applicants where challenging the legal title of the respondents to the land, but could not pursue the same thereafter. No reason has been placed before me for me to doubt or reject the documentary evidence before me.

Since the challenge of the status of the respondents on the farm had been their main strength in the reasons for prospects of success, it seems they no longer have any leg to stand on. In the absence of any evidence in rebuttal as to the authenticity of the evidence by the respondents this court is inclined to agree with the submissions made by the respondents. Of Significance are s 2 of Gazzetted Lands (Consequential Provisions Act) [*Chapter 20:28*] and s 8 of the Land resettlement Act [*Chapter 20;01*], which highlight that the proof that a person is an authorised person or a legal occupier comes in three forms, a permit, an offer letter, and or a land resettlement lease. Applicants produced neither of these.

It is also important to note, that according to the above authorities a former owner or occupier of acquired land who without lawful authority continues in occupation of the acquired land after the prescribed period of ninety days commits a criminal offence.

DISPOSITION

Consolidating on the above, I am inclined to agree with the respondents' submissions that the applicants have no bona fide defence in the main case nor do they have reasonable prospects of success. In their own admission the applicants fall under the category of illegal occupiers further their defence that a fully-fledged trial will give them an opportunity to

challenge the authenticity of the first respondents claim to the land in dispute does not hold. It is on record that the land in question was procedurally transferred to the local authority, Zvimba District Rural Council by the Ministry of Local Government, Rural and Urban Development. There is a plethora of official communications to and from the relevant departments confirming the sale of the said piece of land to the first respondent. *Zhanda and another* v *TJ Greaves (Pvt) Ltd and others* HH 148/11 *and Biti* v *Majuta and others* HH 156/11 are authorities to the effect that . In *Biti* v *Majuta* above it was stated that:

> "There is a presumption in favour of validity of all official documents issued by government officials in the course of duty"

The above assertion was further applied in the case of *S* v *Biddlecombe* HB 62/15, where it was held that letters from the Ministry of Environment and Tourism constituted a permit in terms of the Gazetted land (Consequential Provisions) Act *[Chapter 20:18*].

Consequently, I therefore find no justification compelling me to reject the evidence tendered by the respondents in support of their argument that the applicants have neither a bona fide defence nor prospects of success against them in main action of *rei vindicatio.*

In this regard although the delay in serving the appearance to defend has been pardoned in contrast there are no prospects of success in the applicants' defence if the matter proceeds to trial. As a result there is no need to explore all other essentials of the principle of the upliftment of the bar since the issues had been narrowed to two and the ground on prospects of success has disposed of the matter. The application for the upliftment of the bar is thus unsuccessful.

The respondent had urged that the court visits the applicants with costs at a higher scale. I am satisfied that applicants' case was not frivolous as to justify such punitive costs.

Accordingly, it is hereby ordered that,

1. The application is hereby dismissed
2. Each party to pay its costs

Nyakudanga Law Chambers, for the applicants
Machinga Mutandwa, for the respondents