TAPIWA WAMAMBO
and
KUDAKWASHE NYABONDA

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 29 March 2023 and 26 January 2024

Opposed Application

J Sinyoro, for the applicant
M S Mlambo, for the respondents

KATIYO J: The applicant approached this court seeking the following relief. Where upon after reading documents filed of record and hearing counsels. IT IS ORDERED THAT:

"1. The application for *vindicatio* be and is hereby granted.
2. The Respondent shall vacate from Stand 399 Wankie township, more commonly known as Number 399 South Cliff, Hwange, demolish the structure built by himself on the stand and dispose of the resultant debris within 14 days from the date of the service of this order on him, failure of which, the Sheriff or his lawful Deputy, be are hereby authorized with the assistance of the Republic Police to evict the Respondent and those claiming occupation through him from number 399 South Cliff, Hwange.
3. The Sheriff or his Deputy be and are hereby further authorized to demolish the buildings erected on the property and remove the debris from the property. The costs of demolishing the buildings shall be fully borne by the respondent.
4. The Respondent shall bear the costs of this application on a legal practitioner and client scale.

In the counter application the respondent seeks the following relief. **IT IS ORDERED THAT:**

1. The Second Respondent's application in case number HC 294/21 be and is hereby dismissed with costs.
   alternatively, **IT IS ORDERED THAT**:
2. It is declared that the owes the Applicant an indemnity and shall accordingly indemnify the Applicant of all costs, expenses and losses incurred or to be incurred by the Applicant in defending the proceedings for eviction, the costs and losses to be incurred by him in consequence of the order made in the main proceedings.
3. The First Respondent be and is hereby ordered to pay the Applicant the assessed costs incurred by the Applicant in constructing the improvements made at Stand No. 399 South Cliff, Chibondo, Hwange as determined by a qualified quantity surveyor appointed by the Registrar of the High Court. The payment shall be made within 10 days of the determination of such amount by the quantity surveyor. The costs of the quantity surveyor shall be paid by the First Respondent within 10 days of the rendering of his invoice failing which such amount may be recovered as part of this judgment.
4. The First Respondent be and is hereby ordered to pay the costs of the eviction of the applicant and those claiming occupation through him, and the costs for the demolition the property constructed at 399 South Cliff, Chibondo, Hwange and the removal of therefrom, Respondent be is hereby ordered to pay the Applicant's costs of suit."

Background

According to Hwange Rural District Council Board the applicant was allocated stand number 399 Chibondo Hwange whose annexures are attached to the papers. An offer letter was then given to the applicant on 1 July 2002 signed by the Ministry of Local Government at the material time. Ministry of Local Government was the sole administrator of all Government Land including that under council's jurisdiction. A lease agreement was then drafted and the copy provided marked "AB3". He was then paying rentals up to $1700 Zimbabwean currency per annum. He duly submitted his plans wherein he was supposed to build a structure within a stipulated period. In 2005 Hwange Local Board took over the administration of the stand together with several others from the Ministry of Local Government. In 2006 the applicant lease was extended upon payment of ZW $3000000. He was advised to develop the stand within

the ensuing 12 months period as required. This was the last communication with the council. Upon non-renewal nor any development of the lease and the stand, the Council repossessed the stand and allocated it a Mrs. Sibanda who in turn sold it to a Mr. Nyabonda now the respondent in the main matter and the applicant in the counter application. A permanent structure was then developed and a cession agreement which was recognized by the Hwange Rural Board was trustee. It later turned out the applicant had a deed of grant of deed as attached to the application. Hwange Local Board was not aware of this position and in trying to rectify it settled for a discussion to accommodate both parties. They offered the applicant a similar stand in the same location 1 km from the one in dispute. According to council this was a genuine mistake of fact. This they did after last receiving communication from the applicant in 2006.Hwange admits it as a genuine error which they have always committed to resolve. They argue that it is not in the interest of justice to give back …a third innocent party is now in occupation. He has been offered an alternative stand no 7008 Chibondo Hwange.

The applicant insists that the respondent and anyone occupying the property in question be evicted and he be restored of his status. He avers that he was not consulted and as a title holder he be restored of *status quo*.

This is a simple straightforward matter which was supposed to have been settled out of court. This matter has taken this long because parties asked for settlement on a number of occasions. Further the court also directed that Hwange Local Board clarifies the position because they were not made a party to these proceedings when it was very clear that they gave rise to the cause of action in the matter. I am grateful to Hwange Rural Board for being honesty as they admitted their error. What is however confusing is that at one time they entered into a lease agreement with the applicant and then it turned out he had tittle. How he obtained title is not clear but since it is not disputed, I will comment no further. It is clear that when Hwange Local Board took over from the Ministry there was no due diligence done on

this property.

The court also probed these parties as to why they lodged their litigation in Harare when there is another High Court in Bulawayo and the answer was that the legal practitioners are both in Harare and this would also save costs on their clients. The court accepted the submission. The probe was done to try and discourage citizens from shunning locally provided courts in preference to those far away. I am quite alive to the jurisdiction issue of the High Court but administratively and access to justice demand that citizens utilize locally available courts.

Analysis

Hwange Rural Board admits making an error of fact but on a genuine belief that they were entitled to act the way they did. Even assuming they repossessed the stand for non-compliance with Board rules there is nothing to show that effort was made to locate the applicant or at least notify him of their intention to repossess the property. In the case *of Dlamini v Lipholo & Anor* [2010] ZAFSHC 54 it was held that:

> "A deed of transfer is prima face proof of ownership and where its validity is challenged it is the duty of the court to determine its validity."

See also the case **of** *Freddy Chinyavanhu* **vs** *Letwin Chinyavanhu* HH 156/09 the court decided that:

> "The registration of rights in terms of the deeds registries act/chapter 20:05 is not just a formality. it is a matter of substance as it conveys real rights to the person in whose name the property is registered."

The above cited cases do confirm that the title holder do as they please with their property as long as they comply with the by-laws of Hwange Local Board being the 1st respondent in the counter application has admitted in the affidavit deposed to by Ananias Banda on the 1st of February 2023. A mistake of this nature cannot overturn an existing tittle no wonder why Hwange Local Board is prepared to offer alternative. The court whilst persuaded by the applicant it is not satisfied as to the applicant s disappearance from the scene. Surely a structure was built and stayed that long

without noticing it. He must have been up to some mischief. In that vain, if he was prepared to wait this long why would he want the respondent or anyone occupying the structure to be given 14 days to vacate. Equally as much as Hwange Rural Board did not carry out due diligence, they deserve enough period to rectify the error. The applicant though not morally obliged he was supposed to compromise on receiving alternative stand since he had not carried out any development. He never paid any rates nor did he comply with the requirement of developing his stand within the stipulated time. Why did he also sign lease agreements with Hwange Local Board if indeed he knew of the existence of this deed of grant. The rights here were conditional upon carrying out some developments. As much as the title holder do as they please with their property that right can be taken away in certain circumstances.

The first defendant has raised defense of ***Estoppel*** in that the applicant is estopped from asserting that the property is his. Argued that the defense of estoppel is available to a possessor faced with a claim for a vindication by an owner of the of the property. If negligence is proved the owner may be estopped from asserting ownership. In Roman Dutch Law ordinarily the owners right to his property is guarded but in in appropriate circumstances he is estopped.

The requirements for proving estoppel within this context are, as stated on page 284-285 of the book *The Law of Property* by DG Kleyn:

> "There must be a representation by the owner, by conduct or otherwise, that the person who disposed of his property was entitled to dispose of it.
> The representation must have been made negligently in the circumstances;
> i. The representation must have been relied upon by the person raising the estoppel; His reliance upon the representation must be the cause of his acting to his detriment,
>
> There must be a representation by the owner, by conduct or otherwise, the person who disposed of his property was the owner of it or was entitled to dispose of it, the representation must have been made negligently in the circumstances The representation must have been relied on by the person raising estoppel."

Silence or inaction can amount to a representation on which estoppel can be premised. In *Aris Enterprises (Finance)* v *Protea Assurance* 1981 (3) S 274 (AD) at 291d-e the court remarked as follows:

> "The essence of the doctrine of estoppel by representation is that a person is precluded, i.e. estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice (see Joubert. The Law of South Africa vol 9 para 367and the authorities there cited). The representation may be made in words, i.e. expressly, or it may be made by conduct, including silence or inaction, i.e. tacitly (ibid para 371); and in general, it must relate to an existing fact."

In view of the above the applicant argues the respondent's conduct showed no interest in the property as he went completely silent. The court has to strike a balance of convenient *vis a vis* the interests of justice.

Even in the absence of negligence on the part of the owner, the courts have held that there will be compelling considerations of falmoss "to estop" an owner from vindicating his property where culpa has not been proven by the application of that broad concept of equitable estoppel.

In the matter of *Stambic Finance Zimbabwe Limited* v *Chivhungwa* 1999 (1) ZLR 262 MALABA J (as he then was) held that:

> "In certain circumstances an owner of property in the position of the Applicant in this matter can be stopped from vindicating their property in certain circumstances where it will be grossly unfair and would offend any reasonable man's sense of justice to allow the recovery of such property."

At p 273 of the judgment, the Honorable Judge held as follows at p 272 -273:

> "Does it necessary follow from the above statement that the burial of exception doll means that in every case of rei vindication in which the defense of estoppel is raised, negligence is a requisite element that must be alleged and proved and that, in the absence of culpa, the principle of fairness cannot be relied upon to defeat the right of owner to vindicate his property? Holding that the general rule was necessary to prove culpable (negligence) on the part of the person whom it is sought to stop from vindicating his property, Steyn CJ indicated in *Johaadien's case supra*, that cases might conceivably arise in which it would be justified to

allow the defense of estoppel to succeed without fault on overwhelming grounds of fairness. The Learned author of Silberberg and Schoeman, *The Law of Property 3rd Ed*, states at p 286 that*:*

> "It would be unrealistic to discard fixed contemporary principles and perceptions relating to fairness merely because the *exceptio doli* may not be considered as part of our law" I agree. Part of Holmes JA's formulation in Oakland's Nominees (*supra*) relating to the use of compelling consideration of fairness to estop an owner from vindicating its property where culpa has not been proved by the Defendant may still be applied within the broad concept of equitable estoppel."

Mashave v *Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) at 414-442A.

The applicant was advised of the need to develop the stand within the stipulated period but never did anything about it. Further, to that he was also obliged to pay rates but he did not for almost a period spanning over Six (6) years. The stand was undeveloped and nothing stood there until the respondent was allocated and acted promptly. It can only be assumed that he did so negligently or for speculative purposes. This is an urban set up where properties are supposed to be developed for developmental purposes. Even assuming he had remained available he was likely to lose it for non-compliance. There is no good and sufficient explanation as to his silence. The inconvenience of demolition and rebuilding or compensation will not set a good example for characters of similar mind. The courts should show its displeasure for such conduct. The applicant has been provided with a viable solution which he declined. The out of court settlement they went through was meant to find an answer to few problems.

I agree with the findings in the *Stanbic Finance case* (*supra*) that where fairness entails that the doctrine of estoppel be applied when circumstances demand so. There is no logic in having the hard-earned rate payers' money be used to compensate individuals who had followed due process in acquiring a property as is in this matter. The applicant simply has to get stand of similar value in the same area without any prejudice. He had not put anything on the stand in dispute. Had the respondents done it fraudulently it could have been a different issue. The balance of convenience

does not favour the applicant at all. If one analyses the Deed of grant relied upon by the applicant paragraph 11 gives a condition that he was supposed to do certain developments. The Minister still retained some powers over this land until that condition was fulfilled. In any case that development was supposed to have been done under the new Administration of Hwange Rural Board. This title is which according to the deed of grant he acquired in November 1980; no development ever took place until Hwange Rural Board took over. The applicant can only accept another piece of land without loss in value.

Conclusion

I am not persuaded by the argument put by the applicant. It is not in the interests of justice that neither this application nor the counter application be granted. However, the 2nd respondent in the counter application has agreed to compensate the applicant in the main application and which resolution this court agrees with. After reading papers filed of on the record and hearing counsels, **IT IS ORDERED THAT:**

1. The application be and is hereby dismissed.
2. The counter application be and is hereby dismissed.
3. The 2nd respondent in the counter application (Hwange Local Board) is hereby ordered to compensate the applicant by giving true value of the stand he lost upon professional confirmation by valuators of the same.
4. No order as to costs.

I E G Musimbe & Partners, applicant's legal practitioners
Wintertons, respondent's legal practitioners