1. PUNGWE CHIMURENGA HOUSING COOPERATIVE

versus

JETMASTER PROPERTIES (PVT) LTD

and

DEPUTY SHERIFF HC 5566/11

1. TENDAI CHITIMBE

and

SHEPHERED CHIPIDZA

And

NANISAYI CHIMUSORO

and

FARIRAYI CHIFAMBA

and

SEKAI CHIKETA

versus

JETMASTER PROPERTIES (PVT) LTD

and

THE DEPUTY SHERIFF HC 5584/11

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 20 June 2011, 24 June 2011 & 13 July 2011

Mr *N. Chikono & Mrs T. Dongo*, for the applicants

Adv *L. Uriri with Mr Sakhe*, for the respondents

 CHIWESHE JP: The above matters have been consolidated in the interest of and at the behest of the parties. In this judgment I shall refer to the application under case number HC 5566/11 as “the first case” and the application under case number HC 5584/11 as “the second case.”

 In this urgent chamber application the applicant in the first case seeks a provisional order in the following terms:

 “**TERMS OF THE FINAL ORDER SOUGHT**

1. That the execution of judgment in High Court case number HC 9529/03 granted in 2005 be and is hereby stayed.
2. That the respondents be and are hereby ordered to pay the costs of this suit.

**INTERIM RELIEF SOUGHT**

That the execution of judgment in High Court case number 9529/2003 granted in 2005 be and is hereby stayed pending final determination of the matter.”

The dispute between the parties spans a period of at least eleven years. The history of the matter is as follows. At all material times the respondent was the owner of Nyarungu Estate in Harare South, held under Deed of Transfer Number 1070/95. At the height of the land reform movement in 2000 the property was occupied by a group of settlers. By July 2001 the settlers had constituted themselves into a cooperative known as Pungwe Chimurenga Housing Cooperative (the applicant). The cooperative was registered in terms of the Cooperative Societies Act [*Cap 24:05*]. The applicant then approached the City of Harare with a view to regularise its members’ occupation of the property. In 2002 the City of Harare granted the applicant permit No. 1312, authorising the consolidation of Nyarungu Estate, the contiguous Chizororo Estate and Lot 1 of Eyrecourt and subdivision of the consolidated properties into 1470 residential stands. The applicant then partnered with Amalish Investments, a property developer, for purposes of servicing the land.

Riled by this development the first respondent approached this honourable court under case number HC 1633/03. It sought and was granted as against the applicant and the City of Harare the following order:

“IT IS ORDERED THAT:

1. The consolidation and Subdivision Permit No/ 1312 is hereby set aside.
2. The consolidation of Nyarungu Estate, Chizororo and Lot 1 of Eyre Court and all works and rights arising therefrom are declared illegal and null and void.
3. The subdivision of what was to be Stand 1 of Eyrecourt Township and the work and rights arising from such are declared illegal and null and void.

1. The first respondent shall pay the costs of this application.”

Notwithstanding this order, the applicant continued its activities on the property, encouraged in this regard by the stance taken by the Ministries of Lands and the Local Government, whose officials’ conduct tended to support the applicant’s occupation of the property.

The first respondent was back in court again, this time under case number HC 9529/03 wherein it sought and was granted as against the applicant a provisional order interdicting and restraining the applicant and others from occupying the property, failing which the deputy Sheriff authorised and directed to evict the applicant and such others and all those claiming right of occupation through them. The provisional order was confirmed on 7 June 2006, three years after its grant. The first respondent explains this delay on the basis that in the intervening period the applicant and its members had been temporarily removed from the property by what was known as “Operation Murambatsvina”, a State sponsored clean-up operation. The writ of eviction was served on the applicants on 28 June 2006. The notice of removal was served on the applicants on 3 July 2006. The applicant immediately responded with an urgent application for an order interdicting the respondents from evicting its members from the property – case No. HC 4153/06. This application was dismissed for want of prosecution. The averments in the founding affidavit are however instructive in so far as the history of the dispute is concerned. In it the applicant states that they had taken the initial court papers served in 2003 to the District Administrator and the Ministers of Lands and Local Government. The three officials had advised them to “stay put” on the farm as they were going to deal with the issue themselves. Nothing was heard from the respondents until 2006. They had assumed in the intervening period that the matter had been resolved at the national level between “the acquiring authority” and the respondent. The applicant had been informed that the property had been acquired by the State and that its members were the intended beneficiaries. That being so the applicant believed that the respondent no longer owned the property and therefore lacked the *locus standi* to evict them. At that time applicant’s members had been confirmed as holders of the residential stands created by subdivision of the property. Many were building homes and developing their stands. The applicant reiterates its belief – namely that its members are at the property at the instance of Government and that in any suit the respondents should cite the Government.

A similar application by the second applicant, Amalish Investments, for an order stopping the eviction was dismissed for want of urgency – HC 4274/08. In it Amalish Investments had averred that its eviction and that of all other persons who purchased stands at Eyrecourt Township, Waterfalls through it was imminent. It was at that stage in the process of developing the area with the permission of the Ministry of Local Government. It had sold the stands to various beneficiaries in terms of the mandate so given to it by the Ministry in terms of letters dated 8 and 27 April 2004. These letters are filed of record. In the letter of 8 April 2004 addressed to the applicant written under the hand of S.V. Sibanda on behalf of the Secretary for Local Government, the opening paragraph reads:

“The Ministry has approved your proposal to embark on the above projects with Amalish Investments (Pvt) Ltd in which you propose to dispose 550 stands on the open market to raise funds to subsidise members of the co-operative on the following conditions………….”

 And on 27 April 2004 the Ministry wrote in the following terms:

“Please be advised that the Ministry……. has regularised the operations of Amalish Investments on Eyrecourt Farm. This means the Ministry has agreed to the sale of stands for the servicing of the housing stands on Lot 1 of Eyrecourt”.

Meanwhile, in yet another development, the applicants in the second case who themselves are not *per se* members of the applicant in the first case, filed an application to stop the eviction of the applicant’s members because, though not members, they were resident at the same property and were likely to be evicted with the applicant’s members. They too purchased stands through Amalish Investments. They had built cottages thereon and would be prejudiced if evicted. They also state that the land in question had since been acquired by the State. This matter has been consolidated with the present application. It will be decided in the course of this judgment. In its notice of opposition in the second case, the respondent raises the same defences as it does in the first case. However of interest is the tone of a letter from the Ministry of Local Government which takes a different position from that previously taken. Whilst seeking to protect the original group of settlers it condemns what it terms illegal sale of stands by Amalish (Pvt) Ltd and confirms that the farm had not yet been acquired by the State. It recognises the ownership and dominion of the respondent over the property.

In the first case the applicant’s position is clear and unassailable. It states that it has been served with a notice of removal due to take place on 14 June 2011. It applies for stay of execution on the grounds that the property from which it is intended to evict them has since been acquired by the State in terms of the Land Acquisition Act [*Cap 20:10*]. The applicants’ members are the intended beneficiaries of this acquisition. Stands have already been allocated to them pursuant to that acquisition. Further the acquisition is likely to be confirmed by the Administrative Court. The matter is pending before that court under case number 6064/2010. If the eviction is carried out, over three hundred families will be left homeless.

The respondents in this first case have opposed this application. They have raised three points *in limine*. Firstly it is argued that the matter is not urgent as the applicants in both the first and second case had been aware of the existence of the High Court order and the attendant writ of execution since 2006. They have resisted eviction since then in contempt of this honourable court. At one stage the applicants were, together with their development partners Amalish (Pvt) Ltd, convicted of fraud with respect to selling stands on this property. This was in 2010. In any event the applicants have no right to remain in occupation of property belonging to respondent.

Secondly the respondents argue that the applicants have no *locus standi* being neither owners nor lawful occupiers of this land. Further, argues the respondent, the applicants have not shown the existence of any legal right which they are entitled to protect by way of an interdict. Further, as the applicants claim to be in occupation by virtue of the authority of the Ministries of Local Government and Lands, they ought to have cited these Ministries in this application. In any event the applicants have not purged their contempt of a valid court order evicting them from the property. They are therefore in contempt of court. Their hands are dirty and for that reason, they cannot be heard until their contempt is purged, argues the respondent.

The respondent’s case was ably argued by Adv *Uriri*. Under normal circumstances I would have dismissed the application for the reasons cited by the respondent both *in limine* and on the merits. However the arguments proffered by the respondent have, as the applicant points out, been overtaken by events. The State has intervened in a decisive manner. It has acquired this property subject to confirmation by the Administrative Court. As I hear this application, the Administrative Court is already seized with an application in which confirmation is sought. In my view common sense demands that the parties await the outcome of the case pending before the Administrative Court for, if the acquisition is confirmed, the respondents will cease to be the owners of this farm. In fact it is proper to argue, as the applicants do, that because a notice in terms of section 8 of the Land Acquisition Act has been issued, the correct position may well be that it is the respondents who no longer have *locus standi* in this case. On the facts of this matter the applicant’s rights derive from the fact that the acquiring authority has allocated them residential stands on this property. Some of the beneficiaries have been living there for as long as ten years. They have built houses and have families to look after. Their interests are obvious and the State intends to protect such interests.

It is true that hitherto the applicants had acted in contempt of a court order. However they had been encouraged to do so by State officials. It has always been the State’s position that it intends to acquire this property. The applicant’s members have been told to remain at the property on that understanding. The fact that the State has now moved to acquire the property vindicates the applicants and to that extent purges their otherwise contemptuous conduct.

It is common cause that the State has acquired this property subject to confirmation by the Administrative Court. In the circumstances the failure to cite the Minister responsible for lands cannot be fatal to this application. His position is well known and accepted by both parties, namely that he has acquired the property. The parties are already before the Administrative Court to argue confirmation or otherwise of this acquisition.

In the result the balance of convenience clearly favours the applicants. It was for these reasons that I granted the application in the first case with costs. For the same reasons the application in the second case is also granted with costs.

*Robinson & Makonyere*, the first case applicant’s legal practitioners

*Ngarava, Moyo & Chikono*, the second case applicants’ legal practitioners

*Kantor & Immerman*, 1st respondent, the first & second cases’ legal practitioners