

RUDO HOUSING CO-OPERATIVE
versus
CITY OF HARARE

IN THE HIGH COURT OF ZIMBABWE
BERE J
HARARE 27 – 28 JULY 2015 & 27 SEPTEMBER 2017

Urgent Chamber Application

T. Mutebere for the applicants
J. Mutizwa for the respondent

BERE J: On 28th of July 2015 I granted an interim order prohibiting the respondents from evicting or demolishing applicant's members residential structures located in Budiro, Harare. I have since been requested to provide reasons for my order. Here they are.

Rudo Housing Co-operative (the applicant) is registered in terms of the Co-operative Societies Act¹ and was allocated land by the respondent and furnished with a site plan through the respondent's department of planning, which site plan the applicant used to parcel out land to its members who proceeded to construct residential houses. The houses are at different stages of construction and they are around 177 representing the total membership of the applicant.

The respondent served some of the applicant's members with 48 hour notices requesting them to vacate the occupied stands or face eviction and or demolition of their residential structures in the event of them failing to vacate the premises. The eviction or demolition of the structures was scheduled to take place on 27 July 2015.

¹ Chapter 24:05

Thrown into a state of panic the applicants filed the instant urgent application arguing that the 48 hour period given by the respondent is not realistic and above all that they have no alternative accommodation. The applicants argued that the summary eviction, and or destruction of their properties was in complete violation of the Constitution.

When the parties appeared before me, Mr Mutizwa who was representing the respondent argued in favour of the stance taken by the respondent. His position was that the respondent was merely acting in terms of clause 18 (2) of the Urban Councils (Model) (Use and Occupation of Land and Buildings) By-laws 1979: Statutory Instrument 109 of 1979. Counsel for the applicants argued that the Statutory Instrument relied upon by the respondent was in violation of the Constitution of the Republic of Zimbabwe. He further argued that the applicants have always felt they properly acquired the stands in question as confirmed by the site plan which they got from the respondent's officers.

It will be necessary to closely look at the legal instrument relied upon by the respondent in carrying out the threatened eviction and or demolition. Section 18 (2) of SI 109/1979 is framed as follows:

“If at any time the Council is satisfied that person are using or occupying, otherwise than by virtue of a lease or permission of the Council, land which is vested in or controlled by Council, the Council may by written notice served upon so many of the users or occupants of the land as the Council or an authorized official considers will result in the terms of the notice becoming generally known amongst the users or occupants inform the users or occupants of the land that unless they depart with their property from the land within such period being not less than forty-eight hours from the service of the notice, as may be specified therein, steps will be taken to evict them summarily from the land.

- (4) If at any time after the period specified in a notice served in terms of the subsection (1) (2) or (3) it appears to council that the terms of the notice have not been complied with, the council may direct an authorized official to enter upon the premises or land concerned and take such steps as are necessary or desirable to –
 - (a) Evict summarily such persons or number of persons as the case may be, together with their property as is necessary to secure compliance with the notice; or

(b) Demolish the shanty or temporary building which was the subject of the notice, as the case may be.”²

In its urgent application to stop the threatened demolition of the residential structures of its members the applicant argued that from 2013 up to the time the application was filed the respondent had been fully aware of the presence of the applicants and the developments which culminated in the residential structures and had done nothing to try and discourage or stop the applicants in their activities.

The applicant went on to argue that the respondent’s department of planning had created a site plan demarcating the residential stands, which site plan was used in the allocation of the stands by the applicant.

In its notice of opposition to the application made the respondent denied that the site plan alluded to by the applicant had originated from its office and that it was not its official document. It alleged that the site plan was not authored by its officers and that it was therefore not a genuine document.

The respondent further argued that the subsidiary instrument relied upon by the respondent in carrying out the threatened eviction was made in terms of the Urban Councils Act (Chapter 29:15) which was consistent with the Constitution of Zimbabwe and further that the instrument in question had not been declared unconstitutional.

I am far from being convinced that the Statutory Instrument 109/1979 as well as other allied provisions of the Urban Councils Act referred to me by the respondent’s counsel must cumulatively be read to override section 74 of the Constitution of the Republic of Zimbabwe which was specifically crafted to avoid arbitrary evictions like what is being threatened to be done in this case. For the avoidance of doubt section 74 of the Constitution reads as follows:

² RGN No. 109/1979

“74. Freedom from arbitrary eviction

No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.”

Further, section 71 (3) of the same Constitution speaks against deprivation of an individual’s property except in terms of the law. It is clear that the instrument relied upon by the respondent is *ultra vires* the Constitution.

Accepted, the applicants may not have followed the spirit and letter of the relevant laws governing the construction of their dwelling houses in issue but the complicity of the respondent in allowing such construction to take place for several years suggests that it must have waived full compliance with its own regulations. We are not talking of a single structure, not even 10 structures but several structures in a built up area within the jurisdiction of the respondent. The respondent, by its conduct must be taken to have consented to the construction by the applicants.

I am more than satisfied that the demolition of the various dwelling structures without an order of court would amount to a serious violation of the applicant’s rights.

It is for these reasons that I granted the provisional order of 28 July 2015.

Messrs Mutebere & Company, applicant’s legal practitioners

Messrs Chihambakwe, Mutizwa & Partners, respondent’s legal practitioners