

SENZENI NAOME MAKOMBE  
and  
TAFADZWA VALERY MAKOMBE  
and  
BEVERLY KUDZAIISHE MAKOMBE  
versus  
NGONI MUTUWA  
and  
JOCKSTAR INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE 9, 12, 19 and 26 July 2017

**Urgent Chamber Application**

*B Mushamiri*, for applicants  
*M Ndebele*, for 1<sup>st</sup> respondent  
*G Machingambi*, for 2<sup>nd</sup> respondent

TAGU J: This is an application to interdict the first respondent from building and erecting structures on the applicants' property commonly known as Stand Number 2745 Zizalisari, Mount Pleasant Heights, Harare. The applicants want the following provisional order-

“TERMS OF FINAL ORDER SOUGHT

That you show cause to the Honourable Court why a final order should not be made in the following terms:-

1. The final interdict be and is hereby granted barring the 1<sup>st</sup> Respondent from building or constructing any structure on Stand Number 2745 Zizalisari, Mount Pleasant Heights, Harare and interfering with the Applicants' rights in the Stand.

2. The Respondents be and are hereby ordered not to interfere in any manner whatsoever with the Applicants' rights in Stand Number 2745, Zizalisari, Mount Pleasant Heights, Harare.
3. Applicants be and are hereby granted leave to demolish any structures constructed by 1<sup>st</sup> Respondent on Stand Number 2745, Zizalisari, Mount Pleasant Heights, Harare.
4. That the Respondents shall pay the costs on the higher scale of attorney and client.

#### INTERIM RELIEF GRANTED

Pending the determination of this matter, the Applicant is granted the following relief:-

1. 1<sup>st</sup> Respondent be and is hereby interdicted from constructing any structures on Stand Number 2745, Zizalisari, Mount Pleasant Heights, Harare.
2. The 1<sup>st</sup> Respondent be and is hereby interdicted from occupying Stand Number 2745 Zizalisari, Mount Pleasant Heights, Harare.

#### SERVICE OF PROVISIONAL ORDER

This provisional order may be served on the Respondent by the Deputy Sheriff or the applicant's Legal Practitioners."

On the 9<sup>th</sup> June 2017 this matter was postponed to the 12<sup>th</sup> June 2017 at the request of the first respondent who wanted to engage a legal practitioner of his choice. On the 12<sup>th</sup> June 2017 after deliberations the matter was postponed again to the 19<sup>th</sup> June 2017 on condition that none of the parties was to continue with any construction on the said Stand to enable the parties to settle the matter out of court. This followed the second respondent's submissions that the Stand at the centre of the argument was no longer in existence and that the applicants' new Stand number was now 2856 per annexure 6 in the respondents' opposing affidavit. The second respondent undertook to go to the site and show the fighting parties their new boundaries and pegs. On the appointed date and time for the exercise the applicants did not avail themselves. On the 19<sup>th</sup> June 2017 the applicants persisted with their application.

To put the matter in its rightful perspective what happened is as follows. On the 13<sup>th</sup> of November 2009 and at Harare the applicants and the second respondent entered into an agreement of sale in terms of which second respondent sold to the applicants an immovable property commonly known as Stand Number 2745, Zizalisari, Mount Pleasant Heights,

Harare. In terms of the agreement the applicants were obliged to pay the sum of US\$14 000.00 as the purchase price in respect of the property in question. The applicants duly paid the full purchase price on the 6<sup>th</sup> of November 2009 to the second respondent through its Estate Agents Real Estates. It was a further term of the agreement of sale between the applicants and the second respondent that the second respondent was to transfer the property in question into the applicants' name when the applicants had paid the full purchase price. However, transfer has not yet been done due to the fact that the second respondent is yet to comply with the conditions of the subdivision permit issued in respect of the said property. However, the applicants had moved onto the stand since 2011 and have constructed a cottage and erected a fence on one side of the property. On the 7<sup>th</sup> of June 2017 the first respondent contracted builders and sent them onto the property for purposes of erecting a durawall. This prompted the applicants to file the present application for an interdict.

In its opposition to the application second respondent explained that the misunderstanding between the parties arose as a result of the misinterpretation of the agreement. He said when the agreement with the applicants was made subdivision of the land had not yet been done. After the subdivision was done the stand sizes and numbers changed. This was done in terms of conditions 6.1 to 6.7 of the agreement particularly condition 6.5. That condition reads as follows-

“6.5. The purchaser accepts that the property or stand size, shape and number may be changed by the statutory authorities in which case he further accepts that the Seller will allocate the purchaser a new stand number. If there is material difference in stand size, as a result of the mentioned change then, the Seller will adjust the price proportionately to the change in the area.”

*In casu*, the applicants moved onto the Stand before subdivision was done. After the subdivision was later done, stand 2745 in question and stand 2746 ceased to exist. A copy from the Surveyor General of the overall site plan filed and marked Annexure ZLC 7 and the list of stands marked Annexure ZLC 8 shows that stand number 2745 does not exist. The stand numbers have since been overtaken by events.

In my view to grant the relief being sought will be *brutum fulmen* since there is no Stand number 2745. This matter was capable of resolution had the applicants attended the exercise where they were to be shown their new Stand numbers by the second respondent which despite the court's directive to do so they did not attend. The applicants had and still have an alternative remedy which they do not want to pursue. It does not assist them to cling to a non-existent stand even when their argument is followed that there was a double

allocation of stands or that the second respondent changed stand numbers without notifying applicants.

In my view the relief being sought is incompetent and the following order is granted.

It is ordered that-

1. The application is dismissed.
2. Each party to bear its own costs.

*Kadzere, Hungwe & Mandevere*, applicants' legal practitioners  
*Zvinakovu law chambers*, first respondent legal practitioners