

REPORTABLE (63)

**(1) FUNGAI NHAU (2) JOSEPH MUSIKA HOUSING
COOPERATIVE**

v

**(1) FAITH MINISTRIES CHURCH (2) THE MINISTER OF
LOCAL GOVERNMENT PUBLIC WORKS AND NATIONAL
HOUSING**

**SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, BHUNU JA & CHIWESHE JA
HARARE: 21 JUNE 2022 & 30 JUNE 2023**

F. Nyamayaro, for the appellant.

T.B Muvhami, for the respondent

BHUNU JA:

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[1] This is an appeal against the whole judgment of the High Court (the court *a quo*) which granted an eviction order to the respondent against the appellant and all those claiming occupation through him with costs.

BACKGROUND FACTS

[2] The first respondent is a church organization whereas the appellant is a member of a housing cooperative known as Joseph Musika Housing Cooperative. Although the Housing Cooperative was a party to the proceedings in the court *a quo*, it has not appealed against the court's judgment against it. The second respondent is a government Minister and owner of the state land in dispute. The disputed piece of land is commonly known as Stand Number 16549 Hatcliff Harare (the stand).

- [3] On 25 April 2014 the first respondent successfully applied for a lease of the stand from the second respondent for use as a church site. The second respondent granted the first respondent a lease agreement on 15 April 2019 in respect of stand Number 16549 Hatcliff Harare. A copy of the lease agreement was adduced in evidence as annexure C.
- [4] Notwithstanding the issuance of the lease agreement to the first respondent, the appellant took occupation of the same land under the auspices of his Housing cooperative. He thereafter denied the first respondent access to the stand.
- [5] The appellant claims lawful occupation of the stand through his membership of the Housing Cooperative which made an application to the second respondent for land for residential stands in collaboration with the appellant. The Minister acknowledged the application for land by the cooperative. On 14 September 2017 he wrote to the appellants requesting them to furnish a properly drawn diagram showing the existing development and pay the requisite fees. There was no compliance with the minister's request. The Minister then turned to the respondent and accepted its application for a lease. The appellant however argued that he had a legitimate expectation to be allocated the stand following the Minister's acknowledgment of receipt of their application and his request for diagrams and payment of the necessary fees.

FINDINGS BY THE COURT A QUO

- [6] The court *a quo* found that the first respondent had a real and substantial interest in the matter as lease holder to the disputed property. It further found that there was no material dispute of fact hindering the court from determining the application on the papers before it.

[7] It found no merit in the appellant's assertion that the first respondent's lease agreement was fraudulent. The learned judge *a quo* determined that apart from a bald assertion there was no evidence to support the applicant's averment that the lease agreement was fraudulent. Placing reliance on the presumption of validity of government documents he held that the first respondent's lease agreement is authentic and valid.

[8] The court *a quo* found no merit in the appellant's plea of legitimate expectation. It held that the appellant had only occupied the stand in 2020 and not 2012 as he claims.

[9] On the basis of such findings of fact and law, the court *a quo* upheld the first respondent's application for eviction and issued the following order:

“IT IS ORDERED THAT:

1. The first and second respondents and all those claiming occupation through them be and are hereby ordered to vacate stand number 16549 Hatcliff Harare within seven (7) days from the date of this order.
2. Should the first and second respondents and all those claiming occupation through them fail to comply with paragraph 1 above, the Sheriff of the High Court be and is hereby ordered to evict them forthwith and demolish any structures erected at no.16549 Hatcliff Harare.
3. The first respondent be and is hereby ordered to pay costs of suit on an ordinary scale”

[10] Aggrieved, the appellant appealed to this Court on the following 3 grounds of appeal:

- “1. The court *a quo* erred and misdirected itself in holding that, the appellants took occupation of the land in question in 2020 instead of 2012 resulting in the court granting the order of

eviction under the mistaken belief that the appellants took occupation of the land when the respondent had already been granted a lease by the second respondent.

2. The court *a quo* erred and misdirected itself in holding that no dispute of facts existed in the matter, when it was clear that the parties were not in agreement as to when the appellants took occupation of the land and which exact piece of land the appellants were in occupation of.
- [3] The court *a quo* erred and misdirected itself in failing to uphold the appellant's argument that a legitimate expectation had been created hence the third respondent could not have proceeded to issue a lease to a third party in respect of the same piece of land in clear breach of the legitimate expectation it had created.

[11] On the basis of the above grounds of appeal the appellant prayed for the setting aside of the court *a quo*'s judgment and its substitution with an order dismissing the applicant's application.

ANALYSIS AND DETERMINATION OF THE APPEAL.

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[12] The grounds of appeal raise one issue for determination as to whether the court *a quo* correctly ordered the eviction of the appellant from the stand.

] 13] The facts clearly establish that the appellant did not apply for land to the Minister in his own right. It is the cooperative which applied for land for distribution to its members. There was therefore no contractual link between him and the Minister. He looked forward to be allocated his portion of the land not by the Minister but by the cooperative by virtue of his membership of the association. In the absence of a contractual relationship between the Minister and the appellant no rights or obligations arose between them in relation to the cooperative's application for land. In legal parlance there was no privity of contract between them.

[14] In the absence of a contractual relationship between the appellant and the Minister the appellant could not hold the Minister to account for the lease agreement he concluded with the first respondent in respect of the stand. No legitimate expectation could arise in the absence of any contractual relationship between them. It is only the cooperative which had applied for land to the Minister which could raise the issue of legitimate expectation. The cooperative swept the rug from underneath the appellant by failing to appeal against the judgment of the court *a quo*. This is because the appellant claims to occupy the disputed stand through the cooperative. Its failure to appeal means that it has capitulated and that leaves the appellant with no leg to stand on as he was riding on the back of the cooperative in his claim for legitimate occupation of the stand.

[15] The learned judge *a quo* was undoubtedly correct in holding that the first respondent is the rightful lessee of the stand by virtue of its valid lease agreement with the owner of the stand. The appellant's futile attempt to impugn the respondent's lease agreement on the basis of fraud was correctly dismissed. Considering that the appellant had no lease agreement with the owner of the stand or legitimate expectation to lawfully occupy the stand, it was an exercise in futility to challenge a lawful contract to which he is not a privy on the basis of a mere application to occupy the same land. To make matters worse, he admitted that he was in unlawful occupation of the land but sought to sugar the pill by saying that he was in the process of regularizing his unlawful occupation of the stand. The learned trial judge drives the point home when he says in conclusion:

“The issue of regularization as per annexure A, B and C does not prove anything other than a process meant to acquire a stand. There is nowhere in the record which shows the respondents (appellant) were ever given any right of occupation by the third respondent (the Minister). This Court wonders why the two respondents decided to oppose this application. They were supposed to pursue their application to the third respondent to its logical conclusion than interfering with the applicant's undisturbed peaceful possession of the said property.”

[16] There is merit in the learned judge's sentiments. A mere application for land does not strip the owner of the land of the rights of ownership of the land. Thus a mere application until such time it succeeds is no bar to the land owner from leasing the land before the application has succeeded.

[17] In the circumstances of this case, this was a matter eminently suited for disposal on the papers. The points *in limine* raised, were red herrings meant to throw spanners into the works. The first respondent clearly had an interest to protect its lease agreement and the rights flowing from the lease. The appellant having admitted that there was no binding contract between him and the owner of the stand he raised no further argument that could have rendered the matter incapable of resolution on the papers.

[18] In the result I hold that there is absolutely no merit in this appeal. It is accordingly ordered that the appeal be and is hereby dismissed with costs.

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MAVANGIRA JA: I agree

CHIWESHE JA: I agree

Farai Nyamayaro Law Chambers, the appellant's legal practitioners.

Mugiya & Muvhami Law Chambers, the respondent's legal practitioners.