

KEVEN MIROSI
and
TARISAI CHIGIDI
and
LUCIA CHISVETO
and
EDNAR MUCHECHETERWA
and
PROSPER MUNEMO
and
DANIEL NYERENYERE
and
EDNAR CHINEMBIRI
and
PROSPER MANDINDE
and
ADMIRE MAHWENGWA
AND
TICCHARWA MUTEGWA
and
ELIZABETH WURAYAYI
and
LETWIN MUKONDIWA
and
PATIENCE MUSUNDASORO
and
FARAI CHIWENDE
and
RACHEL MAHWATA
and
PRIMROSE CHIGIDI
and
PLAXEDES MUTIZIWA
and
SPENCER MAGIYA
and
PRINCE NDORO
and
NATHAN ZVAVAMWE
and
EMANUEL NEMARUWA
and
FORGET NYANDIRO
and
TENDAI MUCHANDO

and
SHUPIKAI MANYENYE
versus
CITY OF HARARE
and
MINISTER OF LOCAL GOVERNMENT PUBLIC
WORKS & NATIONAL HOUSING N.O

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 4 & 30 August 2023

Urgent Chamber Application

Advocate *Mudhau*, for the applicants
Mr *N B Nyathi*, for the 1st respondent
Mr *P C Chibanda*, for the 2nd respondent

MHURI J: Applicants approached this Court with an urgent application for a spoliation order. Initially the relief they sought which they applied to be amended read as follows:-

INTERIM RELIEF

Pending the return day it is ordered that:-

1. The first respondent or any of its agents and or its employees or anyone acting through it or on its behalf to restore possession of the land in Kuwadzana Extension Harare known as the Sub division of the Remainder of Fountainblaeu Township immediately upon service of this provisional order failing which the Sheriff be and is hereby ordered to forthwith eject the respondents or any of its agents and or its employees from occupation thereon and restore possession to the applicants.

FINAL ORDER

1. That the provisional order granted in this matter be and is hereby confirmed as a final order.
2. That first respondent pays costs of suit on the legal practitioner and client scale.

On the day of hearing of this application, applicants made an application to amend the provisional order which application I granted. To that end, the provisional order was amended to read:-

TERMS OF FINAL ORDER

1. The provisional order granted in this matter be and is hereby confirmed as a final order.
2. First respondent or any of its agents or its employees or anyone acting through it or on its behalf be and is hereby ordered to restore possession to applicants of the land in Kuwadzana Extension Harare known as Sub division of the Remainder of Fountainblaeu Township failure of which the Sheriff of High Court Harare be and is hereby ordered to forthwith eject respondents or any of its employees and restore possession to the applications.
3. The first respondent shall pay costs of suit on the legal practitioner and client scale.

INTERIM RELIEF

Pending the return day it is ordered that:-

1. First respondent or any of its agents and or its employees or anyone acting through it or on its behalf be and is hereby ordered to allow the applicants access to collect their household belongings housed in their partially demolished houses on the land in Kuwadzana Extension known as Subdivision of the Remainder of Fountainblaeu Township within 7(seven) days of the date of this Order.

As a result of the amendment, the matter was postponed to enable first respondent to file a supplementary notice of opposition dealing with the amended provisional order. Both parties Counsel (applicants and first respondent's) agreed and it was ordered that first respondent files its supplementary opposition by 4 pm Tuesday 8 August 2023 and heads of argument by 17

August 2023 and applicants file their answering affidavit and heads of argument by 4pm 11 August 2023.

Both counsel suggested and agreed that there after the Court proceeds to determine the application on the papers filed.

Second respondent's counsel filed a notice to the effect that it will abide by the Court's decision, so it did not file any papers.

On 11 August 2023 applicants filed their answering affidavit and heads of argument.

It is noted that on 3 August 2023 first respondent filed the first notice of opposition, the opposing affidavit of which does not have a date endorsed on by the commissioner of oaths. Contrary to what was agreed and ordered on 4 August 2023, by 17 August 2023 first respondent had not filed anything. It was only after follow ups were made that a supplementary notice of opposition was availed. Strangely the notice of opposition (supplementary) availed is dated 2 August 2023 and the opposing affidavit whose contents are a replica of the first opposing affidavit has a computer generated date of 3 August 2023 and is not signed by either the deponent or the commissioner of oaths.

This issue was raised by applicants in their answering affidavit and it was their prayer that the supplementary opposing affidavit be expunged from the record. In view of the observations alluded to earlier, I will grant applicants' prayer. There is no affidavit before this Court, so the document availed as a supplementary opposing affidavit is hereby expunged from the record. The case of *Mike Mandishayika v Maria Sithole* HH 798/15 is apt.

As stated in para 1 of this judgment, this is an application for a spoliation order. Generally applications of this nature are by their very nature urgent. See *Chiwenga v Mubaiwa* SC 86/20. A litigant has to show that he acted timeously, that is, when the need to act arose. See *Kuvarega v Registrar General & Anor* 1998(1) ZLR 188 and also:-

Documents Support Centre P/L v Mapuvire 2006 (2) ZLR 240 H.

As aptly stated in the case of *Exmin Syndicate v Luke Dube & Ors* HB 102/22 spoliation proceedings are by their very nature urgent. An order for a *mandament van spolie* seeks the restoration of property that has been despoiled and the restoration of the *status quo ante*.

As per first applicant's founding affidavit whose contents the other applicants associated themselves with, applicants are members of a Housing Scheme, Kuwadzana Extension South

Pay Scheme. They were allocated the land in question and in 2020 they started erecting residential buildings. They have been regarding this land as theirs and have been staying there since.

In 2022, members of another Housing Scheme called Parkridge Housing Scheme became violent towards applicants claiming that the land applicants occupied was theirs as it had been allocated to them by first respondent. Applicants reported a case of malicious damage of property and assault to the Police. Members of Parkridge Housing Scheme filed an application for an interdict with the Magistrate Court under HREC-CG 186/23 which was dismissed. Applicants continued staying on the land unmoved by the violence. On 16 July 2023, after the judgment of the Magistrate Court, applicants learnt of first respondent's intention to demolish their houses on 20 July 2023. Acting on this information applicants filed an urgent chamber application with this court under HC 4777/23 which application was found not to be urgent.

On 28 July 2023, first respondent demolished applicants' houses and cabins and also chased them away from the land. On the same day applicants filed this application. I find therefore that applicants did not sit on their laurels but acted timeously when the need to act arose.

The established legal requirements in applications such as this are that an applicant must prove that he was in peaceful and undisturbed possession of the property and was unlawfully dispossessed of the said property. Ownership of the property does not matter at this stage.

The celebrated case of *Botha & Anor v Barrett* 1996(2) ZLR 73(s) aptly stated the position at pp 79-80.

"It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:

- (a) that the applicant was in peaceful and undisturbed possession of the property; and
- (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent."

The question is, have the applicants proved these requirements? It is not in dispute that applicants occupied the land in question. They had built residential structures on the land. Whether applicants had possessed/occupied this land without first respondents authority, is irrelevant at this stage. In terms of the law, they could not be dispossessed without following due process.

Kama Construction (Private) Ltd v Cold Comfort Farm Coop 1999(2) ZLR 19. Even a thief or robber is entitled to a spoliation order, this is well established.

Possession *in casu*, has been proved. Was it peaceful and undisturbed? The events as narrated by first applicant in his founding affidavit do not support that applicants were in peaceful and undisturbed possession. Applicants occupied the land in 2020, in 2022 members of another Housing Scheme attacked them claiming the land in question was theirs as it had been allocated to them by first respondent. There was violence, property was damaged and they took each other to the Police and Magistrate court. Just after the magistrate's judgment, first respondent's intention to demolish applicants structures built on the land came to the attention of applicants and they approached this Court with an application for an interdict. A few days later, first respondent moved in and demolished applicants' structures on the land.

In my considered view, these incidences show that applicants were not in peaceful and undisturbed possession of the land in question. Applicants have failed to pass the second hurdle. Consequently, the application cannot be granted. It is therefore ordered that the application be and is hereby dismissed. In view of the manner first respondent handled this case, I will order that each party bears its own costs.

Chatsama and Partners, applicant's legal practitioners
Gambe Law Group, first respondent's legal practitioners
Civil Division of Attorney General's Office, second respondent's legal practitioners