

MARGARET MUTAMBA ZVINAVASHE
versus
RICHARD MUSUNGWA ZVINAVASHE

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 12, 14 & 19 June 2019

OPPOSED APPLICATION

J Dondo for the applicant
M. T Mavhaire, for the respondent

CHIRAWU-MUGOMBA J: The late Vitalis Musungwa Zvinavashe acted responsibly during his lifetime by making a will and also causing the formation of a family trust. No doubt he did this to ensure that peace prevails in his family after his death. But alas peace has been elusive especially between his widow and his eldest son who are the applicant and the respondent respectively in this matter. The two also happen to be among the ‘first’ trustees of the Vitalis Musungwa Gava Zvinavashe Trust. The other ‘first’ trustee was the late Vitalis Musungwa Zvinavashe.

The applicant filed a court application on the 29th of January 2019 seeking the following relief:-

1. That respondent and all those claiming through the respondent be and are hereby barred and or interdicted from entering stand 730 Cowie Road, Tynwald, Harare without the consent of the applicant.
2. The respondent be barred and or interdicted from engaging in any conduct which is calculated to disturb and or interfere with applicant’s peaceful and undisturbed possession of stand 730 Cowie Road, Tynwald, Harare.
3. The respondent be ordered to remove any of his possessions from stand 730 Cowie Road Tynwald Harare, including haulage trucks and or equipment brought into stand 730 Road, Tynwald, Harare.

4. The respondent pays the costs of this application on a legal practitioner and client scale.

The applicant's averments can be summarised as follows: - She is the widow of the late Vitalis Musungwa Zvinavashe. The respondent is the eldest son of the late with another woman. The applicant and the respondent's relationship is far from being cordial and there have been numerous court battles between them. In terms of the last will and testament of the late Vitalis Musungwa Zvinavashe, applicant was granted a lifetime usufruct over the Tynwald property and also over a farm known as Subdivision 1 of Lot 3 Knockmallock Estate of Austria. The estate of the late in which the respondent was the executor has since been wound up. Ever since the passing on of her husband, the applicant has enjoyed peaceful and undisturbed possession of the Tynwald property without disturbance from anyone. On the 13th of January 2019, the respondent came to the property uninvited and used force and threats of physical violence to wrongfully and unlawfully gain entrance into the property. Respondent scaled the wall and used a bolt cutter to open the main gate. In the process, he damaged the padlock. Such padlock was removed and replaced with another set of locks. The respondent also gave instructions to the security officials that he was now in charge of the property in his capacity as the son of the deceased. On the 14th of January 2019, the respondent brought a haulage truck and parked it inside the yard. The respondent has effectively occupied the place as his place of business without the applicant's consent. On the 25th of January 2019, the respondent unlawfully broke into the main house and surrounding buildings to gain access. The respondent also threatened the applicant's workers and pointed a firearm at one of them. The matter has since been reported to Kuwadzana Police station. The respondent's actions have interfered with the applicant's peace and right to enjoy undisturbed occupation and possession. The respondent and the applicant cannot live together peacefully since the latter insults her at will. The applicant attached a supporting affidavit from her daughter in which she stated that she was called to the premises on the 13th of January 2019 and witnessed the respondent forcing his way into the premises. She also witnessed the respondent shouting abuses at applicant.

In response the respondent stated as follows: - he admitted that the applicant was awarded a lifetime usufruct but it is not an exclusive one. The same property was awarded to the family and all the beneficiaries are entitled to enjoy the same property. Clause 5:3 of the Will specifically bestows the right to all beneficiaries to enjoy the property. Further the same

property was bequeathed to the family trust to which the respondent is also a beneficiary. Respondent denied pointing a firearm at the applicant's worker as alleged. The applicant hired four men to forcibly remove respondent from the property but the security details managed to make these men go away. I must hasten to point out to the rather improper use of language such as 'hogwash' and 'thugs' in the affidavit. Such language demeans the dignity of the courts. The respondent denied that he forced himself into the property but that the security details know him and are aware of who he is. Further there are other rooms that respondent does not have access to for cleaning and maintenance purposes because the applicant has never been at the property which is in a state of disrepair. The respondent has made a report to the police over theft of trust property due to the fact that all the trucks on the property have had their tyres removed and engines taken out. Respondent blames this on applicant's negligence. On the day in question, respondent went to the property with a truckload of sand and cement for purposes of effecting repairs and there was no one except security details. Respondent moved into the property so that he maintains it for the benefit of all the beneficiaries. The applicant has never lived at the property and is comfortably living at the farm. Respondent admitted that he sometimes verbally abuses the applicant but it will be in response to her insults to him. He denied that he has harassed or physically abused the applicant.

At the hearing *J. Dondo* for the applicant had nothing meaningfully to submit on the legal rights of a usufructuary and whether or not the fact that the applicant has a usufruct meant that all the other beneficiaries in of the Trust and in the Will had no right to visit the Tynwald home. *M.T Mavhaire* had nothing to submit save to stand by the documents filed of record. I found the conduct of the two legal practitioners disappointing given the fact that their role is also to assist the court to make an informed decision. I expected them to have the law on usufructs at their fingertips.

Essentially the critical documents are the last will and testament of the late Vitalis Musungwa Gava Zvinavashe dated the 25th of February 2009 in which a testamentary trust was created and the Vitalis Musungwa Gava Zvinavashe Trust created on the 25th of February 2009 and registered in terms of a notarial deed of donation and trust on the 3rd of March 2009.

In my view the pertinent legal issues in this matter are as follows:-

- a. What are the legal rights of the applicant in relation to the Tynwald property as a usufructuary?
- b. Are these rights exclusive?
- c. Is the applicant entitled to the relief that she seeks which is essentially in the form of an interdict?

As already stated, the issue of the usufruct which is the class of a servitude over the Tynwald property is not in dispute. It is not clear however whether or not the said usufruct was registered against the title deeds of the property in terms of the Deeds Registries Act [Chapter 20:05] section 58.

P. J Badenhorst, Juanita M Piennar and Hanri Mostert , *Silberberg and Schoeman's The Law of property*, 5th edition pp 339-340, describe a usufruct as follows:-

“A usufruct may be defined as a real right in terms of which the owner of a thing, (often referred to as the grantor) confers on the ‘usufructuary’ the right to use and enjoy the thing to which the usufruct relates. The thing may be movable or immovable, whether corporeal and incorporeal. A usufruct may be constituted over a collection of things, (*universitas facti* or *rerum distantium*) such as a herd of cattle or flock of sheep and even the entire estate of the grantor. It furthermore extends to the accessories of the thing that is subject thereto. A usufruct over a farm, for example will normally extend not only to all buildings but presumably also to the livestock, farming equipment and the furniture in the homestead, provided of course a contrary intention does not appear from the will or agreement *inter vivos*, as the case maybe. As the usufructuary is only entitled to the use and enjoyment of the property he or she does not acquire the ownership over it, though he or she is of course entitled to its possession.....”

In *casu*, in the family trust, the applicant’s rights as a usufructuary are specified as those of the, “right to occupation, use and enjoyment” of the Tynwald home and the farm and the assets thereon (as per clause 6:2 (a) and (b)). The law recognises that a usufructuary has rights but also obligations. In *Silberberg and Schoeman (supra)* at pp 340, the obligations are specified as follows:-

“The usufructuary has no entitlement to consume and destroy the thing (*usu abutendi*) and is obliged to preserve its substance.The obligation to preserve the substance of the property means that the usufructuary is bound to maintain it.....As the usufructuary is not the owner of the property that is the subject matter of his or her right, he or she cannot alienate or encumber it”

The law thus can be summarised as follows:-

- a. A usufruct is a limited real right

- b. The usufructuary has the use and enjoyment of the property whilst the remainderperson (usually referred to as remainderman in older cases and texts) has the bare dominium
- c. The usufructuary has the right to use and enjoy but not destroy the property
- d. The usufructuary is a *bona fide* possessor and is entitled to fruits but the corpus must be handed over at the termination of the usufruct
- e. The remainderperson has a right to demand an inventory at any time.
- f. The remainderperson can demand security.

In *casu*, it is not disputed that the trust is the remainderperson and therefore has the bare dominium, in other words, the Tynwald property belongs to the trust. It is also clear that the applicant has all the rights of a usufructuary in the property. The legal question therefore becomes this- are these rights exclusive? In my view the answer lies in both the will and the trust deed.

In *Zvobgo v Madondo N.O*, HH-96-06, the court re-stated the three cardinal principles in the interpretation of wills as follows:-

- a. The main rule of construction is to ascertain the intention of the testator
- b. The testator's intention, as ascertained from the will may be supplemented if necessary by "armchair" evidence that may be admissible; and
- c. The court cannot make, or remake, a testator's will for him. It cannot change the devolution of his estate as he has directed – see also *ex Parte Bosch*, 1943 C.P.D 369@372.

The respondent averred that the will particularly in paragraph 5:3 should be interpreted to mean that the deceased wanted all his family to enjoy the benefit of the Tynwald property. The clause reads as follows:

"I leave all my worldly belongings, movable and immovable corporeal and incorporeal to the **Vitalis Musungwa Gava Zvinavashe Trust**, which is a trust for the benefit of my wife and all my children, my mother and my late brother, Francis Pachedu Zvinavashe's children."

A reading of both the will and the trust however shows that the usufruct over the Tynwald property and the farm were given exclusively to the applicant and no-one else. If the testator meant to bestow a usufruct on any other member of his family, he would have said so

in black and white. Sight should also not be lost on the fact that these two properties were essentially matrimonial property and the testator wanted to ensure that his wife would not be left out in the cold upon his death. I do not read clause 5:3 of the will to mean that the other family members should also enjoy the usufruct at the property, which property belongs to the family trust. Even if I am wrong, as held in *Mashonganyika and anor v Pfute and ors*, HH-492-14, the dominant provisions and clauses in a will must be given full effect, unless it appears from the rest of the will that the testator wished to qualify them. In my view, the clause creating a usufruct is dominant and I do not read any other clause to qualify it. In any event, the family trust also bestowed unequivocally the usufruct on the applicant. Contrary to the respondent's assertion, applicant has not 'disinherited' any beneficiary since the estate has been wound up and the property is in the name of the trust. To that extend, the applicant has shown that she has exclusive rights of enjoyment, use and occupation over the property.

What the applicant essentially seeks is an interdict. The law relating to interdicts has been stated and re-stated in this and other jurisdictions but it is still worth repeating. An applicant has to show the following:-

- a. A clear right;
- b. An injury actually committed or reasonably apprehended;
- c. Absence of similar protection by any other remedy.

See: *Setlogelo v Setlogelo* 1914 AD 221 pp 227; *Minister of Law and Order Bophuthatswana & Anor v Committee of the Church Summit of Bophuthatswana & Ors* 1994 (3) SA 89 (B) at page 98B-D; *Knox D'Arcy Limited & Others v Jamieson & Ors* 1995 (2) SA 579 (W) at pages 592H-593C; *Admark (Recruitment) (Pty) Ltd v Botes* 1981 (1) SA 860 (W) at page 861 C-D.

Applicant has cleared the first hurdle by proving that she has a clear right. Although the applicant's case could have been presented in a better manner, I have taken note of the admissions made by the respondent who has admitted that there is bad blood between the two that results in them hurling insults at each other. The respondent has admitted that he is in occupation of the property. His justification on being at the property is that he is effecting repairs and that the property is in state of disrepair. Whilst he may have noble intentions, his assertion is misguided because the property belongs to the trust and it is only the trustees who can bring the applicant to book over the state of the property. As I have already observed, the

applicant as a usufructuary has rights but also responsibilities. If she has is not performing her obligations, she can be brought to book. The respondent acting in his personal capacity and allegedly on behalf of the beneficiaries has no legal right to effect repairs or to bring his property onto the premises. The property still remains that of the remainderperson, in this case the trust. The fact that there are some rooms at the property that cannot be accessed for the purposes of cleaning is neither here nor there as it is the duty of the trustees to bring the applicant in her personal capacity to task. The applicant is right to be apprehensive about the conduct of the respondent.

The applicant is not protected by the provisions of the Domestic Violence Act [*Chapter 5:16*] given the specific definition of a ‘complainant’ in that act. Section one reads as follows:-

(1) In this Act—

“complainant”, in relation to a respondent, means—

- (a) a current, former or estranged spouse of the respondent; or
- (b) a child of the respondent, whether born in or out of wedlock, and includes an adopted child and a step-child; or
- (c) any person who is or has been living with the respondent, whether related to the respondent or not; or
- (d) any person who—
 - (i) cohabits with the respondent; or
 - (ii) is or has been in an intimate relationship with the respondent; who applies for a protection order or in respect of whom a protection order may be issued.

The applicant therefore has met the requirements for the granting of an interdict.

At the hearing I engaged *J Dondo* over the appropriateness of seeking relief against unknown persons as stated in paragraph one of the draft order. He conceded that it was not proper but that the phrase ‘and all those claiming through the respondent’ could be removed from that paragraph. I also bemoaned the lack of alternative dispute resolution mechanisms in this matter. The applicant and the respondent who are both trustees and beneficiaries in the family trust have been at each other for years. There has been litigation in this court and also criminal and counter-criminal charges against each other. It seems that peace between them is elusive. It is incumbent upon them to find each other and find a lasting solution to their dispute and differences.

As for costs, I do not perceive anything in this application that warrants an order of costs on a higher scale against the respondent.

For the avoidance of doubt, the application is granted in terms of the following order:

1. The respondent be and is hereby barred and or interdicted from entering stand 730 Cowie Road, Tynwald, Harare without the consent of the applicant.
2. The respondent be and is hereby barred and or interdicted from engaging in any conduct which is calculated to disturb and or interfere with applicant's peaceful and undisturbed possession and occupation of stand 730 Cowie Road, Tynwald, Harare.
3. The respondent be and is hereby ordered to remove any of his possessions from stand 730 Cowie Road Tynwald Harare, including haulage trucks and or equipment brought into stand 730 Road, Tynwald, Harare.
4. The respondent shall pay the costs.

Dondo and partners, applicant's legal practitioners
Takawira Law Chambers, respondent's legal practitioners