REPORTABLE (124)

CLEVER NJOVANA
v
(1) KUDAKWASHE KARAGA (2) COSMAS MASAWO (3) MINISTER OF LANDS, AGRICULTURE, WATER, FISHERIES AND RURAL RESETTLEMENT (4) P. MAPARA

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ; CHIWESHE JA & MUSAKWA JA
HARARE: 3 OCTOBER 2023

C. S.T. Dzvetero, for the appellant

W. Chishiri, with *E. Dondo*, for the first and second respondents

No appearance for the third and fourth respondents

GWAUNZA DCJ:

[**1**] This is an appeal against the whole judgment of the High Court, Harare, handed down on 4 August 2022. The judgment granted an interim spoliation order and other relief against the appellant and in favour of the first and second respondents. At the conclusion of the hearing in this matter, the court issued an order in these terms:-

1. The appeal be and is hereby allowed with costs;
2. The judgment of the court *a quo* be and is hereby set aside;
3. The matter is remitted to the court *a quo* for it to determine the case that was before it and;
4. The matter is to be placed before a different judge for determination.

The first and second respondents have requested full reasons for this order, and these are they.

[2] FACTUAL BACKGROUND

The first, second and fourth respondents are holders of an offer letter in respect of Subdivision 2 of Lot 1 of Avalon, Hurungwe District, Mashonaland West Province (the 'farm'). In addition to the offer letter, there are various judgments and orders of the High Court which confirm the first respondent's right of occupation. The farm was repossessed from the appellant by the third respondent following a national land audit and was jointly allocated to the first, second and fourth respondents in 2013. In 2018, the first respondent successfully instituted eviction proceedings against the appellant in judgment number HH707/20. Aggrieved by this judgment, the appellant appealed to this Court under case number SC 39/21 but the appeal was dismissed.

[3] The appellant thereafter filed an application for review under HC 7124/21 which was dismissed. Undaunted, he further filed another case under HC 7057/21 which was also dismissed. He was thereafter evicted from the farm, with the result that the first respondent was granted vacant possession thereof. In June 2021, the appellant filed an application for the review of the decision of the third respondent in withdrawing his offer letter. Despite the first and second respondents being correctly cited as interested parties to the review application, they were however not served with the notice of set down. As a result an order against the third respondent was subsequently granted, in default, on the 12 July 2022. The order reads as follows in the relevant part:-

> IT IS ORDERED THAT:
>
> 1 The decision to withdraw a letter of withdrawal of applicant's offer letter dated 18 November 2013 be and is hereby declared a nullity and set aside.
> 2 ……
> 3 In the result it is hereby declared that the applicant is lawfully authorized and entitled to be in occupation of Subdivision 2 Lot 1 of Avalon Farm in

Hurungwe measuring 115 hectares in terms of the offer letter issued to him by the respondent on 1 December 2006

4 ……..

[4] Following the granting of the review application, the appellant proceeded to invade the farm and eject the first and second respondents, without a court order or writ of eviction backing his actions. In response to these actions, the first and second respondents filed an application seeking to have the order granted under case number HC 3129/21 rescinded. In addition, the two filed an urgent chamber application for stay of execution pending the determination of the application for rescission of judgment that had already been filed. Both applications were premised on the fact that the judgment in HC 3129/21 was granted in error.

[5] In dealing with the urgent chamber application the court *a quo* held that the requirements for a spoliation order were clear and that the first respondent[1] was in peaceful and undisturbed possession of his part of the farm and was therefore dispossessed unlawfully. The court *a quo* held that it was proper that the first respondent be restored to the farm. The court further held that the appellant was not in possession of a court order for the eviction of the first respondent from the farm. Further, that he had invaded the farm and sought to dispossess the first respondent who was occupying the farm peacefully. The court held on this basis, that this circumstance justified a spoliation order 'as pleaded' and prayed for. The court *a quo* further held that even though no warrant of eviction had been issued against the first respondent, given that the order granted in HC 3129/21 was declaratory in nature, the appellant had made it clear that he had come back to the

[1] Even though the court *a quo* in its judgment refers only to the first respondent as the one who was despoiled of the farm in question, it is pertinent to note that the second respondent in his supporting affidavit *a quo*, asserts that he too was a victim of the alleged dispossession, and associated himself with the relief sought *a quo.*

disputed farm on the strength of that order. The court then granted the order sought by the first and second respondents.

[6] Disgruntled at that decision, the appellant filed this appeal on a number of grounds, but only one of them is relevant for the determination of the matter at hand. The ground reads as follows:-

> 1. Having been approached for an order for stay of execution, the court *a quo* erred at law and grossly misdirected itself in granting, on a *prima facie* basis and in the form of a provisional order;
>
> Interdictory relief
>
> Spoliatory relief, and
>
> Eviction relief
>
> which causes of action had not been pleaded or established by the first and second Respondents and which is final in nature and effect.

[7] ISSUE FOR DETERMINATION

The ground of appeal cited above raised the only issue that, in the event, was determined by the court and disposed of the appeal. This was:-

> ***Whether or not the court a quo erred in determining a matter that was not properly before it.***

[8] The appellant in his first ground of appeal, avers that the court *a quo* erred at law and grossly misdirected itself in granting, on a *prima facie* basis and in the form of a provisional order, a spoliation order, an order of eviction, and an interdict. He avers that the relief was also granted in circumstances where the requirements for it were neither pleaded nor established by the first and second respondents. In short, it is the appellant's submission that the court went on a frolic of its own and determined a matter not properly before it.

THE LAW AND APPLICATION THEREOF TO THE FACTS

[9] It is common cause that the first and second respondents approached the court *a quo* on an urgent basis seeking a suspension or stay of execution of the order granted by the court in HC 3129/21 pending determination of their application for rescission of judgment under case number HC 4928/22. Based on that application, the respondents sought the following interim relief, which the court *a quo* granted without any alteration;

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 judgment of this Honourable Court granted under HC3129/21 on the 12 July 2022 be and is hereby suspended pending the determination of (the) Court Application filed by the Applicants under HC4928/21.

2. The first respondent shall pay the costs of suit on the higher scale of attorney and client

INTERIM RELIEF GRANTED

Pending determination of this matter the applicant is granted the following relief:

1. Pending the determination of the application for rescission of default judgment filed under case number 4928/22, the execution and operation of the court order granted under HC 3129/21 on 12 July 2022 be and is hereby suspended.
2 The first respondent and all those acting through him be and are hereby ordered to vacate Subdivision 2 of Lot 1 of Avlon Farm forthwith.

3 The first respondent and all those acting through him be and are hereby ordered to forthwith return and give vacant possession of Subdivision 2 of Lot 1 Avlon Farm forthwith to the applicants.

4 First respondent is ordered not to interfere with applicant's exercise of rights in Subdivision 2 of Lot 1 of Avlon Farm.

5 First respondent be and is hereby ordered to pay costs of suit on a legal practitioner and client sale."

[10] Whatever the merits or demerits of the main relief that the respondents sought to secure from the court *a quo*, it is evident from a reading of the order granted by the court that pending the return date, the court granted a spoliation order simultaneously with an order for the eviction of the appellant from the disputed premises. Whether or not the court could competently grant a spoliation order as interim rather than final relief, is however not what is at issue *in casu*. The issue, rather, is whether or not the court *a quo* reached its determination on spoliation on the basis of the matter having been fully pleaded, argued and established. In other words, was the matter properly before it?

[11] A look at relevant *excerpts* from the court *a quo's* judgment is instructive in this respect. At pages 5 and 6 of the cyclostyled judgment of the court *a quo*, the learned judge opined as follows:-

> I ruled that the matter is urgent given that the applicant was accosted at the farm on 22 July 2022. He filed this application on 25 July 2022 that is three days after the incident…….As for this application, it is the invasion and unlawful eviction which prompted him to seek the court's intervention on an urgent basis.
>
> Equally, the point raised that there is no cause of action is without basis. The applicant's farm was invaded. The first respondent was taking the law into his own hands. In as much as he had a court order declaring that the withdrawal of his offer letter is null and void, he had to properly seek the applicant's eviction.
>
> The point that no writ has been issued therefore the relief is incompetent does not hold. This is because the applicant seeks spoliatory relief and this is apparent from the averments. He also seeks the suspension of the order pending the hearing of the application for rescission of judgment.

> The requirements of a spoliation order are clear and are that the applicant must have been in peaceful and undisturbed possession and has been disposed unlawfully. This obtains herein hence it is justified that the applicant be restored to the farm. The first respondent had no order for the eviction of the applicant, he invaded the farm and sought to remove the applicant who was occupying the farm peacefully. That justifies a spoliation order as pleaded and as prayed for. (*my emphasis)*

[12] The *excerpts* cited above, while showing that the court *a quo* was alive to the main relief that the first and second respondents' papers and draft relief suggested they were seeking before it (whatever its merits or demerits), also demonstrate the fact that the court was preoccupied even in relation to the determination on the urgency or otherwise of the matter, more with the issue of spoliation than the matter that was substantively before it. It is also evident that the *ratio decidendi* of the court's judgment was spoliation related, that is that the appellant unlawfully raided the first respondent's farm and dispossessed him of his peaceful possession thereof. This, notwithstanding the fact that, according to the order sought and granted, the spoliation order was, improperly, in the form of interim rather than final relief[2]. Notably, this Court finds that this *ratio decidendi* is not what would have properly founded any relief pertaining to whether or not execution of the court *a quo's* own earlier judgment in **HC3129/21** could be suspended or stayed.

[13] On the basis of an application titled 'URGENT APPLICATION FOR STAY OF EXECUTION', the first and second respondents approached the court *a quo* seeking an order for stay of execution. This is the matter that was properly before the court. That this

[2] In *Gateway Primary School & Ors v Marinda Fenesey SC 63-21* the court stated as follows;

"The leading case on this settled point of law is *Blue Rangers Estates (Pvt) Ltd v Muduvuri & Anor 2009 (1) ZLR 368.* That case is authority for the proposition that a spoliation order being a final and definitive order cannot be granted as a provisional order. That being the case, it follows that the respondent erred and strayed into the realm of illegality when it sought a spoliation order in the form of a provisional order."

is the case is borne out by the final order sought by the respondents *a quo*, as well as para 9 of the first respondent's founding affidavit, which reads as follows:-

> *"This is an urgent chamber application filed to suspend or stay the operation of an order granted by KATIYO J on the 12 July 2022 in HC3129 pending the determination of an application for rescission of judgment by myself under* HC4928/22*."*

[14] Settled law, supported by an abundance of authorities, sets out clearly what an applicant has to establish in order to secure an order staying or suspending the execution of a judgment of the court (see among others, ***Humbe v Muchina & Ors* SC 81-22, *Mupini v Makoni* 1993 (1) ZLR 80 (S)** at 83 B–D). Spoliation proceedings are determinable on completely different legal principles. To the extent that the court did not advert to the relevant law in order to determine the real matter before it but instead, determined spoliation and other unrelated related claims, it went on a 'frolic' of its own.

[15] It is important to note that courts should refrain from granting relief neither sought by the parties, nor based on a case properly argued and proved. In other words, a court should not craft a case for any of the parties before it, no matter how badly the real case may have been pleaded and argued. These principles are aptly captured in the matter of ***Nzara and Others v Kashumba NO and Others* 2018 (1) ZLR 194(S)** where UCHENA JA at p 195 *B* held as follows:-

> *"…In its judgment, a court must decide no more than what is absolutely necessary for the decision on the case. The decision of the court must always be based on the pleadings of the parties, the evidence placed before the court and the submissions made by the legal practitioners representing the parties. The granting of relief which is not sought and in respect of which no argument was heard amounts to a violation of the right to a fair hearing. A court's judgment must be founded on legal principles and not equity."*

In *casu*, while the first and second respondent might have in reality craved spoliatory

relief, they did not file, as they might have done, a substantive application for spoliation. They instead filed an application for the stay or suspension of an earlier order of the court pending determination of their application for the rescission of the same order. The spoliation case, as evidenced by the *excerpts* from its judgment, cited above, was instead crafted for them by the court *a quo*. On the basis of the *Nzara* case (*supra)* the court misdirected itself in so doing.

[16] In light of the foregoing, this Court found accordingly that the court *a quo* misdirected itself in granting defective relief that was neither premised on a sound legal basis, nor properly pleaded, argued or proved. In the process the court *a quo* determined a matter not properly before it.

The court thus found that the appellant's first ground of appeal had merit and to that extent, that the appeal ought to succeed, and the matter remitted to the court *a quo* for a proper determination of the matter that was before it. Costs follow the cause.

[17] DISPOSITION

Having found that the court *a quo* erred by not determining the real issue before it, the court granted the order cited at the beginning of this judgment.

CHIWESHE JA : I agree

MUSAKWA JA : I agree

Antonio & Dzvetero, appellant's legal practitioners

Saunyama & Dondo, 1st and 2nd respondents' legal practitioners