

**NICOLA GOUMA**

**Versus**

**MARC PHILIP MITCHEL N. O.**

IN THE HIGH COURT OF ZIMBABWE  
NDLOVU J  
BULAWAYO 12 & 17 MAY AND 8 JUNE 2023

**Spoliation**

*M. P. Moyo* for applicant  
*C. Nyathi* for respondent

**NDLOVU J:** This matter came to me as an urgent chamber application. We quickly caused it to be set down for hearing. The hearing followed the filing of voluminous pleadings, quite thick for an urgent chamber application but quite understandable consideration of the history of the matter and the relationship between the parties being had.

From the papers filed of record, the respondent was appointed Executor of the Estate of the late Mr. David Mitchell. The applicant on the other hand is a registered co-owner of an immovable property known as a *Certain Piece of Land being Lot 2 of Subdivision C of Subdivision 10E of Matsheumhlophe situate in the District of Bulawayo measuring 4 048 square metres or known as 2 Vair Close, Burnside Bulawayo,[the house]*

The applicant is seeking a spoliation order against the respondent, his assignees, and agents for the restoration of her undisturbed possession and control of the house together with all household properties therein.

**APPLICANT’S CASE**

The applicant avers that from the time of the death of David Mitchell, she has been in peaceful and undisturbed possession of the house and has been using all household properties therein without any hindrances.

On 2 May 2023, the respondent used his tenants that are residents at the domestic quarters to, without the applicant’s consent, unlawfully remove a generator from the property. Respondent further cut off the water pump that supplies water to the premises and took it away leaving the applicant without water supplies.

## **RESPONDENT'S CASE**

He is the Executor of the Estate of the Late David Mitchell. He does not deny taking the property in question away. He avers that he took the property in question in order to distribute it to its beneficiaries per the estate distribution account. He did so after informing the applicant in writing through his Lawyers. Without any response or objection from the applicant, he took the applicant's silence to mean that she was consenting to the removal of the property. He took the property in the presence of the applicant's boyfriend. He further argues that it is not true that the applicant has been in peaceful and undisturbed possession of the house and the movables therein. Respondent contends, and that is a common cause, that the parties have been in and out of Court including the Magistrates Court fighting over the ownership, control, and possession of the deceased's property. According to the respondent.

In reply to the respondent's response to her application, the applicant avers that her silence and non-response to the respondent's lawyers advising her that the respondent would be coming to collect the property and distributing it to the beneficiaries of the estate cannot be taken as consent to the removal of the property. By this application, it should be clear to the respondent that she did not consent to his act. The respondent must go back to the recipients of the property and advise them that he donated or distributed that property illegally and return it to her possession, or the court orders anyone in possession of such property to return it to her.

## **THE LAW**

An applicant will succeed in a spoliation suit if he/she establishes the following to the Court's satisfaction.

*[a] That he/she was in peaceful and undisturbed possession of the property.*

*[b] That the respondent deprived him/her of the possession forcibly/wrongfully against his/her consent.*

***Botha And Anor v Barret 1996 (2) ZLR 73 (S)***

The relevant defenses available to a respondent are, per the authority of *Bernard Mahara Mutanga v Tsitsi Mutanga [nee Mangawadu] HH 247/13*.

*[a] That the applicant was not in peaceful and undisturbed possession of the property at the time of dispossession.*

*[b] That the dispossession was not unlawful and did not constitute spoliation.*

*[c] That the restoration of the property is impossible.*

It is trite that the law is against the resort to self-help. Spoliation, therefore, does not look at the rights of the parties to the property. If the peaceful possession is interfered with unlawfully, the court will not condone such interference and will redress the situation pending the taking of lawful action by the respondent regarding its asserting its rights to the property.

*Base Minerals Zimbabwe & Otrs v Mabwe Minerals [Pvt] Ltd SC 29/15.*

#### THE LAW TO THE FACTS.

In this case, the parties have been in court several times over the possession or control of the property and the house. In amplification of their extensive litigation, when the applicant filed this application, she had counter-applied for spoliation in the Magistrates Court *BYO 256/21*. She withdrew that counter-application on 12 May 2023, the day the respondent filed its opposition to this matter before me. According to the Respondent, the Applicant went on to file another application in the Magistrates Court for spoliation within 4 days of withdrawing case number *BYO 256/21*. This buttresses the point that the applicant was never in peaceful and undisturbed possession of the property. In case that finding is wrong, the situation is compounded by the fact that, on the backdrop of this intense litigation, the Respondent's lawyers wrote to the Applicant about 2 weeks prior to the removal of the property, advising her that the Respondent would be coming to collect the property in question. The applicant did nothing about that notification. She did not communicate any objection to the Respondent, until after the event and avers that her silence was not consent, but does not say what it was. How was the Respondent supposed to know that she was not consenting without her communicating that to him? The property was removed in the presence of her boyfriend without protestation.

Objectively, it cannot be said that the dispossession was wrongful or unlawful or without the Applicant's consent. Not everything in life is or should be done through a Court Order as the Applicant seems to suggest. To cap it all the property in question is no longer available for restoration to the Applicant. This Court cannot make orders that affect people who are not parties to the proceedings before. It is a principle of our law that there must be finality to litigation. Let me add to that and say, especially litigation involving a Deceased Estate.

### **DISPOSITION**

The applicant has not made a case for spoliation and the application is dismissed with costs.

*Mathonsi Ncube Law Chambers, applicant's legal practitioners*  
*Masamvu & Da Silva-Gustavo Law Chambers, respondent's legal practitioners*

**NDLOVU J**  
**08/06/2023**