

**REPORTABLE** (103)

ANTHONY MAHONDONGWE CHIGUMBA  
v  
TAFADZWA LAURENCE CHIDZAMBWA

**SUPREME COURT OF ZIMBABWE  
HARARE: 26 JANUARY 2023**

*J. Koto*, for the applicant

*E. Mutandiro*, for the respondent

**CHAMBER APPLICATION**

**BHUNU JA:**

1. This is an opposed application for condonation and extension of time within which to note an appeal. The application is brought in terms of r 43 of the Supreme Court Rules 2018.

**FACTUAL BACKGROUND**

2. The applicant is the owner of a certain piece of immovable property commonly known as Lot 16 Waterfalls Harare held under deed of transfer 0008193/97. He subdivided the property and sold stands 139 and 140 measuring 400 square metres each to the respondent.
3. It was a term of the contract of sale that vacant possession and occupation of the two stands would pass to the respondent upon conclusion of the agreement of sale.

4. Upon conclusion of the sale, the respondent delayed in putting up structures on the stands with the result that a footpath developed across Stand Number 139. This prompted the applicant to develop the footpath into a road without the respondent's approval and consent. The conversion of the footpath into a road was approved by the City Council.
5. The respondent objected to the construction of the road but his objections fell on deaf ears. To protect his property from invasion by members of the public, the applicant included, the respondent built a permanent perimeter precast wall around the stand. This did not go down well with the applicant who approached the court *a quo* for a spoliation relief. He argued that he was in peaceful and undisturbed possession of the road. It was his submission that the respondent had unlawfully deprived him of the same without his consent. On that score, he contended that the construction of the perimeter wall amounted to self-help depriving him of the use of the road which he had been using for the past twenty years. On the basis of such argument he prayed for an order of demolition of the perimeter wall.
6. On the other hand the respondent countered that he was the one who was in possession of the land where the temporary road was developed. This was because he had obtained possession of the same at the conclusion of the agreement of sale in terms of the contract of sale. He argued that he was entitled to erect a perimeter wall around his property.
7. The respondent denied that the applicant was in possession of the road at the time he erected the precast perimeter wall. This was for the simple but good reason that possession had already passed to the respondent at the time of erection of the wall.

8. The court *a quo* found that the applicant was never in peaceful and undisturbed possession of the road. It found that even though the applicant had been using that road for many years the road was in physical and mental possession of the respondent from the conclusion of the sale. It also found that a road that is accessible to everyone cannot be said to be in the possession of the applicant alone. The application was accordingly dismissed.
  
9. Aggrieved by the decision of the court *a quo* the applicant noted an appeal against the decision of the court *a quo* under SC 322/22. The appeal however could not be heard as the notice of appeal was fatally defective in that it captured the wrong date when the judgment of the court *a quo* was granted. As a result it was struck off the roll with the result that he is now out of time within which he must lodge his appeal. It is because of the foregoing that the applicant now makes an application for condonation and extension of time within which to note an appeal.
  
10. He now seeks the following relief:

**RELIEF SOUGHT**

1. The application for condonation of late noting of an appeal be and is hereby granted.
2. The applicant is granted an extension of time within which to file and serve a notice of appeal in terms of the Rules.
3. The notice of appeal shall be deemed to have been filed on the date of this order.
4. The respondent to pay costs should he oppose this application.

### **DETERMINATION OF THE APPLICATION.**

11. The relevant principles for consideration in an application of this nature are well known such that they hardly need any recollection. These are:
- (a) That the delay was not inordinate, having regard to the circumstances of the case;
  - (b) That there is a reasonable explanation for the delay;
  - (c) That the prospects of success should the application be granted are good; and
  - (d) The possible prejudice to the other party should the application be granted.
12. For a clearer insight of the above legal requirements one need not look beyond the cases of *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) and *Kombayi v Berkout* 1988 (1) ZLR 53.

### **LENGTH AND REASONABLENESS OF DELAY**

13. The judgement of the court *a quo* was handed down on 23 June 2022, the applicant ought to have noted a valid appeal within 15 days from that date. However the applicant filed a defective appeal which was struck off the roll, on 14 October 2022. The application for condonation and extension of time within which to appeal was made on 26 October 2022. I find that the delay is not inordinate and the explanation thereof reasonable.

The explanation given by the applicant's legal practitioner for the default is that he erroneously captured the wrong date as the date when the judgment of the court *a quo* was granted. In my view the explanation is reasonable.

### **PROSPECTS OF SUCCESS**

14. The cardinal issue to be determined which resolves the whole dispute between the parties has to do with who had possession of the stand at the material time when the perimeter wall was erected. This is because unlawful deprivation of possession is of the essence of spoliation proceedings.
  
15. The applicant's case is that the court *a quo* erred in finding that he was not in peaceful and undisturbed possession of the road at the material time when the perimeter wall was erected. As he was asserting that the respondent unlawfully deprived him of possession of the road, he bore the onus of proving all the essential elements of a *mandamus van spoile*. The requirements were set out in *Botha v Barret* 1996 (2) ZLR 73 (S) as follows:
  - (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.
  
16. In a defence to a claim of *mandamus van spoile*, the respondent must show that the applicant was not in peaceful and undisturbed possession of the item in dispute, in this case the road. The pleadings filed in the court *a quo* show that the applicant did not disclose a material fact to the effect that the road over which he sought spoliatory relief was constructed on the land he had sold to the respondent. The non-disclosure exhibits a deceitful and malicious frame of mind. A reading of the applicant's founding affidavit shows that he never disclosed this material fact to the court *a quo*. The non-willful disclosure betrays knowledge on his part that he was not in peaceful and undisturbed possession of the road at the time of the alleged deprivation. This is because he knew that possession of the land on which the road lay had passed to the respondent at the time of conclusion of the sale agreement. Undoubtedly he therefore knew that the conclusion

of the sale agreement of the stand divested him of possession of the stand and by extension the road he built on the stand without the respondent's consent.

19. It is common cause that the parties were wrangling over transfer of the disputed stand. That being the case, the applicant could not have been in peaceful and undisturbed possession of the stand he had sold under a term of contract divesting him of possession of the stand and passing it on to the respondent.

20. In *Nino Bonino v De Lange* 1906 TS 129 at 122 the court held that,

“It is a fundamental principle that no man is allowed to take the law into his own hands, no one is permitted to dispossess another forcibly or wrongfully and against the consent of the possessor of property whether movable or immovable if he does so the court will summarily reinstate the *status quo* and will do that as a preliminary to an enquiry or investigation into the merits of the dispute”

21. That case makes it clear that in spoliation cases, it is possession that counts at the time of the alleged unlawful dispossession and not ownership. What this means is that, although the applicant was still the owner of the disputed stand he had lost spoliatory relief by virtue of his loss of possession of the stand in terms of the contract of sale.

22. It matters not that at the time of construction of the road the respondent was not in physical possession of the stand. At law possession of a thing can either be physical or the mental state of the possessor towards the property. The learned authors *Silberberg and Schoeman's, 'The Law of Property', Second Edition* at p 114 define possession as follows:

“Possession’ has been described as a compound of a physical situation and of a mental state involving the physical control or detention of a thing by a person and a person’s mental attitude towards the thing. ... whether or not a person has physical control of a thing, and what his mental attitude is towards the thing, are both questions of fact”.

23. Thus in the absence of any evidence that the respondent ever lost possession of Stand 139 after acquiring it in terms of the contract of sale, he continued to have possession of the stand notwithstanding that he did not have physical possession of the stand at the time the applicant constructed the road on the stand without his consent. It is clear from the facts found proved that the respondent despite his absence from the stand still evinced in his mind the right to possess the stand. This is thrust beyond reasonable doubt when he resurfaced to protect his possession of the stand upon getting wind that a road had been constructed on the stand without his consent.
24. It is also important to note that it matters not that the City Council has since approved the construction of the road as the construction was done in violation of the respondent's possessory rights. Thus the approval is no bar to the respondent restraining him from building the wall to protect his rights

### **DISPOSITION**

25. Having regard to the circumstances and the facts found proved in this case, the court *a quo* cannot be faulted at all for finding that the applicant was not in peaceful and undisturbed possession of Stand 139 at the material time. For that reason, I find that there are no reasonable prospects of success on appeal. The application can only fail.
26. Costs follow the result.
27. It is accordingly ordered that the application be and is hereby dismissed with costs.

*Koto and Company*, applicant's legal practitioners

*Mutandiro, Chitsanga & Chitima*, respondent's legal practitioners