

ANTHONY MANDONGWE CHIGUMBA  
versus  
TAFADZWA LAWRENCE CHIDZAMBA

HIGH COURT OF ZIMBABWE  
BACHI-MZAWAZI J  
HARARE 23 - 29 June 2022

### **Opposed Application**

*J Koto*, for the applicant  
*M H Chitsanga*, for the respondent

**BACHI-MZAWAZI J:** This is a contested court application for a *mandamus van spolie*. It is an urgent chamber converted into an ordinary court application on the same papers for lack of urgency. After hearing the submissions of the parties. I gave an extempore ruling at the conclusion of the hearing. This is the full judgement.

The undisputed facts are that on 5 August 1997, the applicant, an owner of a subdivided property Lot 16, Waterfalls, Harare, under title deed number 000 8193/97, sold two stand numbers, 139 and 140 Derbyshire road, subdivision of lot 16, Waterfalls to the respondent. The total paid for both properties, measuring 400 square metres each was \$180.000. In terms of the agreement of sale, vacant possession and occupation passed to the respondent at the conclusion of the sale agreement. However, since the respondent had not erected any structures on his properties a footpath passing through one of his stands developed. The convenience of this passage led the applicant who is both the seller and developer to turn the footpath into a permanent road.

In 2002, the applicant proceeded to prepare a road map encompassing this road. This was subsequently approved by the local authorities without consultation and consent of the respondent who had purchased the land where the portion of the road was. Upon learning of the said developments, the respondent wrote a letter of objection to the City fathers, but the road had already been approved. Several efforts to settle the dispute of the road encroaching into the respondent's property were made by the parties over a considerable period to no avail, culminating in the construction of a precast perimeter wall by the respondent around his property. This boundary wall inevitably closed off part of the road which passed through respondent's property. The construction of the wall closing off the road prompted the applicant to approach this court on an urgent chamber basis for the relief of spoliation. Hence, this application after the urgent application was referred to the ordinary roll.

Applicant claims that he was in peaceful and undisturbed possession of the road in question and wants its restoration. He asserts that he was unlawfully deprived of the use of the road by the respondent as he is the title holder of the whole vast property. He states that he had been using the road for the past twenty years therefore he should be allowed to continue without hindrance. Applicant further points out that the construction of the perimeter wall was self -help, as the respondent took the law into his own hands thereby despoiling him of his possession of the road. He urged the court to restore his possession and order the demolition of the wall.

The respondent counter-argues that he was in possession of the land where the temporary road had been developed. Possession had been obtained at the conclusion of the agreement of sale. Therefore, the applicant was never in possession of the road. As such there was no de-spoliation. Thus, the remedy of spoliation cannot be availed to the applicant. He asserts that he simply erected a structure on his own property. He contends that by virtue of that vacant possession in terms of the agreement of sale his actions were lawful. He further argues that when he purchased his stands in 1997, there was no road passing through anyone of them. Had it been there at the conclusion of the sale transaction, he would have chosen another area. The road only materialised in 2002.

However, it is the respondent's argument that, in any event, even if it was to be concluded that the applicant was in possession of the road at the time of construction of the wall (which they adamantly refuted) it was not peaceful and undisturbed possession as there were several continuous discourses over the road construction. They stated that applicant was aware of the time and day the pre-cast wall was to be erected since he had asked for several postponements to enable him to comply with what the parties had agreed on the stand consumed by the portion of the road. The respondent relied on the text messages wherein the parties were in continuous discourse up to the time the wall was constructed.

Two issues have emerged from the above set of facts and arguments by the parties. The first is whether or not the applicant was in peaceful and undisturbed possession of the road in question? Secondly whether or not he was deprived of such possession unlawfully?

The requirements of a *mandamus van spolie* from the maxim *is spoliatus ante omnia restituendo est* are well established. They were clearly outlined in the case of *Kama Construction (Pvt) Ltd vs Cold Comfort Farm Cooperative and Other*; s1999(2) ZLR (SC) as follows:

For an applicant to succeed in a relief of spoliation he must prove that;

- a. He/she was in peaceful and undisturbed possession of the land
- b. He/she was unlawfully deprived of such possession.

**Silberberg and Schoeman** in, ‘The Law of Property’, 2<sup>nd</sup> edition, at pages 135-136 states:

“...all that the applicants must prove is that he was in peaceful and undisturbed possession at the time he was illicitly ousted from such possession.”

The burden of proof as to peaceful and undisturbed possession vests with the applicant and shifts to the respondent on the lawfulness of de-spoliation. See, *Chimeri v Nguluve* HH 06-17  
TSANGA J.

The rationale underlying the doctrine of *mandamus van spolie*, is to preserve the rule of law. Where everyone should act within the confines of the law and not take the law into their own hands. The legality of the possession nor the merits of the matter are not of paramount consideration. The relief may be open even to a thief for as long as the owner does not follow legal channels to retrieve or reclaim his ownership. See, *Bisschoff and Others v Boerdery (Pvt Ltd)*, case 815/2016 (2021) SASCA 81/13, June, 2021.

In, *Nino Benin v Delange* 1906 at 122, it was noted 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.”

In *Bisschoff*, above it was stated that what constitutes spoliation or unlawful possession must be determined on the facts. The essence of the remedy of spoliation, being that the person deprived of possession must first be restored its possession before the merits of the case can be considered. See, *Chiwenga v Mubayiwa* SC 86/2020 *Nienaber v Stuckey* 1946 AD 1049 at 1053.

*In casu*, the question is was the applicant in possession of the road in question? Possession is an essential element of the remedy of spoliation. As such there is need to examine the facts to see whether they establish possession. Applicant argues that he is the title holder of the immense property therefore, he was in possession of the road. He further asserts that he was in constant use of the road. In other words, he had constant access to the road.

From the facts on record this road in question was accessible to all the property owners within lot 16, Waterfalls. Which means all the road users pass through the road which undisputably is within the respondent’s property. The lingering question is can access to a road be equated to possession warranting spoliation.

The law says possession can either be physical or of a mental state. Silberberg and Schoeman, at page 114 explains,

“Possession has been described as a compound of a physical situation and of a mental state involving the physical control or *detentio* of a thing by 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.” See *Banga v Zawe and Anor* SC54/14.”

In my considered view the applicant was never in possession of the road for two reasons. The first one being that even if they had been using the road for a long period it was in physical and mental possession of the respondent from the conclusion of the sale in 1997 to the day of the construction of the wall. Applicant had no road *easement* which at property law, is the legal right of a non -owner to use a part of another person’s land for a road or passage. See Singer, ‘Property Law-With Access’ ISBN13 6<sup>th</sup> Edition. Although the remedy does not entail delving into the merits, there is nothing on record that shows applicant had possession of the entire road used by all other residents. The WhatsApp communication produced showed that the applicant was in constant discourse pertaining to the road trespassing onto the respondent’s property and his intended solution to the impasse between the parties. In those conversations the applicant never indicated that he had possession of the road. In essence, he was actually begging the respondent to suspend the construction of the road pending his efforts to regularize the title to respondent’s stands. Secondly, a road which is accessible to everyone cannot be said to have been in the possession of the applicant. Otherwise all the road users would end up claiming possession. The applicants claim fails on this first hurdle. He has failed to demonstrate that he had possession of the road let alone peaceful and undisturbed possession.

Even if it was to stretch the imagination and say he had possession from the submissions of the parties, it was not peaceful and undisturbed. The litany of correspondence over the road as well as its accessibility to other users do not indicate peaceful and undisturbed possession. I agree with the respondents that as the persons in possession of the property, their actions to erect the wall was lawful. In my view the applicant was never unlawfully deprived of the road in question. See *Botha & Anor v Barret*, 1996(2) 2LR 73(5).

Accordingly, the application is dismissed with costs.

*Mutandiro, Chitsanga & Chitima.* Respondent's Legal Practitioners