

VARLERIE PAIDAMOYO MADANIRE
versus
MARIA MAFUNGA

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 21 October 2021

Urgent Chamber Application

Mr *S M Bwanya*, for the applicant
Mr *A Mufari*, for the respondent

MUZOFA J: I granted this application in court. The respondent has requested for written reasons for purposes of noting an appeal.

The applicant approached the court seeking spoliatory relief in respect of a property known as Plot 14 Shortlands Farm, Marondera “the property”.

The applicant’s submissions are as follows. He purchased the property in November 2016. He immediately took occupation. No meaningful developments were made until May 2021 when the applicant erected a wooden cabin, built a blair toilet, dug a well and fenced two of the four sides to the property. A caretaker and other workers occupy the property. He resides and works in Harare.

On the 25th of September 2021 he visited the property. He discovered that a cabin had been erected some 20-30 metres from his cabin on the property. He spoke to the occupants who advised him that they were on the property at the instance of the respondent. These occupants were accessing and using the toilet and the well for their day to day needs. The applicant engaged the respondent who confirmed her occupation on the property. The respondent advised him that she had purchased the property. When engagements could not bring any viable solution, the applicant approached the court for an order to restore peaceful possession, to bar the respondent from accessing applicant’s wooden cabin, water well and toilet and to stay away from the property.

The respondent opposed the application. A point *in limine* was taken that the matter is not urgent.

The respondent's submitted that she purchased Lot 13 of Shortlands, Marondera. She occupied her piece of land in January 2019. She cleared the land and placed a cabin. She did not dispossess the applicant as alleged. If there was any spoliation, it took place in 2019 and not on 25 September as alleged. The applicant has always known about the respondent's presence but did nothing about it. There is no urgency in the matter. This application was filed to counter a police report made against the applicant for trespass.

The applicant insisted that the matter is urgent. His peaceful possession was disturbed in September 2021. He conceded that parties have a boundary dispute but that did not detract from the unlawful dispossession perpetrated by the respondent.

I found the matter to be urgent. It is apparent that the parties are neighbours. There is a boundary dispute. The applicant is supposed to be in Lot 14 and the respondent in Lot 13 of Shortlands Farm. Urgency in this case depends on who was on the property first. The court at this stage is not concerned of ownership. The relief sought is meant to maintain the status *quo ante* until the parties' rights are determined or either party can use the law to acquire lawful possession.

It is not in dispute that the applicant was the first to purchase the property. The applicant made some developments in May 2021 on the property. This has not been denied by the - respondent. If the developments took place in May 2021 and if the respondent's version is accepted the result is implausible. The respondent indicated she was on the property in 2019. If indeed she was in occupation, she was first in time, no reasonable person would have allowed the applicant to make the said developments without raising a finger. The court cannot believe that the respondent watched the applicant make all the developments without a single complaint. This conduct by the respondent leads to the inescapable conclusion that the applicant took occupation first and made the improvements. In any event she is the first purchaser. The respondent was the later occupant. I accept the applicant's averment that the respondent brought in the cabin in September when he was already on the property. Thus the matter is urgent.

On the merits, the respondent indicated she did not place her cabin in Lot 14 but in Lot 13 and this was in 2019.

In short there was no spoliation at all. This is an application made to derail certain processes taking place on the ground.

A spoliation order is final in nature. The applicant has to establish his/her case on a balance of probabilities. In this case the applicant had sought a provisional order. An amended draft order was later filed by consent.

In order to succeed in such an application the applicant must show that he was in peaceful, undisturbed possession of a thing and that he was unlawfully deprived of such possession. According to Silberberg & Schoeman's Law of Property¹ cited in *Banga v Zawe* SC 54 /14,

“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 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”.

The court therefore has to make a value judgment on the facts if indeed the applicant was in peaceful and undisturbed possession and that he was deprived of such possession.

Some of the defences available to the respondent are that the applicant was not in peaceful and undisturbed possession at the time of dispossession or that the dispossession was not unlawful and therefore did not constitute spoliation.

Mr Mufari argued that the applicant was not unlawfully dispossessed of the property since she is in Lot 14 and respondent is in Lot 13. In other words the applicant encroached on Lot 13 believing it is part of Lot 14. According to him the applicant was in unlawful occupation. This is not the intended lawful dispossession contemplated by the defence. The defence envisages a dispossession on the authority of a lawful order and not some undeclared right that a party believes they are entitled to. Even if the applicant was in Lot 13 the respondent must have followed due process to get rid of the applicant. By simply erecting a cabin and using the applicant’s facilities because the respondent believed the applicant was in her Lot 13 still boils down to spoliation. Thus in this case it is not about who has the lawful right to be where. The issue is who was in possession and was despoiled.

I have already addressed the issue on which of the parties was in physical control of the property. The applicant averred that she found a cabin that had always not been on the property in September 2021. Although the respondent denied this invasion, the circumstances are clear that there was an invasion by the respondent.

¹ 2nd Edition@p114

Firstly as already indicated, it is apparent that the applicant took occupation and was in possession of the property first. It matters not that this was in Lot 14 or Lot 13, an order for spoliation protects possession until the parties' rights have been determined. I reject the respondent's submission that there must be lawful possession. Delving into that area could lead to a determination on the parties' ownership rights. This is not what is envisaged by the relief sought.

In this case the boundaries in respect of Lot 13 are yet to be marked. In para 14 the respondent alleged that the applicant is mistaken as to the boundaries, thus she encroached into her Lot 13 carrying out developments to her own prejudice. One wonders, if by May 2021 the respondent was aware of her boundaries for her to make such an averment. As at the 27th of April 2021 the respondent's property had not been pegged. This is evident from the letter written by her legal practitioners. If her property was not yet pegged, it defies logic that she can raise any issue about the boundaries.

The applicant stated that some people occupied the cabin mounted by the respondent. They did not confine themselves to the respondent's cabin but also used the applicant's blair toilet and water source. These actions were not specifically denied. All that the respondent submitted is that she was in occupation from 2019. There is ample authority that what is not denied is admitted. Then it follows that the respondent's employees or persons who were at her cabin at her instance used the applicant's facilities without her consent. Clearly there was an invasion of the applicant's possession of the property. The setting up of the cabin by the respondent and the use of the applicant's facilities without his consent was an act of dispossession.

In my view the applicant established that he was in peaceful and undisturbed possession and that he was deprived of such possession.

On that basis I granted the order as prayed for as follows:

1. Respondent and all those claiming occupation through her be and are hereby:
 - (a) ordered to restore peaceful and undisturbed occupation of Plot 14 Shortlands Farm, Marondera to the applicant within 24 hours of service of this order.
 - (b) barred from accessing, using or destroying applicant's wooden cabin, water well and latrine at Plot 14 Shortlands Farm, Marondera.

(c) ordered to refrain from carrying within 50 metres of any part of Plot 14 of Shortlands Farm, Marondera.

Mutusu, Tarvinga & Mhiribidi Legal Practitioners, applicant's legal practitioners
Muhonde Attorneys, respondent's legal practitioners