

ZALEEKHAH ISLAM  
versus  
YUSUF ABDUL KARIM JOOMA

HIGH COURT OF ZIMBABWE  
CHINAMORA J  
HARARE, 3 February 2021 and 8 November 2021

**Urgent Chamber Application**

*F Nyakatsapa*, for the applicant  
*T E Gumbo and Mr T Mugomezwa*, for the respondent

CHINAMORA J:

**Background facts:**

On 29 January 2021, the applicant filed an urgent chamber application for a spoliation order. The applicant was married to the late Faruk Abdul Karim Jooma, who was a young brother to the respondent. Before the death of Mr Faruk Jooma on 1 December 2020, he lived with the applicant at 28 Demera Road, Rotchdale, Nyanga, which was their permanent home. The applicant and her husband worked together in a general dealer store and hardware shop at Nyanga. They had a single cab truck, UD truck and 5 tonne truck, which were for domestic and business use.

The respondent, who had been living in the United Kingdom for some 25 years, returned to Zimbabwe following the death of his brother. The applicant averred that, when she went back to Nyanga after the burial of her husband in Harare, the respondent had taken the keys to the shop from her bedroom. On 15 December 2020, the applicant went to the shop, but was told by the respondent that she was no longer welcome at either the shop or the house, 28 Demera Road, Rotchdale, Nyanga. She further asserted that she was forcibly evicted from her house at 28 Demera Road, Rotchdale, Nyanga, and her personal property had been removed from the premises. In

addition, she alleged that she had been denied access to the general dealer and hardware shop. She also submitted that, before the respondent's actions, she had been in peaceful and undisturbed occupation of both her house and the general dealer and hardware shops. Finally, she contended that the respondent had no right to resort to self-help and act without a court order. Hence, she approached this court by way of an urgent court application for spoliatory relief.

The application came before me on 3 February 2021 during the time of the Covid-19 lockdown restrictions. This application was considered on the papers filed by the parties without oral argument, in accordance with *paragraph 4* of Practice Directive 2 of 2021 issued by the Chief Justice of Zimbabwe. The said directive, in the relevant part, reads as follows:

**“Part III: Hearing of urgent chamber and bail applications (4)** With effect from 22 January 2021, a Judge may consider and dispose of an urgent chamber or bail application on the papers without calling the parties to make oral representations or arguments”. **[My own emphasis]**.

I granted an order (which I will the **first order**) in the following terms:

**“IT IS ORDERED THAT:**

Pending the return date and any order granted on that day, the following interim relief is granted:

1. The respondent shall not without an order of court, evict the applicant from the properties known as 28 Demera Road, Rotchdale, Nyanga; the general dealer store numbers 10 and 11 Inyanga Village, Nyanga and the hardware shop at Inyanga Village, Nyanga, or otherwise interfere with the applicant's peaceful possession/occupation and use of the said properties.
2. (a) The respondent and/or any person claiming right of possession or use through him shall forthwith return to the applicant the single cab truck, UD truck and 5 tonne truck.  
(b) Failing compliance with paragraph 2 (a) of this order, the Sheriff or his lawful deputy with the assistance of members of the Zimbabwe Republic Police, is hereby authorized and empowered to recover from the respondent or any person who may be in possession or use of the property named in paragraph 2 (a).  
(c) For the purposes of enforcing paragraph 2 (a) the Sheriff or his lawful deputy shall be accompanied by the applicant who shall identify and point to the Sheriff or his deputy the aforesaid motor vehicles.
3. The Sheriff or his lawful deputy with the assistance of members of the Zimbabwe Republic Police is hereby authorized and empowered, within 24 hours of service of this order, to remove the respondent, his agents, employees and any persons claiming right of occupation or use through him from the properties known as 28 Demera Road, the general dealer's store numbers 10 and 11 Inyanga Village and the hardware shop, Nyanga”.

Reasons for my order have since been requested, and I now provide them.

**Whether the matter was urgent**

As I dealt with the application on the papers, I first considered whether the matter was urgent and justified jumping the queue. The allegation in the applicant's papers was that she was in undisturbed possession and had been despoiled of that possession without a court order. She was therefore urgently seeking restoration of the *status quo ante*. It is also pertinent to note that a spoliation application is by its very nature urgent, given that peaceful and undisturbed possession would have been disturbed without due process. The position of the law was aptly put by KUDYA J (as he then was) in *Gifford v Muzire & Ors* 2007 (2) ZLR 131 (H) in the following words:

“It seems to me that the preservation of law and order and the prevention of self-help in the resolution of disputes place an application for spoliation in this unique position. To wait for the ordinary time limits and procedures to apply would undermine these salutary aims and encourage the usurpation of the due process by the strong and well connected at the expense of the weak and disadvantaged. In determining whether a matter involving spoliation is urgent, the court will in the exercise of its discretion obviously be guided by the specific averments of fact that are made in the particular case before it.” [My own emphasis].

I considered this matter to be urgent and granted the first order appearing above.

### **The respondent's case**

The respondent filed his opposing affidavit on 8 February 2021. He averred that his late father (Abdul Karim Jooma) had two companies, Kashmir Trading (Pvt) Ltd (“Kashmir Trading”) and Kashmir Investments (Pvt) Ltd (“Kashmir Investments”), in which he and the applicant's late husband were directors. Additionally, he said that after his brother's death, he became the only director. He added that Kashmir Investments owns 28 Demera Road, and attached its title deeds. In addition, he averred that Kashmir Investments owns 10 and 11 Inyanga Village, Nyanga, and provided the title deeds. Further, he submitted that the general dealer shop and hardware store are run by Kashmir Trading, and attached the shop licences issued in January 2021. The respondent also stated that Kashmir Trading owned a Nissan Diesel vehicle (registration number AAN 4562), while the Nissan UD truck belonged to his brother (Bashir Abdul Karim Jooma). He attached the registration books for these vehicles. Mr Jooma asserted that he continued to run the businesses after his brother died. He concluded that the applicant was unhappy about this and filed the present application. I have confirmed that I issued an order, which I described as “the first order”. During the hearing of the application, I issued two other orders, and will now explain how this came about.

### **The issuance of two subsequent orders**

This matter was due to be heard on 10 June 2021. On that day, Mr Rodgers Matsikidze attended the hearing and advised that the estate of the late Faruk Adbul Karim Jooma had been registered with the Master of the High Court under DR 132/21. He also advised he had been appointed the executor and wished the estate to be joined to the proceedings in order to protect its interest. Mr *Nyakatsapa*, for the applicant also informed the court that the respondent had defied the first order which I issued on 3 February 2021 and had, instead, obtained two orders for the eviction of the applicant in the Nyanga Magistrates Court under CIV 9/21 and Harare Magistrates Court under Comm 117/21. In addition, Mr *Nyakatsapa* raised the doctrine of “dirty hands” and submitted that the respondent should not be heard until he had complied with the first order’

In light of the above information and in order to protect the integrity of the proceedings before me and efficacy of my eventual decision, I issued an order as follows:

**“IT IS ORDERED THAT:**

1. The hearing of this matter is hereby postponed to 17 June 2021 at 12:00 noon.
2. The following directions are hereby given:
  - (a) The records of proceedings in Nyanga Magistrates Court CIV 9/21 and Harare Magistrates Court Comm 117/21 are hereby subpoenaed to be placed before Chinamora J on 17 June 2021 at 12:00 noon and married to the record in HC 74/21.
  - (b) The Registrar of the High Court shall subpoena the following persons to appear before Chinamora J on 17 June 2021 at 12:00 noon in relation to Case No. HC 74/21.
    - (i) Mr P Kufakwaro of LT Muringani Legal Practitioners, 1 Aidre Road, Eastlea, Harare.
    - (ii) Mr Peacemaker Katiyo of 181, 2<sup>nd</sup> Street, Harare.
    - (iii) Mr Rodgers Matsikidze, No. 7 Frank Johnson Drive, Eastlea, Harare.
    - (iv) The Master of the High Court or any official authorized by him to attend the hearing of Case No. HC 74/21.
    - (v) Mr Zaleekhah Islam of No. 7 Valiand Road, Ridgeview, Harare.
3. There shall be no order as to costs in connection with the postponement of today’s hearing.

Mr Matsikidze had advised me that the estate of the late Faruk Adbul Karim Jooma was now registered with the Master of the High Court, and that an executor had been appointed. Additionally, Mr *Nyakatsapa* had informed me that the first order had not been complied with, and that two orders of the Magistrates Court had effectively undermined the first order. I therefore issued the above order motivated by section 176 of the Constitution. That provision allows this court to regulate its own processes in the interest of justice.

After I had perused the records from Nyanga and Harare Magistrates Courts, on 17 June 2021 (although the order says 16 June 2021), I issued the following order:

**“IT IS ORDERED THAT:**

Pending the determination of the application filed as HC 74/21, the following orders are given:

- (a) The following orders issued by the Magistrates Court shall not be executed.
  - (i) The eviction order issued by the Magistrates Court at Nyanga under Case No. CIV 9/21.
  - (ii) The eviction order issued by the Magistrates Court at Harare under Case No. Comm 117/21.
  - (iii) If any of the said orders has been executed to evict the applicant herein, the applicant shall forthwith be reinstated into occupation of the premises named in the said orders, namely:
    - A. House No. 28 Demera Road, Rotchdale, Nyanga and the general dealer store known as numbers 10 and 11 Nyanga Village and Stand 818 Nyanga Township,
    - B. No. 45 Herbert Chitepo Street, Harare.
  - (iv) In the event of non-compliance with this order, the Sheriff or his lawful deputy or assistant is hereby authorized and empowered to restore the applicant herein into occupation of the aforesaid premises with the assistance of the police and a locksmith if need be”.

Reasons were requested for the orders which I issued. My judgment will deal with why I issued the three orders in this case.

**Analysis of the case**

The applicant contended that the respondent had despoiled her of the property known as 28 Demera Road, Rotchdale, Nyanga; the general dealer store numbers 10 and 11 Inyanga Village, Nyanga and the hardware shop at Inyanga Village, Nyanga, as well as the single cab truck, UD truck and 5 tonne truck, which were in her possession. For the relief she seeks to succeed, the applicant must show that it was in peaceful or undisturbed possession of the said property, and that it was forcibly or wrongfully dispossessed without her consent. (See *Botha & Anor v Barret* 1996 (2) ZLR 73 (SC).

At the time that I issued the first order on 3 February 2021, there was nothing to controvert the applicant’s allegations, especially, that she was in peaceful possession of the aforesaid property and the respondent did not act in terms of an order of court or with any other lawful basis which allowed him to dispossess her of the property. Consequently, I came to the conclusion that an act of despoliation of the applicant had occurred in the manner alleged. The applicant was, therefore, entitled to spoliatory relief. In this respect, the law makes it clear that once an applicant demonstrates that he was in peaceful or undisturbed possession, and that he was dispossessed forcibly or wrongfully without his consent, then spoliation is established. This court set out this trite position of the law appositely in *Chisveto v Minister of Local Government* 1984 (1) ZLR 248 (H) in the following words:

“The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party ... lawfulness or otherwise of the applicant’s possession of the property does not fall for consideration”.

Having reached the conclusion that an act of spoliation occurred, the law is clear that the relief sought ought to be afforded.

I have already explained that the second order was issued in terms section 176 of the Constitution, which permits this court to regulate its processes if justice so demands. The order to ensure that the Magistrates Court records are placed before me in order to verify that indeed orders which have the effect of undermining an order of this court had been issued. This order was to all intents and purposes an interlocutory case management order.

After perusing the two records from the Magistrates Court in Nyanga and Harare, it was evident that the court did not have jurisdiction to deal with the eviction matters brought before them. In this respect, no evidence was placed before the court to establish jurisdiction. Nor did the court enquire into the value of the occupation to ascertain whether or not it had the requisite jurisdiction. (See *Mutangiri and Ors v Mutema and Ors* HMA 6-18). It is trite that if a court lacks jurisdiction, the order of eviction emanating from it is a nullity. (See *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S)). In this context, it is imperative to examine section 11 (b) (iii) of the Magistrates Court Act which deals with the jurisdiction of the Magistrates Court in eviction/ejectment matters. This provision was extensively examined by Justice MAFUSIRE in *Mutangiri and Ors v Mutema and Ors supra*. Section 11 (b) (iii) reads:

“Every court shall have in all civil cases, whether determinable by the general law of Zimbabwe or by customary law, the following jurisdiction –

- (i) ...
- (ii) ...

(iii) in actions of ejectment against the occupier of any house, land or premises situate within the province:

Provided that, where the right of occupation of any such house, land or premises is in dispute between the parties, such right does not exceed such amount as may be prescribed in rules in clear value to the occupier”.

The Magistrate's Court is different from the High Court in that it can only deal with matters that it is permitted to deal with by the Magistrates Court Act [*Chapter 7:10*]. In other words, it is not imbued with inherent jurisdiction. In light of this reality, by issuing eviction orders without first establishing its jurisdiction, the Magistrates Court in Nyanga and Harare acted *ultra vires* the Magistrates Court Act. See *Hatfield Town Management Board v Mynfred Farm (Pvt) Ltd* 1963 (1) SA 737, where it was held:

“It has repeatedly been stated that the Magistrates Court is a creature of statute and has no jurisdiction beyond that granted by the statute creating it...and may claim no authority which cannot be found within the four corners of the statute”.

The effect of an order granted in the absence of jurisdiction was spelt out by the Supreme Court in *Muchakata v Netherburn Mine supra* at 157B-C, where KORSAN JA accepted the following:

“If the order was void *ab initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it. As Lord Denning MR so exquisitely put it in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 at 1172I:

‘If an act is void, then it is in law a nullity. It is not only bad, but incurably bad ... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.’”

Sight must not be lost of the fact that I am seized with an application under HC 74/21 whose integrity and efficacy must be maintained till proceedings are finalized. Yet the two orders of the Magistrate's Court in Nyanga and Harare have created an absurd situation where they are in conflict with the order granted on 3 February 2021, and have impeded the enforcement of the spoliation order. This cannot be allowed to happen if our courts are to function properly. I do not find any reason grounded in law or common sense for me not to ignore an invalid order granted without jurisdiction. In fact, there is support for my view. In this respect, it is interesting to note that in *Folly Cornishe & Anor v Topwamwa NO & Ors* SC 26/14, GARWE JA referring to *Muchakata v Netherburn supra* made the following germane observation:

“To the above remarks by KORSAN JA that it does not matter when and by whom the issue of validity is raised, **I would add that it matters not how the issue is raised or what procedure is adopted.** If it is clear upon a consideration of all the circumstances, that an act is void, then everything that is predicated on that act would be equally void”.

**[My own emphasis]**

At any rate, *Manning v Manning* 1986 (2) ZLR 1 (SC) at 3G-4A, is authority for the proposition that a declaration of invalidity is unnecessary. MCNALLY JA appositely remarked that:

“..judicial decisions will ordinarily stand until set aside by way of appeal or review, but to that rule there are certain exceptions, one of them being that, where a decision is given without jurisdiction, it may be disregarded without the necessity of a formal order setting it aside – per FANNIN J in *Mkhize v Swemmer & Ors* 1967 (1) SA 186 (D) at 197C-D”.

Relying on the above authorities, my view is that a legal basis exists for me to ignore orders granted by the Magistrates Court, and issued the order that I granted on 17 June 2021.

### **Disposition**

It for the reasons set out above that I granted the three orders in these proceedings.

*T Pfigu Attorneys*, applicant’s legal practitioners  
*Dhlakama B Attorneys*, 1<sup>st</sup> respondent’s legal practitioners