

REPORTABLE (141)

SARAH ANNABELLE LUCY CARTER

v

(1) KATHLEEN NORAH MACINTOSH (Represented by Edward Mark Warhurst the Executor of the Estate Late Kathleen Norah McIntosh)

(2) PARKS AND WILDLIFE MANAGEMENT AUTHORITY

**SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, BHUNU JA & CHATUKUTA AJA
HARARE: 19 NOVEMBER 2020 & 15 NOVEMBER 2021**

T. Magwaliba for the appellant.

J. Woods for the first respondent

BHUNU JA:

[1] During happier times the 1st respondent leased her bird and game sanctuary to the appellant. Upon termination of the lease the appellant lost the contest for ownership and possession of animals at the sanctuary in the High Court (the court *a quo*). She now appeals to this Court for relief.

FACTUAL BACKGROUND

[2] At the 22 kilometre peg along the Harare Shamva Road lies Bally Vaughan Bird and Game Sanctuary. The first respondent and her late husband established the sanctuary sometime in 1990 mainly for the care of birds and animals in need of care. At the time of litigation in the court *a quo* she was the sole surviving owner of the sanctuary.

- [3] The primary source of animals for the sanctuary was through donations from members of the public. Funding was mainly derived from donations and sale of animals at the sanctuary.
- [4] Owing to a conglomeration of advanced age and injuries sustained in a road traffic accident the first respondent was wheelchair bound and unable to represent herself in a court of law. She was however lawfully represented by one Gordon Rees Putterill the deponent to the opposing affidavit duly authorised thereto by power of attorney. She is now deceased and was duly substituted according to law by the executor to her estate one Edward Mark Warhurst.
- [5] It is common cause that on 1 June 2010 the appellant and the first respondent concluded a written lease agreement. The contract was to endure for a period of 3 years expiring on 31 May 2013. The material terms of the contract provide as follows:

“AGREEMENT OF LEASE entered into by and between Mrs K N McIntosh (Hereinafter “called The Lessor” on the one part and Miss S. A. L. Carter (Herein after called the tenant)

Whereas the lessor is the registered owner of the operation known as Bally Vaughan Bird and Game Sanctuary situated in the Arcturus [CA District of Goromonzi].

And whereas the Lessor has agreed to let to the Tenant the aforesaid immovable property, as more fully set out in Annexure ‘A’ which also includes details of immovable property being kitchen and catering equipment, restaurant furnishings and fittings of the two restaurants known as the “Duck or Grouse restaurant”, all birds and animals that were resident within the area known as the Bally Vaughan Bird and Game Sanctuary on one October, 2005 water pump, cold room motor and Mazda B2500 pick-up truck.” (The emphasis is mine)

NOW THEREFORE IT IS AGREED AS FOLLOWS:

“Subject to the provisions of this lease, the lessor hereby lets to the Tenant who in turn hires from the lessor the leased premises and equipment specified In Annexure ‘A’

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4 Income derived from the sale of animals resident on the farm on 1
October, 2005 shall be divided equally between the Lessor and the
Tenant, and income from the sale of birds resident on 1 October 2005
shall be divided as follows:
45 per cent to Lessor, 45 per cent to Tenant and 10 per cent to staff as a
bonus.
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11 In the event of the death of the Lessor or the Tenant, during the currency
of this lease, this lease agreement shall be binding on the legal
representative of the Lessor or the Tenant until the date provided for the
expiry thereof.
12
13 In the event of the Tenant failing to pay the rent or committing any
breach of this agreement and failing to remedy such breach within
fourteen days after receipt from the Lessor of written notice requiring
the Tenant to so remedy such breach, the Lessor shall be entitled to
cancel this lease without any prejudice to any action for the recovery of
rent or any loss or damage arising from such lease.”

[6] Following disagreements, the first respondent lawfully evicted the appellant from her sanctuary by court order in November 2013 on grounds of breach of contract. Upon her eviction the appellant sought to relocate the disputed animals to Twala Trust Sanctuary in the same district. The disputed animals are listed as:

Domestic animals

- (ii) 3 cows
- (iii) 3 pigs
- (iv) 11 sheep
- (v) 16 donkeys
- (vi) 4 goats

Wild animals

- (i) 3 male lions
- (ii) 4 female lionesses
- (iii) 1 female spotted hyena
- (iv) 2 serval (male and female)
- (v) 1 male meekat
- (vi) 1 male genet
- (vii) 1 male zebra
- (viii) 2 female common duikers
- (ix) 1 male bush baby
- (x) 3 female baboons
- (xi) 13 marmoset monkeys
- (xii) 13 vervet monkeys

[7] The appellant's claim was premised on a vindicatory or possessory order. The first respondent objected to the translocation of the animals from Bally Vaughan Sanctuary claiming ownership of the same animals. To protect her title and interest in the animals she applied for and obtained a temporary interdict from the Magistrates Court blocking the appellant from removing the animals from the sanctuary pending determination of ownership of the disputed animals by the courts. The temporary interdict is in the form of a *rule nisi* dated 3 July 2015 crafted in the following terms:

“IT IS ORDERED THAT:

1. A rule nisi issue ... in the following terms:
 - (i) That pending a court determination on the ownership of the birds, animals, equipment and motor vehicles on Bally Vaughan Bird and Game Sanctuary, 22 km peg, Shamva road, first and second respondents be and are hereby temporarily interdicted from removing any birds, animals, equipment and motor vehicles from the said premises.

- (ii) In the event of the Respondents failing to comply with this order, or any part thereof, that the Zimbabwe Republic Police, Juru or any attested member of the Zimbabwe Republic police be and are hereby authorised to enforce the Order and for so doing, this shall be their warrant.
- (iii) First and second respondents shall pay costs of suit on a legal practitioner and client scale.”

[8] The appellant did not violate the terms of the above temporary interdict but properly took the dispute to the court *a quo* claiming the right to relocate the animals by virtue of being the rightful owner and possessor of the animals. On the other hand, the first respondent resisted the appellant’s claim on the basis that she was the lawful owner and in *defacto* lawful possession of the disputed animals.

[9] In the court *a quo*, the appellant claimed ownership and possession of the disputed animals on the basis that in terms of the lease agreement she only leased the animals that were on the sanctuary as of October 2005. All the other animals that came onto the sanctuary thereafter were donated to her as her personal property. Her claim was based on vindication and or a possessory order.

[10] The first respondent countered that the appellant was not leasing Bally Vaughan as a sanctuary for animals donated to her but for animals donated to the sanctuary. She therefore as owner of the sanctuary assumed ownership of the animals regardless of who had facilitated the donations.

[12] As we have already seen, the court *a quo* resolved the dispute in favour of the first respondent. It now behoves this Court to determine the correctness or otherwise of the judgment *a quo*.

ISSUES FOR DETERMINATION ON APPEAL

[13] Despite having raised 7 grounds of appeal which are in the main prolix and argumentative, before us Mr *Magwaliba* for the appellant abandoned all the other issues raised in the grounds of appeal leaving only one issue for determination on appeal. He submitted that the sole issue for determination is, whether the court *a quo* was correct in restricting itself to ownership. I now turn to determine that issue.

WHETHER THE COURT A *QUO* WAS CORRECT IN RESTRICTING ITSELF TO THE QUESTION OF OWNERSHIP.

[14] Right from the onset I must point out that the way the sole issue for determination is crafted is misconceived and misleading in so far as it gives the impression that the learned judge *a quo* did not determine the question of possession. In his concluding remarks the learned judge *a quo* had this to say at page 11 of his cyclostyled judgment:

“The hurdles which stand in the way of the application are many and varied. The applicant could not succeed under the given circumstances. **She could not establish a prima facie case in respect of the animals, let alone proof of ownership or possession of the same albeit on a balance of probabilities.**” (My emphasis)

[15] It is plain that the learned judge was not guilty of any omission to determine the issue of possession as alleged by the appellant. This really should be the end of the matter because the sole issue to be determined is founded on the wrong and false misapprehension of the reasons for judgment. Notwithstanding the defect, I proceed to briefly ventilate the validity of the appeal on the merits.

[16] The appellant’s submission before us presupposes that the appellant is no longer contesting the issue of ownership on appeal. That amounts to a concession that the first respondent is in fact the owner of the disputed animals. That concession was well made

because there is overwhelming evidence before us that the animals were donated to the institution called **Bally Vaughan Bird and Game Sanctuary** owned by the first respondent. The written lease agreement makes no provision whatsoever for the appellant to keep her own animals on the Sanctuary. It only permitted her to lease and not to own animals on the sanctuary. Donors could not have donated animals to the appellant for safe keeping in her personal capacity when she had nowhere to keep them in her personal capacity.

[17] The natural inclination and presumption at law is that the owner of land is presumed to own all property on his/her land until the contrary is proved. In *Chetty v Naidoo* 1974 (3) SA 13 (A), the Appellate Court held that:

“It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withdraw it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right.)”

[18] The above proposition of law was quoted with approval in *Savanhu v Hwange Colliery Company* SC 8/15 and in *Indium Investments (Pvt) Ltd v Kingshaven (Pvt) Ltd & Ors* SC 40/15. The cited cases make it abundantly clear that it is only the owner who can vindicate. The appellant having failed to prove that she was the owner of the disputed animals, could not vindicate the animals from the first respondent. The court *a quo* was therefore correct in dismissing the appellant’s claim for vindication because she failed to prove ownership of the animals.

[19] We have already seen that case law establishes that the owner is entitled to possess the property which he/she owns. No one can take away that property from the owner without

his/her consent save where the claimant has proved that he/she has some lawful residual right to possess the property such as contractual or retention rights.

[20] The appellant having failed to prove ownership of the disputed animals the ball was squarely in her court to prove that she had the right to possess the animals despite not being the owner. Her claim for the right to possess the animals was grounded on her claim of ownership of the animals. Her failure to prove ownership of the animals automatically by operation of law divested her of the right to possess the animals because the law vested the right of possession on the owner.

[21] Her lease agreement with the first respondent could not assist her because according to her claim the contract did not apply to the disputed animals. It only applied to the animals resident at the sanctuary on 1 October 2005. These animals were not the subject of the dispute. The dispute only related to the animals that came to the sanctuary after 1 October 2005.

[22] In any case the lease agreement terminated when she was evicted from the sanctuary. She could therefore not continue to hold onto the first respondent's property on the basis of an expired contract.

[23] In the final analysis we find that the appellant having failed to prove ownership of the disputed animals, had no legal basis to claim possession of the animals from the owner. That being the case, the learned judge *a quo*'s judgment is unassailable.

DISPOSAL

[24] In the result it is ordered that the appeal be and is hereby dismissed with costs.

MAVANGIRA JA: I agree

CHATUKUTA AJA: I agree

Kantor and Immerman, the appellant's legal practitioners

Matizanadzo, 1st respondent's legal practitioners