

CHARLES NYATHI
versus
ESTATE LATE PHILEMON NCUBE MABUZA
and
TANDIE MABUZA N. O
and
MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO JANUARY 18 & 19, 2018 & APRIL 11, 2019

CIVIL TRIAL

J. Ndubiwa, for the plaintiff
T. Sibanda, for the 1st and 2nd defendants

BERE J: On 21 July 2015 the plaintiff issued process out of this Court against the first and second defendants with the 3rd defendants merely cited in his official capacity. In the action the plaintiff sought to recover from the 1st and 2nd defendants a sum of USD144 864-00 being damages for unjust enrichment arising out of improvements allegedly made by the plaintiff on the latter's Kalanga Farm.

The plaintiff also sought to recover interest on the amount of claim at the prescribed rate from the date of issue of summons to date of payment in full together with costs of suit.

THE BACKGROUND

The facts which are not in dispute are that in an earlier judgment of this court under HB179/13 this Court cancelled an agreement of lease between the plaintiff and the 1st and 2nd defendant and evicted the plaintiff from the leased farm, *viz*, Kalanga Farm owing to default in rental payments by the plaintiff.

In the case in question the now plaintiff's claim of having purchased part of Kalanga Farm was dismissed and the court made a specific finding that the plaintiff was a mere lessee on the farm who had breached the terms of his tenancy, hence the order of his eviction.

Having been evicted in 2013 the plaintiff subsequently issued the instant process in 2015 wherein he sought to recover the aforementioned sums of money.

PLAINTIFF'S CASE

In his declaration, the plaintiff alleged that the late Philemon Ncube Mabuza who was his uncle had successfully cancelled their lease agreement under judgment number HB179/13. Plaintiff further alleged that during the subsistence of the lease agreement he had carried out "necessary developments and improvements" on the farm to the tune of US\$144 864-00, as a result of which he had been impoverished and the defendant unjustly enriched in equal measure.

THE DEFENDANT'S DEFENCE

After being furnished with further particulars upon request the defendants took the position in their plea that the plaintiff was not at all entitled to the amount claimed or to any amount at all.

The defendants stated that the plaintiff's improvements were not authorized at all and further that the plaintiff took a monumental risk by stubbornly continuing with the construction of the improvements despite being advised against it by the defendants.

They also stated that the improvements were not for the benefit of the defendants but were for the exclusive benefit of the plaintiff during the currency of the lease agreement which was subsequently terminated.

In conclusion the defendants sought the dismissal of the plaintiff's claim with an appropriate order of costs.

THE EVIDENCE

The evidence in this trial consisted of the plaintiff's narration of events coupled with the tendering of documentary exhibits. The plaintiff reciprocated in the same manner.

By agreement of all the parties involved, the court carried out an inspection *in loco* at the farm in question where it saw for itself the built structure and the land cleared for a garden as well as crop farming activities.

THE PLAINTIFF'S EVIDENCE IN COURT AND AT THE INSPECTION *IN LOCO*

Mr Charles Nyathi (the plaintiff) opened his evidence by appraising the court of his relationship with the late Philemon Ncube Mabuza whom he said was his uncle. The witness said in 2001 he negotiated and concluded a verbal sale agreement for Usher Paddock for Z\$1 000 000 000-00 (one billion Zimbabwe dollars). The payment was to be done in instalments. Usher Paddock was a portion of Kalanga Farm owned by the deceased.

The plaintiff informed the court that in 2002, after paying the deceased part of the purchase price he started clearing part of the sold portion in preparation for farming operations. He said his activities included limited crop farming and cattle fattening which he was jointly involved with the deceased.

The witnesses said since he had purchased Usher Paddock, he embarked on the construction of a house at the farm which he valued at Z\$ 200 000-00 (two Hundred thousand Zimbabwe dollars). He used bricks which were moulded at the farm for which he swapped for pavers which the deceased wanted for his house in 4 Wings in Bulawayo. The witness further told the court that he initially built a 2 roomed servant's quarters and then followed that up with the construction of the main structure which the court saw on the inspection *in loco*. The court noted that the structure in issue is an imposing house built in the country side which would qualify to be in the urban set up.

Throughout his testimony the witness maintained that he embarked on this unauthorized construction on Usher Paddock because he had purchased it. When the witness's attention was drawn to the lease agreement which he signed in 2006, the witness said that it was a sham agreement, which had nothing to do with the actual arrangement between him and the deceased as the deceased wanted to keep the alleged purchase of Usher Paddock as a secret.

In his evidence in chief, the witness conceded that the lease agreement did not speak to improvement on the farm. Under precise and pointed cross examination the plaintiff conceded

that when he built the structures on Usher Paddock, he did not seek authorization from the defendants as he had purchased the portion of the farm.

It was also quite significant that under cross-examination the plaintiff conceded that having been evicted by this Court and found liable to pay the defendant's outstanding rentals flowing from the breached lease agreement, the plaintiff did not appeal against that judgment. I will come back to deal with this aspect later in this judgment as I deal with the analysis of the evidence.

Of further significance in the plaintiff's evidence was his admission that after he had been evicted from the farm he went back to occupy the farm as he did not regard that he had been lawfully evicted, thereby prompting a subsequent action of contempt of court action under case number HC856/15.

THE DEFENDANTS' EVIDENCE

Ms Thandie Mabuza, the deceased's wife gave evidence on behalf of the defendants. The witness's evidence commenced with the production her letters of administration as the executrix of the deceased's estate and the deed of transfer confirming the estate's entitlement to the farm in question.

The witness went into the history of the acquisition of the farm and zeroed in on the lease agreement (exhibit 2) which according to her was the only official known document which allowed the plaintiff to be in occupation of Usher Paddock.

The witness denied the claimed purchase of a portion of Kalanga Farm by the plaintiff. She also maintained that the defendant never authorized the plaintiff to construct any structure on the farm. In this regard the witness referred the court to exhibits 6 & 7 which documents confirmed the existence of the lease agreement and the latter advising the plaintiff against embarking on any construction on the farm.

The witness concluded her evidence by pleading with the court to assist her in removing the plaintiff from the farm as he had continued to be a thorn in the flesh to the family because of his determination to defy a court order that spoke to his eviction.

ISSUES FOR DETERMINATION

The joint pre-trial minutes signed by both parties and filed in this Court identified the following issues as relevant in the determination of the dispute between the parties:

- “1.1 Whether or not Plaintiff carried out improvements on Kalanga Farm prior to the year 2009.
- 1.2 If so, the exact nature, extent and costs of improvements made on the Property
- 1.3 Whether or not the Defendants have been unjustly enriched by the improvements highlighted in 1.1 and 1.2 above and if so, the extent of such enrichment.
- 1.4 Whether or not the plaintiff is at law entitled to compensation for unjust enrichment for improvements made at Kalanga Farm.”

ANALYSIS OF EVIDENCE

In a well-reasoned judgment this Court, under judgment number HB179/13, by MUTEMA J (as he then was) made a specific finding that the plaintiff was a lessee of the defendants and had breached various clauses of the lease agreement (exhibit 2 in these proceedings). That judgment was not appealed against by the plaintiff. Despite this, however, the plaintiff has remained defiant. He has not shown respect for this very court from which he seeks to get relief. The plaintiff's brazen courage to defile the law is demonstrated by the fact that even after he had been evicted from the farm by the sheriff he defiantly decided to go back to the farm because in his own words, “I did not regard that as a lawful eviction”. This attitude is unacceptable and in this regard I can do no more than regurgitate the position taken by CHIDYAUSIKU CJ (as he then was) in the case of *Associated Newspapers of Zimbabwe (Pvt) Ltd vs Minister of State for Information & Publicity and Others*¹ where he echoed the following didactic remarks:

“The principle that a citizen who disputes the validity of a law must obey it first and argue afterwards is founded on sound authority and practical common sense ...A situation where citizens are bound by only those laws they consider constitutional is a recipe for chaos and a total breakdown of the rule of law.”

¹ 2004 (1) ZLR 538 at p 539 A-B

In the recent case of *Paul Muwoni v Rodgers Brothers & Son (Pvt) Ltd & Others*² I commended on the behavior of those litigants who fail to obey court orders as follows:

“Failure to respect such orders for no good cause amounted to naked contempt which is intolerable by the very authority that seeks to do justice between man and man.

In the American case of *Togara v Casaus* reported in the second series of the American Law Reports (49 A.L.R.2nd) p1419 the trial judge at p 1423 of the judgment commented on an appeal lodged by a defendant who had willfully avoided the process of the court and punishment in the following words:

“Such flagrant disobedience and contempt effectually bar him from receiving the assistance of an appellate tribunal. A party to the action cannot with right or reason ask the aid and assistance of a court in hearing the demands, while he stands in an attitude of contempt to legal orders and processes of the courts of the State.”...

In the South African case of *S v Nkosi* 1963 (4) SA 87 the learned Judge HILL J (as he then was) quoted with approval at page 88D-E of his brief judgment the wise and instructive words of DE WAAL J (as he then was) in the case of *Mulligan v Mulligan*, 1925 W.L.D 164 at page 166 to 168 where the learned judge stated:

“...Before a person seeks to establish his rights in a court of law he must approach the court with clean hands; where he himself, through his own conduct makes it impossible for the process of the court (whether criminal or civil) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil right and interests...were the court to entertain a suit at the instance of such a litigant it would be stultifying its own processes and it would, moreover, be conniving at and condoning the conduct of a person, who ...sets law and order in defiance.”

When the defendant testified that despite obtaining a court order against the plaintiff and actually evicting him through the official lawful process, but had continued to be a thorn in the flesh by disobeying the court order, that did not project the plaintiff in good light. The position must always be re-stated over and over again that those citizens who approach our courts with their hands soaked in contempt of the very same court must be frowned upon and have the doors of justice slammed against them.

It is clear that the judgment of this Court which dismissed the plaintiff’s claim of having purchased Usher Paddock is extant and the plaintiff has done nothing to challenge it but has chosen to disobey it.

² . HB22718 at p. 9

The plaintiff's case, according to his declaration was founded upon a lease agreement (exhibit 2). But when the plaintiff testified, he devoted the bulk of his testimony in trying to show that his case was centered on a sale agreement, an issue which was considered and dismissed by this Court in case number HB179/13, (Exhibit 5). Such stubbornness did not help advance the plaintiff's cause.

The evidence tendered in this Court suggests beyond doubt that the plaintiff carried out certain improvements on Kalanga Farm. There is no doubt that in the process the plaintiff was impoverished by such improvements. The question that then arises is whether such improvements unjustly enriched the defendants.

In answer to this the only witness for the defendants simply said that such improvements were not authorized and did not enrich them as they were done for the exclusive benefit of the plaintiff. I am fully aware that there is a line of authorities in this country and beyond that have laid down the principles that govern a general enrichment action. In *Industrial Equity v Walker*³, BARTLET J identified the prerequisites for a general enrichment action which can be summarized as follows:

- “1. The enrichment to the defendant;
2. The improvement to the plaintiff in the process of enriching the defendant;
3. The enrichment must be unjustified;
4. The enrichment must not come within the scope of one of the classical enrichment actions;
5. There must be no positive rule of law which refused an action to the impoverished person”

It occurs to me that where a claim for unjust enrichment flows from alleged improvements made as in this case, at the heart of the summarized requirements must be either actual or implied authorization for such improvements by the defendant. One cannot just embark on unauthorized improvements in the hope that they can build a case of unjust enrichment. The defendant's witness was emphatic in her testimony that the improvements

³ . 1996 (1) ZLR 269 (H) at p270 C-D

were not authorized. Exhibits 6 and 7 are the documents that corroborate the stance taken by the witness. If there was any need for corroboration for lack of authorization, then that came from a very unlikely source, the defendant himself. The following exchange in cross examination of the plaintiff confirm this:

“Question to plaintiff:

Defendants say they never authorized you to make improvements on their farm.

Answer by plaintiff:

There was no reason for me to wait for their permission since I had purchased the property.”

It is the court’s view that if there is no authorization or consent for the improvements made, a case on unjust enrichment stands on shaky ground. It would be strange that a man who decides to go on an unsolicited expenditure in improving leased property is allowed to come back to haunt the leasor by demanding compensation. R. H Christie, in his book, *Business Law in Zimbabwe*⁴ makes the position clear when he states:

“Useful improvements may be defined as those which enhance the value of the property, and it is in respect of these that the Placaat bears most heavily upon the tenant. Instead of the full right of compensation given to a *bona fide* possessor (*Fletcher and Fletcher vs Bulawayo Waterworks Co Ltd* 1915 AD 636) he is entitled to nothing if he made improvements without the owner’s consent. “my emphasis.

The basis upon which the plaintiff built the structure now in issue was the purported sale agreement which this Court shot down in HB179/13, which judgment remains extant even as I write this judgment. The defendants have made it abundantly clear that they do not require the improvements unlawfully made on their farm.

In my well-considered view, this must signal the end of the plaintiff’s claim. The plaintiff’s claim is not well anchored.

The lease agreement (exhibit 2) which the plaintiff breached and led to his eviction does not speak to any improvements on the property.

DISPOSITION

In conclusion, I am more than satisfied that the plaintiff’s case lacks merit.

⁴ . Reprinted in 2014, by Juta & Company Ltd, at p295

I accordingly order as follows:

1. That plaintiff's case be and is hereby dismissed with costs.
2. That the plaintiff dismantles the structure illegally built on Kalanga Farm within 30 days from the date of this order failing which the Sheriff, at the expense of the plaintiff shall dismantle same.

Messrs Mashayamombe & Company, plaintiff's legal practitioners

Messrs James, Moyo-Majwabu & Nyoni, defendant's legal practitioners