

JULIET MUCHA
versus
PHILIMON MUCHA

PLAINTIFF
DEFENDANT

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 1, 2 and 8 October 2009

Civil Trial

Plaintiff, in person
T Govere, for defendant

THE BACKGROUND

BERE J: On 22 July 2008, the plaintiff issued summons out of this court seeking the following:

- (a) an order compelling the defendant to release to her 16 herd of cattle, plough, scotch cart axle, 2 size 16 tyres with tubes and rims, 75 litres of petrol and water pump
- (b) costs of suit.

The facts as given by the plaintiff which gave rise to this suit can be summarised as follows:

The plaintiff and her husband Isaiah Mucha are married in terms of the Marriage Act [*Cap 5:11*] (formerly *Cap 37*) and they jointly own the property forming the subject matter of this suit. At the time the plaintiff issued out summons her husband was critically ill as a result of a serious assault perpetrated against him by the defendant who happens to be a brother-in-law to the plaintiff. That relationship stems from the fact that the defendant is a brother to the plaintiff's husband.

The plaintiff and her husband stay at house number 7718 Kambuzuma 3, Harare but have their rural home in Chikomba. Their cattle at their rural home were left in the custody of the defendant who would look after them and would from time to time account for them to the plaintiff and her husband. This is a common rural practice in this country where many families have basically two homes, one urban and the other a rural one.

In 2000, at the height of the land reform exercise in this country the defendant was resettled at plot 51 MuGreek farm in Marondera district and when he relocated to that place he took with him the plaintiff's cattle

After he had settled at his new place, the defendant approached the plaintiff and her husband and asked to be lent a water pump, plough, scotch cart axle, 2 tyres with tubes and rims both size 16, and he undertook to return these items once he was on his feet.

In July 2007 the plaintiff's husband went to the defendant's new place to collect the items alluded to in the summons. The result was a near fatal assault on him by the defendant ostensibly to prevent him from getting the family property. When the plaintiff unceremoniously left the defendant's homestead on this day he left behind a motor vehicle with 75 litres of petrol.

In his plea to the plaintiff's claim the defendant flatly denied ever keeping the plaintiff's cattle and suggested "the cattle in question were in fact kept by the defendant's parents¹".

The defendant further alleged he only left his original home in Chikomba for MuGreek farm with his six herd of cattle.

As for the other items the defendant denied ever getting them in the manner suggested by the plaintiff or at all. His was a total denial of liability.

At the pre-trial conference held on 16 July 2009 both parties identified basically two issues namely:

- (a) whether or not the plaintiff's cattle were being kept by the defendant if so, whether or not the defendant took the cattle with him when he relocated to the resettled area; and
- (b) whether or not the defendant was given a scotch cart axle, two x size 16 tyres with tubes and rims, water pump and 75 litres of petrol by the plaintiff. If so whether or not the defendant is supposed to return them to the plaintiff.

THE EVIDENCE

Four people gave evidence in this case. The plaintiff and her husband testified in favour of the plaintiff's case. The defendant and his son Evanz Mucha testified in favour of the defendant's case.

¹ para 2 of the defendant's plea

Where closely related family members are the key witnesses in trial proceedings the court has to exercise extreme caution because chances of being misled are extremely high. Throughout the recording of the evidence in this case, I remained alive to this reality.

The plaintiff opened her case by giving evidence to the effect that prior to his relocation to MuGreek farm in Marondera, the defendant was looking after the family's cattle that is, (the plaintiff and her husband's cattle). She testified further that upon his relocation to Marondera, the defendant took the family cattle with him.

It was the plaintiff's testimony that prior to the defendant's relocation in Marondera, there appeared to be no problem at all.

To confirm the fact that the plaintiff and her husband had cattle in Chikomba the plaintiff produced their 1986 stock card exhibit 5 which showed that the family had nine herd of cattle in the district of Chivu. The stock card bore the official stamp of the Animal Health Inspector. On that card the dip tank is given as Mpatsi, a factor which was confirmed by both the defendant and his son Evanz.

Further to this both the plaintiff and her husband Isaiah Mucha testified that after the defendant had settled at MuGreek farm, he paid the family a routine visit at their Kuwadzana home here in Harare to officially notify them that he had taken the family's cattle with him to MuGreek farm. It was Isaiah Mucha's evidence under cross-examination that the defendant had specifically told him that he had taken advantage of the chaotic situation associated with the movement of resettled farmers in 2000 to drive the cattle to MuGreek farm without any paper work. The court will take judicial notice of the fact that indeed, the movement of resettled farmers which spontaneously occurred in 2000 did not necessarily follow strict laid down procedures when it came to the movement of cattle and other related domesticated animals. It was an error of free for all.

It was also the plaintiff's husband's unchallenged testimony that following the visit by the defendant to Kuwadzana, the plaintiff's husband himself made a follow up at MuGreek farm whereupon arrival, he was shown 19 herd of cattle by the defendant's daughter Linda (as directed by the defendant) who further revealed to him that the 20th animal had died and part of its remains were stacked in 2 x 50 kg bags in the form of dried meat which the witness was supposed to take to Harare for family relish.

It was his evidence that on this occasion the defendant was not there but whatever Linda told her was in fact instructions coming from the defendant.

This witness further testified that after this visit he went back again to MuGreek farm and arranged with the defendant about the collection of the cattle and at that stage there appeared to be no problem at all.

The witness further gave evidence under cross-examination to the effect that when he last saw the family cattle in 2007 he was shown 41 fully grown animals and 7 calves and that it was his intention when he finally went to collect the animals that he would discuss with the defendant the number of cattle he would leave for the defendant in appreciation of the work that he had done in looking after the cattle.

Both the plaintiff and her husband gave a flawless account of how the defendant paid them a visit at Kuwadzana and asked for and was given a water pump, tubes, scotch cart, axle and the other items mentioned in the summons. It was Isaiah Mucha's evidence that he actually took these items from his car pot and handed them over to the defendant and loaded them into his motor vehicle and drove the defendant to Mbare Musika from where he boarded public transport to MuGreek farm with the items. The arrangement was that these items would be returned once the defendant had settled down at his newly found home.

According to the plaintiff and her husband, things fell apart when the later went to muGreek farm on a Saturday to collect some of the family cattle. The plaintiff's husband had driven alone and on this day he was subjected to a severe assault by the defendant having been hog-tied. The reason for the assault was to prevent the plaintiff's husband from taking the family cattle as well as the other property mentioned in the summons.

Although the plaintiff's declaration gives the impression that she had gone to MuGreek farm with her husband on this fateful day, the court makes a specific finding that the plaintiff only followed her husband on a Sunday the very day she rescued him from the vicious assault by the defendant.

This clarification was provided by both the plaintiff and the defendant in their evidence in chief and in evidence given under cross examination.

It is also the court's finding that the assault that took place when the plaintiff's husband went to collect the family's property, occurred on 8 July 2007 and not 28 July 2007 which the plaintiff explained must have been a typographical error by her erstwhile legal practitioners.

As for the claim for seventy five litres of petrol allegedly drained by the defendant, the claim arose from the fact that when the plaintiff's husband drove to MuGreek farm to collect the family cattle and the other property he had filled up his motor vehicle with seventy six litres of petrol. In addition he had carried twenty litres of fuel in a container. The plaintiff's husband's uncontroverted testimony was that he must have used fifteen litres or so from Harare to MuGreek farm.

The result of the plaintiff's husband's unexpected assault was that the plaintiff and her husband unceremoniously left MuGreek farm and when they did so the defendant remained with both the motor vehicle and the unused fuel.

The plaintiff produced exhibits numbers I and II to show that she needed a court order and a warrant of arrest to compel the defendant to release the motor vehicle. It was the unchallenged evidence of the plaintiff that when the car was eventually recovered it had no fuel. The court therefore finds no hesitation in concluding by inference that the defendant must have used the fuel and the plaintiff's claim under this heading is therefore justifiable.

In denying the claim by the plaintiff, the defendant denied ever keeping the plaintiff and her husband's cattle and denied ever receiving the other family items.

The defendant argued that the cattle he took from Chikomba to MuGreek farm were his as the plaintiff and her husband did not have any cattle.

The defendant produced his own stock card exhibit 7, and exhibit 6 the movement of animal permit.

The plaintiff's position was that the stock card was a fake document as it bore no official stamp. It referred to Munyati Kraal whereas the correct kraal ought to have been Madyangove, so her argument went. Above all, the plaintiff drew the court's attention to the defaced name of the card holder as well as the identity number of the card holder which had been interfered with.

In addition, the stock card made reference to the dip tank as Honeyspruit instead of Mpatsi which was the communal dip tank for both the plaintiff and the defendant in Chikomba district.

The reservations raised by the plaintiff are quite evident on exhibit 7. The stock card has no official date stamp from the Animal Health Inspector and there is overwhelming evidence of interference both on the name of the card holder and the identity number.

It was quite curious that both the defendant and his witness did not know Honeyspruit as their dip tank. Not only that but both concurred that Munyati was not the name of their kraal head.

In the court's view, the authenticity of the plaintiff's stock card is beyond reproach but the same cannot be said of the defendant's stock card. That document is a fake document which was brought in in a stout effort to confuse issues in order to mislead the court.

Exhibit 6 did not in any way advance the defendant's position because it makes specific reference to plot 49 Munyati when in fact it is common knowledge that the defendant was a resident of Madyangove kraal (not a plot holder then) in Chivu district before resettling at MuGreek farm in Marondera.

Secondly, the movement of the animals reflected on exhibit 6 is restricted to the district of Chivu and yet the cattle were supposed to be moved to the district of Marondera.

It is not surprising that even the classification of the animals on both the permit and the stock card was not confirmed by the defendant's witness, Evanz.

What is clear from both exhibits 6 and 7 is an unmistakable determination by the defendant to lie to this court.

Not only did the defendant lie in this regard, but he made a feeble attempt to deny the existence of exhibits 1 and 2. Not only that but he took his dishonesty a gear up by trying to deny that he is currently facing the charge of assault²

It was only the production of form 53 by the plaintiff which silenced both the defendant and his counsel in this regard.

The credibility of both the plaintiff and the plaintiff's husband cannot be doubted in this case.

For the plaintiff, almost everything she referred to was backed up by documentary evidence. Exhibits 1 to 5 confirm the observations made by the court, when the plaintiff's husband said he was assaulted, exhibit 4 confirmed that.

The genuineness of the plaintiff's stock card was largely confirmed by the defendant himself and Evanz particularly their confirmation of the name of the kraal head and the name of the dip tank.

When the plaintiff testified that the defendant was keeping their family cattle that must be accepted. This position is further confirmed by none other than the defendant when he gave conflicting views on this issue. In his evidence in chief the defendant tried very hard to convince the court that the plaintiff and her husband had no cattle under his custody. In his summary of evidence the defendant says, these cattle were being kept by the plaintiff's father in-law. In one breath he said the cattle were in fact being kept by their mother. Lies know no boundary and the defendant was caught up in a web of his own lies.

It was equally amazing that when the defendant through his counsel was given an opportunity to cross-examine both the plaintiff and the defendant, the cross-examination did not focus on the many issues that the defendant raised in his evidence in-chief. Such issues like who accompanied the plaintiff's husband when he went to collect his cattle at

² c/s 89 of the Criminal Law (Codification and Reform) Act *Cap 9:23*

MuGreek farm, the wild allegations that the plaintiff's husband was displaying signs of insanity and the further allegations that he was trying to take their mother as a wife were never tested under the cross-examination of both the plaintiff and her husband. It is doubtful that if the defendant had told his counsel about all these details, his counsel would not have cross-examined the witnesses on these very important issues. One can only conclude that the defendant was trying to make up his case as the evidence unfolded.

Evanz was of virtually no assistance to the defendant because by his own admission, he did not have an independent knowledge of what he told the court. He tried to feed the court with purely hearsay evidence.

His testimony was quite limping. He could hardly remember when his father the defendant purchased cattle, neither could he remember the classification of his father's cattle at the time the family went to settle at MuGreek farm.

The plaintiff's husband testified that at one stage he was shown nineteen herd of cattle and in 2007 he saw forty one herd of cattle and seven calves. If out of these animals the plaintiff makes a conservative claim of only sixteen cattle, surely she cannot be penalised for that.

In the end I am satisfied that the plaintiff's claim is a legitimate one and she has been able to establish it on a balance of probabilities.

Before I conclude this matter I must comment on the lackadaisical conduct of the defendant's counsel.

Upon concluding, the recording of evidence in this matter I implored both the unrepresented plaintiff and the defendant's counsel to submit their written submissions on or before 5 October 2009.

The unrepresented plaintiff submitted her written submissions in time but as I write this judgment now (8 October 2009) the defendant's counsel has not bothered to submit his submissions. Such conduct is deplorable particularly if it is coming from an officer of this court.

Everything said, I am inclined to make the following order:

- (a) That the defendant be and is hereby ordered to release to the plaintiff within ten working days of the granting of this order, sixteen herd of cattle, one plough, scotchcart axle, 2 x 2 size 16 tyres with tubes and rims, water pump and seventy five litres of petrol.
- (b) That in the event of the defendant failing to comply with (a *supra*), the deputy sheriff be and is hereby ordered to enforce this order.
- (c) That the defendant pays costs of suit.

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Plaintiff In person

Coghlan, Welsh and Guest, defendant's legal practitioners