

TREVOR GIFFORD
versus
I. MUGOMBA
and
MUYESU
and
RONALD MUCHENGA
and
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
CHIWESHE JP
Harare, 30 June 2010

T. Manda, for the applicant
I. Ndudzo, for the first respondent
Ms C.M. Dube for the second to third respondents

CHIWESHE JP: The applicant seeks a spoliation order in the form of a provisional order couched as follows:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms.

- (a) The forcible ejection from Wolverhampton Farm of the applicant by the first to third respondents and all those acting in concert with them is unlawful.
- (b) The cutting of the applicant’s gum plantation and sale of the timber by the first respondent and those acting through him is unlawful.
- (c) The fourth respondent shall do all that is necessary to give effect to or enforce the terms of the above orders.
- (d) Respondents shall pay the costs of this application

INTERIM RELIEF GRANTED

Pending finalization of the matter, the following relief is granted;

- (i) First to third respondents and all those acting through or in concert with them claiming occupation or in possession of the applicant’s house on Wolverhampton farm, Chipinge and shall restore possession and occupation of the house to the applicant who is hereby entitled forthwith to resume occupation of the house and to continue his farming operations without hindrance, interference or obstruction.
- (ii) First respondent and those acting through him shall not harvest applicant’s gum plantation and shall not sell the timber.
- (iii) If necessary fourth respondent shall do all that is necessary to enforce the terms of this order.

SERVICE OF PROVISIONAL ORDER

1. Service of this application and provisional order shall be made on the respondents by applicant's legal practitioners and/or the Deputy Sheriff, Harare."

According to the applicant on 13 June 2010 him and his wife were at home at Wolverhampton Farm, Chipinge District when first, second and third respondents came to their home in a motor vehicle. The three respondents were in the company of some youths. The applicant says the respondents ordered him and his wife to pack their belongings and vacate the house. The applicant refused to vacate saying he was due to attend a court case at the Chipinge Magistrates Court the following week (I understood it to be the case in which he would have been prosecuted for refusing to vacate gazetted land). The respondents would not listen to any of the applicant's pleas and in fear for their safety the applicants packed what they could and left the house at around midnight.

Respondents demanded the keys to the house and these were duly handed to them. The applicant says they were in the time given unable to remove most of their property including livestock, farm equipment, tractors, implements and household effects. The applicant says before he left, the respondents forced him to sign a note stating that he had left the house empty. The applicant says that since their departure no one is looking after their property including crops and livestock. Further he states that the first respondent is already cutting down gum trees on the farm and selling same.

The second and third respondents failed to attend despite service of the notice of set down having been effected, nor did they file any papers. The fourth respondent is not opposed to the grant of the order sought and will abide by the court's ruling.

The first respondent has filed a notice of opposition and an opposing affidavit. In that affidavit he states that he is a business person running a bakery and two shops in Chipinge. He is a lawful beneficiary of the land reform programme in terms of an offer letter issued to him by the acquiring authority on 10 February 2009. He has been allocated subdivision 19 of Wolverhampton farm in Chipinge measuring one hundred and fifty hectares. He is one of nineteen new farmers who were allocated land on the farm. He states that most of the new farmers have been taking up their plots since 2004. He has moved onto the fields within the boundaries of his allocated plot. He denies the allegations of spoliation leveled against him and specifically denies committing any acts of looting and theft as alleged. He says that the applicant removed his belongings from the farm house on 13 June 2010 and left other property in the hands of one Magaisa, applicant's clerk. He

says he has duly moved onto the farm fields which the applicant had not been using in the last three years. The fields had been abandoned and therefore the question of spoliation does not arise. He says he and his employees have been on the fields since beginning of the 2009-2010 farming season. He denies occupation of the farm house and says the second and third respondents told him that the applicant had left voluntarily. He produced a note signed by the applicant to that effect. He denied cutting down applicant's gum trees and blames the other new farmers resettled on the farm for doing so. He further states that this application has been filed for purposes of delaying the applicant's trial at the magistrates court set down for 30 June 2010. He produced his offer letter duly signed by the Acquiring Authority.

In addition, he produced an official map of the farm indicating that the farm is on the Model A2 type of resettlement and showing the subdivisions made in pursuance of that objective. The subdivisions are numbered one to eighteen and the hectrage on each of them indicated. There is no subdivision 19. The only plot measuring 150 hectares is plot 17. I assume that is the plot the first respondent is referring to. That might suggest that the offer letter is defective in so far as it indicates a plot number not reflected on the resettlement subdivisions. Both the applicant and the first respondent say the applicant's house and the first respondent's fields are on the same plot, the one that measures one hundred and fifty hectares. I will assume that to be plot number 17 on the map.

(Papers received from both the applicant and the first respondent during the course of writing of this judgment confirm my construction of the history of the farm and the identification of subdivision 17 as the property to which the present dispute relates. I am indebted to both counsel for their prompt response in that regard)

During the hearing of the matter *Mr Maanda* for the applicant advised that the criminal charge pending at Chipinge Magistrates Court against the applicant had been withdrawn before plea. I have not seen official confirmation of that development. Assuming that to be the case, it is a development that is consistent with what the applicant told the court so far as the history of the farm is concerned. He says that the subdivisions on the farm are a result of agreement between him and the acquiring authority in terms of which the rest of the farm would be offered to new farmers and he would retain that portion of the farm on which the main house and outbuildings are located, measuring one hundred and fifty hectares. I assume this portion to be plot number 17 erroneously referred to as subdivision nineteen on the first respondent's offer letter.

Secondly and also consistent with the history of the farm, new farmers have been taking up the rest of the plots since 2004. The applicant has not raised any issues against them and appears to be in peaceful co-existence with them.

The problem seems to arise with the arrival of the first respondent, armed with the offer letter dated 10 February 2009. If the offer letter, as I presume, relates to the same subdivision on which the applicant's house is situated and in respect of which the applicant, given the history of the farm, believes to have been specifically reserved for his use and occupation, then conflict is bound to arise.

It appears to me then that the applicant, prior to the arrival of the first respondent and more dramatically before the events of 13 June 2010, was in peaceful and undisturbed possession of plot 17 measuring one hundred and fifty hectares. It is the respondents who, without due process, have sought to despoil the applicant's possession. They were not even prepared to wait for the outcome of the criminal proceedings against the applicant scheduled for 13 June 2010.

I would dismiss the first respondent's defence on the grounds that the applicant's version of events is more probable and consistent with the history of the farm. I believe the first respondent was directly involved in the events of the thirteenth of June 2010. In any event by his own admission the first respondent is occupying the same plot as the applicant. The applicant has not been evicted from this plot through due process of law and therefore the first respondent cannot take up the plot without the applicant's consent. To say that he has not been involved in the removal of applicant from the house and is therefore not to blame is no defence to the present application. The fact remains that he is on that subdivision occupied by the applicant. It does not matter whether he has chosen to confine himself to the fields or any other portion of the applicant's subdivision.

Accordingly, I reject the first respondent's defence to this application. As for the second and third respondents an order will be made against them in default. The fourth respondent does not oppose the application or any order that the court may deem appropriate. Given the history of the farm it would be imprudent to grant an order covering the whole farm. Plot 17 measuring 150 hectares is the subject matter of this application. The rest of the farm is occupied by persons other than first, second and third respondents. Those persons have not been cited as respondents and it would be improper to bring them under the purview of the present order. In any event I get the impression that the applicant has agreed with the allocations made in respect of the rest of the new farmers hence the peaceful co-existence.

The provisional order is granted in the following terms:

That you show cause to this Honourable Court why a final order should not be made in the following terms.

TERMS OF FINAL ORDER SOUGHT

- (a) The forcible ejectment from subdivision 17 of Wolverhampton Farm of the applicant by the first to third respondents and all those acting in concert with them is unlawful.
- (b) The cutting of the applicant's gum plantation and sale of the timber by the first respondent and those acting through him is unlawful.
- (c) The fourth respondent shall do all that is necessary to give effect to or enforce the terms of the above orders.
- (d) Respondents shall pay the costs of this application

INTERIM RELIEF GRANTED

Pending finalization of the matter, the following relief is granted;

- (i) First to third respondents and all those acting through or in concert with them claiming occupation or in possession of the applicant's house on subdivision 17 of Wolverhampton farm, Chipinge, shall restore possession and occupation of the house to the applicant who is hereby entitled forthwith to resume occupation of the house and to continue his farming operations on subdivision 17 of Wolverhampton farm (measuring one hundred and fifty hectares) without hindrance, interference or obstruction.
- (ii) First respondent and those acting through him shall not harvest applicant's gum plantation and shall not sell the timber.
- (iii) If necessary fourth respondent shall do all that is necessary to enforce the terms of this order.

Maunga, Maanda & Associates, applicant's legal practitioners
Mutamangira & Associates, first respondent's legal practitioners
Civil Division of the Attorney General, for second to third respondents