

AGNES PARADZA  
versus  
BRIGHTON PARADZA  
and  
PEER PARADZA  
and  
ZANDA PARADZA  
and  
GILBERT MKWENA  
THE OFFICER IN CHARGE  
(CHITUNGWIZA POLICE STATION)  
and  
THE OFFICER COMMANDING  
(CHITUNGWIZA POLICE STATION)  
and  
THE COMMISSIONER GENERAL  
OF THE ZIMBABWE REPUBLIC POLICE  
and  
THE CO-MINISTERS OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE  
GUVAVA J  
HARARE, 29 September 2011 & 7 October 2011

FAMILY LAW COURT

**Urgent Chamber Application**

*N. Mugiya*, for the Applicant  
1<sup>st</sup> 2<sup>nd</sup> & 3<sup>rd</sup> Respondents in person  
4<sup>th</sup> Respondent in default  
*P. Rusinga*, for 5<sup>th</sup> to 8<sup>th</sup> Respondents

GUVAVA J: This matter in my view highlights some of the glaring conflicts between customary law and the general law. This matter presented itself before me in chambers on a certificate of urgency in terms of r 244 of the High Court Rules 1971 as amended. The applicant sought an order in the following terms:

**"TERMS OF FINAL ORDER SOUGHT**

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

1. That first, second, third, fourth and fifth respondents be and are hereby barred from evicting applicant from property known as house number 16351 Unit M Seke, Chitungwiza.
2. That first, second, third and fifth respondent are barred from visiting the applicant at stand number 16351 Unit M Seke, Chitungwiza
3. The first, second, third and fourth respondents be ordered to return the items listed on para 17 of the founding affidavit to the applicant.
4. The first, second, third, and fourth respondents pay costs on a higher scale

#### INTERIM RELIEF GRANTED

Pending the confirmation of the final order sought, the applicant is granted the following relief:

1. That first, second, third and fourth respondents are ordered to reinstate or restore the applicant possession of house number 16351 Unit M, Chitungwiza and all the property listed in para 17 forthwith.
2. That first, second and third respondents are interdicted from interfering with applicants peaceful possession of stand No 16351 Unit M Seke Chitungwiza.
3. That should the first, second and third respondents fail to comply with para 1 above, fourth and fifth respondents are ordered to restore applicants possession.
4. Should the first, second, third and fourth respondents have taken occupation of stand No 16351 Unit M Seke Chitungwiza, that they be ordered to vacate the same forthwith."

The facts giving rise to this matter are common cause and may be summarized as follows. The applicant married the late Wilbert Paradza (the deceased) in terms of the Marriages Act [*Cap 5:11*] on 4 December 2002. At the time of their marriage the deceased was a widower aged 44 and the applicant was 19 years old. This marriage followed the death of his first wife for whom applicant had worked as a maid. The deceased and his first wife had three children. The first respondent in these proceedings is the deceased's eldest child. On 15 May 2007 the deceased died and left an immovable property being house number 16351 Unit M, Chitungwiza. He had acquired this property

with his late wife but continued to reside there with the applicant as their matrimonial home. Following the deceased's death the applicant continued to reside on the said property. In 2007 the applicant proceeded to register the estate with the Master of the High Court under reference DR601/07. The applicant was duly appointed executrix of the deceased's estate. She has since filed a first and final distribution plan wherein she seeks to be awarded the immovable property as the deceased's surviving spouse. The distribution plan has been approved by the master but his decision is being challenge by the first respondent and his two sisters in case number HC3586/10. The matter is presently pending in this court.

In the middle of the night on 23 September 2011, the first, second and third respondents arrived at the house in the company of three police officers from Chitungwiza Police Station. They broke down the doors and removed the applicant forcibly from her home together with her five day old baby. They alleged that she had been unfaithful to her dead husband. The applicant was unceremoniously bundled into a truck and driven to her rural home in Kanobvurunga Village, Chief Mutumba in Madziwa. The applicant left behind some household goods which she had been using in the home together with cash in the sum of US\$450.00. The first to fourth respondent have taken up residence at the property and will not allow the applicant to return.

The application was vigorously opposed by the respondents. The fifth to eighth respondents were represented by the Civil Division of the Attorney General's Office. They stated that they were not aware of the actions of the police officers who had assisted the respondents in removing the applicant. They stated that if indeed the police officers had behaved in the manner described then they had acted outside the scope of their duties. Mr *Mugiya* who was representing the applicants withdrew the claim as against the fifth to eighth respondents in the light of this evidence. The first to third respondents denied that they had forcibly removed the applicant from the house. It was their evidence that they had been living amicably with the applicant. The situation changed when she fell pregnant and matters came to a head when she gave birth to a baby boy and brought him home. The respondents were at pains to explain that culturally they could not stay with the applicant as she had brought into the family a child from another man. They

stated that after holding a family meeting it was agreed that the applicant should be taken to her parent's home. It was the respondent's case that she went of her own free will and was received by her family members. They were however adamant that the applicant could not return back to the house. They denied that they had brought the police in order to assist them in evicting the applicant. They stated that it was actually the applicant who had called the police to assist her.

The *mandamus van spolie* upon which the applicant relies is an extraordinary remedy which is granted by the court in order to prevent self help and unlawfulness in a civilized society. Its objective is without a doubt the protection of property. This principle has been set out in a number of judgments of this court. It was set out succinctly in the case of *Nino Bonino v de Lange* 1906 TS 122 where INNES CJ stated as follow:

"it is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether moveable or immovable. If he does so the court shall summarily restore the *status quo ante*, and will do that as a preliminary to an enquiry or investigation into the merits of the dispute" (see also *Dodhill (Pvt) Ltd & Anor v Min of Lands and Rural Resettlement & Anor* 2009 (1) ZLR 182 (H))

It is thus apparent from the above that the question of lawfulness of the possession of the property does not fall into consideration when such an application is made. The court is merely concerned with a two pronged enquiry which is:

1. Whether the applicant was in peaceful possession of the property
2. Whether the applicant was unlawfully dispossessed.

From the facts of this case it is clear that the applicant was in undisturbed possession of the property until the night in question. The first and second respondents confirmed this position as they say they were staying amicably with the applicant as she was their step mother. The first respondent submitted in his opposing affidavit that the applicant was not entitled to the property as it had been acquired by their parents prior to her marriage to their father. In my view however that argument has no bearing in an application such as the one before me. Her right to inherit the property is an issue which is already before this court and will be determined by that court. I am satisfied that the

applicant has met the first part of the enquiry and I move on to deal with the dispossession.

From the papers that have been filed before me there appears to be a dispute as to whether or not the applicant was removed forcibly or left of her own accord. The applicant submits that she was forced into a motor vehicle and driven away without her consent. The first respondent submits that after the meeting the applicant agreed to go to her parent's home as she had had a child with another man. He denied that they came in the company of police officers to evict the applicant. He alleges that she is the one who called the police in order to get assistance. The second respondent submitted that culturally they acted in a proper manner as they were obliged to return the applicant to her parents in view of the birth of the baby.

It seems to me that the dispute raised in the papers can properly be resolved on the papers. It is quite apparent from the papers that the birth of a baby by the applicant long after the demise of her husband has generated considerable emotion in the deceased's family. The meeting that was held that night could not have been an amicable one. Even if I were to accept the first respondent's version that it was the applicant who called the police to the house it paints a very vivid picture which shows that there was enough acrimony to entitle applicant to feel threatened enough to have called them in for assistance. She obviously did not want to leave. This is further confirmed by the promptness with which the applicant has filed this application. In my view all these factors point to the inevitable conclusion that the applicant was removed against her will.

The facts of the matter before me, in my view, bring to the fore the conflict between general law and customary law. On the one hand, the general law principles as set out in the cases cited above are very clear with regards to applications for spoliation. It is quite apparent on these facts that the applicant was despoiled of her possession of the house she was residing in. On the other hand the respondents can barely restrain themselves as they are of the view that the applicant should not remain in the deceased's house as she now has a child from another man. They argue that their actions were not to despoil the applicant but were in accordance with customary law.

It is however clear from the papers that the matter which has been brought before me falls squarely under general law. The applicant was married to the deceased in terms of the Marriages Act [*Cap 5:11*]. In determining the succession rights in this case the principles that will govern are obviously general law principles. I can find no basis upon which customary law would apply in this case.

The applicant stated that she had also been despoiled of some household goods and money in the sum of \$450.00. The first respondent filed a supporting affidavit of one Angella Joromani who stated that she had bought the fridge from the applicant. This evidence was not seriously challenged by the applicants counsel and I therefore find that the fridge was indeed sold by the applicant. The claim for US\$450.00 was not pursued with any vigor by the applicant. Apart from the bald averment in the papers there is no evidence where the money was kept or whether it was no longer where she had left it. In view of the first respondent's submission that the applicant would not have so much money as he was providing for her upkeep which was not disputed by the applicant, I find that the applicant has not established that she was in possession of this amount.

In the result I find that the applicant has established a *prima facie* case and is entitled to the interim relief that she seeks. I therefore make the following order:

Pending the confirmation of the final order sought, the applicant is granted the following relief;

1. That first, second, third and fourth respondents are hereby ordered to reinstate or restore the applicant's possession to stand number 16351 Unit M, Chitungwiza forthwith.
2. The first, second, third and fourth respondents are hereby ordered to restore to the applicant's possession forthwith the following property: room divider, kitchen unit, four piece set of sofas, coffee table, dining table and 24 inch colour TV.
3. That the first, second, third and fourth respondent be and are hereby interdicted from interfering with applicants peaceful possession of stand number 16351 Unit M Seke Chitungwiza.

4. That should the first, second, third and fourth respondents fail to comply with paras 1 and 2 of this order the Deputy Sheriff is hereby authorized to restore applicant's possession.
5. Should the first, second, third and fourth respondents have taken occupation of stand number 16351 Unit M, Seke, Chitungwiza they are ordered to vacate the property forthwith.

*Mupindu & Mugiya Law Chambers, applicant's legal practitioners*  
*Civil Division of the Attorney General's Office, 5<sup>th</sup> to 8<sup>th</sup> respondents' legal practitioners*