

MADZIMBAHWE HOUSING CO-OPERATIVE LTD
versus
KINGDOM PARK HOUSING SOCIETY
and
RASHID HLOMAI
and
ENOCK HWELA
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MWAYERAJ
HARARE, 27 and 29 July 2015 and 5 August 2015

Urgent Chamber Application

T Dvetero, for the applicant
F Chiwashira, for the 1st – 3rd respondents

MWAYERAJ: The application was placed before me through the urgent book. The applicant prays for a spoliation order as follows

“TERMS OF THE FINAL ORDER

That you show cause why an order in the following terms should not be granted;

1. The interim relief granted by this court on the ---- day of ----- 2015 be and is hereby confirmed

INTERIM RELIEF

Pending the return day, it is hereby ordered that;

1. Applicant, and those claiming possession through him, is hereby declared to have peaceful and undisturbed possession of:
 - (a) Land commonly known as remainder of Marimba Park Township, situated in the District of Salisbury, depicted on layout plan TPX/WR/03/12/1 being 39 stands and;
 - (b) Land commonly known as Portion of Stand 572 Marimba Park Township, situated in the District of Salisbury, depicted on layout plan TPF/WR/03/12/1 being 22 stands
2. 1st and 3rd Respondents are hereby ordered to return to Applicant status *quo ante* prior to this spoliation such that Applicant is returned its peaceful, quiet and undisturbed

possession, occupation and use of land commonly known as remainder of Marimba Park Township, situated in the District of Salisbury, depicted on Layout Plan TPX/WR/03/12 being stands 1061 to 1099 (3 stands) and land commonly as portion of stand 572 Marimba Park Township, situate in the District of Salisbury, depicted on layout plan TPF/WR/03/12/1 being 22 stands

SERVICE OF THE PROVISIONAL ORDER

1. Applicant's legal practitioners shall be and are hereby granted leave to serve this provisional order upon respondents."

The thrust of opposition as discerned from papers filed of record and oral submissions by Mr *Chiwashira* are as follows: that the matter is not urgent because as early as April 2015 the first to third respondents attempted to grade the land in question and the applicant reported to the police on three occasions. The respondent argued that if the matter was urgent then the applicant ought to have approached the court. The respondents further argued that when the need to act rose the applicant sat on their laurels thereby disqualifying the matter from being urgent.

The respondents also argued that they lawfully occupied the land on the basis of recommendation from the sitting member of Parliament for Kambuzuma Constituency; confirmation of land request by ZANU PF Secretary for Security; and, a letter from Joshua Nkomo District ZANU PF stating that the land must be allocated. (Annexures C, D and E) respectively were attached to opposition papers.)

In order to ascertain whether the matter is urgent or not, the brief background of the matter is provided has to be put into perspective. The applicants, through due process applied for, and were allocated two pieces of land by the fourth respondent, that is City of Harare. The Land was allocated for residential development as evidenced by supporting documents attached to the application.

The applicant settled payment for the land with the fourth respondent, City of Harare upon being requested by the latter. Again, this is supported by documents Annexure "K1" and "K2" attached to the application. The payment was effected on 12 June 2015. The applicant commenced bush clearance from 23 June 2015. The applicant acquired a total 61 stands (22 and 39) for residential development depicted on TPX/WR/03/12 New Marimba Park layout plan from the fourth respondent.

From April 2015, a group of individuals who identified themselves as members of the first respondent claimed ownership of the same land. This caused the applicants to report to the police and the respondents ceased interfering with the grading of the land in question. On

2 July 2015, the respondents came again and disrupted the applicant's development of the land by causing chaos and violence to those who were grading the roads. The applicant reported to the police. On 10 July 2015 the respondents again came to the land and pitched up cabins while at the same time driving away contract workers who were carrying out an engineering survey for sewer and water reticulation. The applicants, on realising that their peaceful and undisturbed possession was under threat, then approached this court to seek redress on an urgent basis.

It is apparent that the applicants having followed due process to acquire the land in question for development of residential stands, were in peaceful and undisturbed possession of property which they were working on. The application is for spoliation and as correctly observed by Mr *Dvetero* spoliation proceedings are generally treated as urgent. The applicants in compliance with the requirements of an urgent application did not wait for the day of reckoning but sprouted to action when the need arose. The criticism rendered to the applicant for first seeking recourse to the police does not taint the urgency of the matter. In assessing whether a matter is urgent, among other things the question of whether or not there are other remedies available falls for consideration. The applicant sought and exhausted domestic remedies by seeking police intervention. Initially the respondents stopped disturbing but when the respondents persisted and erected structures and "cabins" the applicant rightly approached the court on urgent basis. The applicant placed evidence before the court that it had been despoiled. The requirements for *mandament van spolie* are clearly outlined in *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-operatives and Others* 199 ZLR (2) 19 which was quoted with approval in *Augustin Banga and Kelvin Janes v Solomon Zawe and Others* in SC 54/14 the requirements are that

- (1) The applicant was in peaceful and undisturbed possession of the thing
- (2) He was unlawfully deprived of such possession.

In *casu*, the applicant's peaceful and undisturbed possession of the land lawfully acquired from the City of Harare (fourth respondent) has been unlawfully interfered with and disturbed by the coming in of the respondents. The purpose of *mandament van spolie* is to preserve law and order and to discourage people from taking the law into their own hands. See *Chisveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 248.

The respondents have on the basis of a recommendation by a political party official and application to them, viewed themselves as having better rights than the applicant which

they see as empowering them without due process to take the law into their own hands and impose themselves on the land in question. By so doing, the first to third respondents have forcefully and unlawfully disposed the applicant. It is this unlawful deprivation of peaceful possession which the court has to redress on an urgent basis. As correctly observed in *Nino Bonino v De Lange* 1906 TS 120 the status *quo* or possession *ante omnia* has to be restored even before the court dwells into the merits of the matter. It is my view that restoration is anchored on the principle that no-one should be allowed to take the law into their own hands as that would lead to anarchy and chaos. In the circumstances of this case, the unlawful intrusion by the respondents into the applicant's peaceful possession of land if unchecked on urgent basis given the potentially volatile nature of land disputes, would lead to lawlessness. It is for purposes of preserving the law that spoliation is generally viewed as urgent. For this I find solace in guidance given in the case *Karori (Pvt) Ltd and Another v Mujaji* HC 842/07. In that case it was stated further that spoliation by nature is urgent to preserve law and order and to stop and reverse self help in resolution of disputes between parties.

It is apparent from the papers filed of record and oral submissions that the applicants had a physical relationship with the property in question. They obtained the property after following relevant procedures and were in the process of developing the property. The first to third respondents, without following due process, unlawfully deprived the applicant of such peaceful and undisturbed possession. The circumstances of this case cry for urgent intervention in order to restore the status *quo ante*. Accordingly, the applicant's case for spoliation order has merit and the relief sought should be granted.

The application is one which cannot wait. Considering the cause of action and relief sought, waiting would cause irreparable harm. The application complies with the requirements of urgency.

Accordingly the following provisional order in favour of the applicant is granted.

TERMS OF THE FINAL ORDER

That you show cause why an order in the following should not be granted:

1. The interim relief granted by this court on 29th day of July 2015 be and is hereby confirmed.

INTERIM RELIEF

Pending the return day it is hereby ordered that;

2. Applicant, and those claiming possession through him, is hereby declared to have

peaceful and undisturbed possession of

- (a) Land commonly known as remainder of Marimba Park Township, situated in the District of Salisbury, depicted on Layout Plan TPX/WP/03/12 being Stands 1061 to 1099 (39) stands and;
 - (b) Land commonly known as portion of Stand 572 Marimba Park Township, situated in the District of Salisbury depicted on Layout Plan TPF/WR/03/12/1 being 22 stands.
3. First to third respondents are hereby ordered to return to applicant status *quo ante* prior to this spoliation such that applicant is returned its peaceful, quiet and undisturbed possession, occupation and use of land commonly known as remainder of Marimba park Township, situated in the District of Salisbury depicted on Layout Plan TPX/WR/03/12 being stands 1061 to 1099 (39 stands) and land commonly known as Portion of Stand 572 Marimba Park Township, situated in the District of Salisbury, depicted on Layout plan TPF/WR/03/12/1 being 22 stands.

SERVICE OF THE PROVISIONAL ORDER

4. Applicant's legal practitioners shall be and are hereby granted leave to serve this provisional order on the respondents.

Antonio & Dvetero, applicant's legal practitioners
Kanoti & Partners, respondents' legal practitioners