

FRANCIS MUGOMBA
versus
MAYOR RIMBO
and
RIMBO MINERALS (PVT) LTD
and
MINING COMMISSIONER

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 30 September 2015 & 29 June 2016

Trial

F Chauke, for the plaintiff
F Musihairambwe, for the 1st & 2nd defendants

MATANDA-MOYO J: This matter commenced as a court application wherein the plaintiff sought the following relief;

- 1) That the erection of a milling plant, workers compound and the carrying on of prospecting and mining at or near the area cleared for agricultural purposes by the first and second defendants be declared unlawful.
- 2) That the applicant should carry on his agricultural activities without hindrance or interference by the defendants.
- 3) That the defendants be precluded from leaving any bricks, sand or any other building materials on such land.

The first defendant opposed the granting of the above relief on the basis that he was the owner of certain mining blocks on the plaintiff's farm. Initially he submitted that the land was pegged as a milling station then later as mining blocks. Such conversion was done on 14 March 2012. He submitted that as the lawful owner of such mining blocks the court could not grant the relief sought.

At the hearing of the application the court found that there were material disputes of facts and referred the matter to trial. In its declaration the plaintiff alleged that the first and second defendants were occupying his land illegally. They had also failed to follow the law with regard to prospecting as such prospecting was done without his consent as the owner of the land in violation of the law. The first and second defendant countered that by alleging that consent was given by plaintiff's father who used to own the farm at the time. The first and second defendants claimed that it is infact the plaintiff who is disturbing their lawful mining activities. The defendants alleged that the clearing of land by the plaintiff for agricultural purposes on a site pegged for mining activities was clearly illegal. The first and second defendants prayed for the dismissal of the plaintiff's claim.

In terms of the joint pre-trial conference memorandum filed with this court on 11 March 2015 the following issues were referred for trial;

1. Whether or not the defendants followed all the necessary procedures for the registration of the claims and the subsequent conversion into blocks.
2. Whether or not the land was cleared before or after the registration of the blocks.
3. Whether or not the third defendant followed the procedures on receipt of a plan from the first two defendants in terms of the Mines and Minerals Act [*Chapter 21:05*] and
4. Whether or not the portion of land cleared by plaintiff is the only portion suitable for farming.

The plaintiff was the first to give evidence on his own behalf. His evidence was that he was the executor to the estate of the late Elias Mugomba. He testified that they bought the farm in 2005 and moved onto the farm that same year. He first came into contact with the defendants in 2008 when their workers started cutting down trees on their farm. He reported them to the third defendant who stopped the operations. This witness said he was concerned because no proper procedures were followed by the defendants before carrying on mining activities on the farm. In particular the plaintiff was supposed to be shown a siting of works plan as the occupier or owner of land so that should he had any concerns, they would be dealt with. To date no such plan was ever shown to him. This witness testified that it could not be true that his late father consented to the carrying on of running activities as it was this witness who was mining the farm from as far back as 2007. His late father did not inform him of that during his lifetime. This

witness testified that he never participated in any Environmental Assessment report. He testified that the defendants are digging everywhere leaving the dug area uncovered thereby posing a risk to humans and livestock. He testified that currently he has about 45-50 herd of cattle. Nobody is staying on the farm as it is no longer safe to stay there due to the illegal mining activities of the defendants. This witness produced a letter from the third defendant written on 4 October 2010. Its contents are as follows;

“REQUEST OR PROOF OF LEGALITY OF MINING ATIVITIES BY RIMBO ---

Reference is made to your letter dated 21 September 2010 on the issue captured above. ... be advised that my records indicate that Rimbo Minerals registered a site for purposes of a setting up of a mill and a compound on 10 December 2007. The registration number of the site is 112. We however note that to date Rimbo Minerals P/L have not yet submitted a Siting Works Plan which will be passed to you for comment, nor have they obtained an EIA, a process that would involve you being consulted ... Rimbo Minerals P/L have therefore no right to be constructing anything on your farm until the processes mentioned above have been successfully complied with.

..... Notification of registration of the site had erroneously been sent to your neighboring farm Mayflower Farm. The site is strictly for setting up a mill and compound only and no mining.”

This witness testified that should the defendants be allowed to carry on mining activities he would be unable to carry out his farming activities on the farm and that would destroy their source of livelihood. Under crosss-examination this witness insisted the first and second defendants are illegal miners as he has never been shown any registration papers. He also said land was cleared in 2005. Asked why he was now contradicting para 11 of his declaration he answered that land clearance started in 2005 and is continuing. Under re-examination he said the milling plant was situate in the land cleared for cultivation.

Irene Chenai Mugomba gave evidence on behalf of the plaintiff. She stays in Mt Pleasant Harare and is wife to the plaintiff. She testified that the plaintiff rents a room in Kadoma where where he stays. She said they could not stay on the farm due to problems with the first and second defendants. She confirmed that the land was cleared in 2005 for agricultural purposes. They do have cattle and goats on the farm. Asked whether this claim is not motivated by the desire by the plaintiff to go into mining, the witness conceded.

The first defendant gave evidence on behalf of the first two defendants. He testified that he is a director of the second defendant. He testified that his relationship with the plaintiff is bad. It was his testimony that he registered a mine which is located in the plaintiff’s farm in 2007 and

was given a go ahead to peg. At the time there were cyanidation tanks on the site that were vandalised. There were previous beacons showing previous mine and dug pits. When they got onto the farm they dealt with the plaintiff's father and the plaintiff's elder brother. This witness testified that he submitted Siting Works Plan to the Ministry of Mines, Kadoma and did the environmental impact assessment report in 2008. He submitted such receipt for the EIA report. It was this witness' testimony that problems started when the plaintiff was appointed executor of his late father's estate. The plaintiff tried to register the mine into his name and failed. The plaintiff disrupted his operations and even beat up his workers. The plaintiff accused him of killing his dogs. This witness testified he was not even aware that the plaintiff owned dogs on the farm. Nobody has been staying on the farm house for almost over ten years and the farmhouse is dilapidated. The first defendant testified that it was in fact the plaintiff who was cutting trees on the farm and selling firewood. As he was approaching the defendants' mine, they reported him to the Commissioner of Mines who ordered a stop to the cutting down of the trees. When the plaintiff assaulted the defendants' workers and was arrested, that is when he (defendant) made a false report to Forestry Commission that the defendants were cutting down trees on his farm. Investigations were done by Forestry Commission and the defendants were exonerated of any wrongdoing. Under cross examination this witness admitted that he registered a mill and compound site in 2007. He also admitted that he is carrying out mining activities on the farm. He said such activities are lawful. He also said they converted the sites to blocks in March 2012. The milling plant could not be completed as EMA stopped the construction and ordered that they redo the process.

Elias Rimbo also gave evidence before the court. He testified that there was no cleared field when they went on to the site. He confirmed he was once assaulted by the plaintiff and others and he reported the matter to police. The plaintiff was subsequently prosecuted.

It is common cause that the plaintiff is the executor of his late father's estate and has taken over the farm in question. Currently the plaintiff resides in Kadoma. No cropping is being done on the farm. There is some cattle on the farm and a herdboys looking after the farm. The first and second defendants moved onto the farm in 2008 for purposes of establishing a milling plant and constructing a compound. The construction of the milling plant has currently been stopped by EMA for purposes of the defendants complying with EMA requirements. The

plaintiff's story is believable in certain respects and of course there are obvious exaggerations in other areas. What came out from the plaintiff's testimony is that he is against the defendants carrying out mining activities on their farm. The plaintiff himself has taken an interest in mining on the farm as evidenced by his attempt to register the mine into his name. It is not very clear when the plaintiff came onto the farm. Initially his late father and elder brother were running the farm before he came onto the farm. The plaintiff did not give a satisfactory response when confronted with the question that his late father had allowed the defendants to prospect and register the mine on the farm. It became probable that the initial engagements were between the plaintiff's late father and the defendants. Without any contrary evidence the plaintiff failed to discharge the onus on him that the defendants came onto the farm illegally. I am of the view that the plaintiff's father indeed authorised prospecting by the defendants on the farm. However the defendants had to satisfy other requirements thereafter. The defendants were to prepare and submit a siting works plan which plan would be passed on to the landowner for comment. No such plan was submitted in court. The defendants had the onus to do so but failed to do so especially in the face of a letter from the Mining Commissioner which pointed out that the defendants had not submitted the siting of works plan nor had they obtained and (EIA) Environment Impact Assessment Report. The defendants only managed to submit a receipt showing they paid fifty four billion dollars for EIA review. Such receipt did not take the matter any further as it can never be used to prove that the process was done. The receipt only shows that monies were paid but is no proof that the assessment was carried out. The defendants also conceded that the Environmental Management Agency ordered them to stop operations as from 2013 for failure to comply with their regulations.

I am satisfied that from the evidence adduced it is clear that the defendants failed to follow all the necessary procedures for the registration of the claims and the subsequent conversion into blocks.

The plaintiff testified that the defendants failed to follow the procedure in registering the blocks. Section 37 of the Mines and Minerals Act requires the defendants to have given notice to the plaintiff as the owner of the farm. See s 38 (2) (b) which provides:

“Every person, before exercising any of his rights under a prospecting licence, special grant to carry out prospecting operations issued under subs (1) of section two hundred and ninety-one or

exclusive prospecting order on any land to which this section applies shall give notice of his intention to do so in whichever one or more of the following forms is applicable to the case –

(a)

(b) If the land is occupied private land, he shall give notice in writing to the occupier of the land in person or by registered letter addressed to the occupier at his ordinary postal address,”.

The plaintiff testified that he received no such notice. The defendants claimed they sent notices to the farm. However the defendants argued that from his own evidence, the plaintiff was of no fixed abode and it was difficult if not impossible to serve any notices on him. I do not agree. The plaintiff’s family resides in Harare and notices could have only been sent to the Harare address or even left on the farm with the herdboys. The defendants failed to produce copies of such notices sent to the plaintiff. However in terms of s 38 (7) of the Mines and Minerals Act, such failure to give notice does not invalidate the pegging of such mining location.

It is important to note that in terms of prospecting the farmer has no right to refuse prospecting. All mineral rights are vested in the state and the farmer does not therefore own what is underneath. Without such ownership it follows that the farmer cannot give permission. The farmer is only notified.

Section 45 (4) provides:

“When application is made for a certificate of registration of a block which has been previously registered and abandoned or forfeited the applicant shall furnish, if possible, the previous name and registered number of the block and so far as is possible only re-pegging of any location shall perpetuate the original name of such location”.

Section 45 (5) provides:

“If the holder of any location fails to apply for a certificate of registration in the manner prescribed within the period of thirty-one days he shall be deemed to have abandoned such block”.

The mining commissioner can extend that period for a further period not exceeding sixty-two days.

The plaintiff argued that by failing to convert the milling site/plant into blocks within the 31 day period provided above such conversion by the defendant is invalid. On the other hand the defendants argued that they took over an existing mining location which had previous approved plans. The plaintiff conceded that lawful mining used to take place on the site. The defendants argued that because the block was already in existence when they took over they were not

obligated to produce siting plans in terms of s 234 but could use the existing plans. The defendants referred me to s 242 for that proposition. Section 242 provides:

“242 Approved plan to be binding on successors in title

A plan approved under section two hundred and thirty-seven shall, subject to section two hundred and thirty-eight, be binding upon any holder or miner of the mining location upon any owner or occupier of the land.”

Whilst I do appreciate that there is a site plan by previous owners, such plans have not been produced in court and I am not privy to what is on the approved plan. The defendants’ case was not that they took over an existing mine but that they complied with the law in registering the blocks. It is my view that in the face of the letter from the Mining Commissioner that such plans were required, I cannot find otherwise; moreso without having had sight of previous plans.

The defendants also argued that in terms of s 239 they are permitted to carry out certain activities without approved plans. I agree with that submission. As long as whatever is constructed fall under the above section. For example dumps other than tailing and residences to house not more than thirty-two workers employed by the mining operations can be done without approved plan in terms of s 239. Section 239 (3) is very clear;

“For the removal of doubt it is hereby declared that a miner mentioned in subsection (2) may prior to the erection or construction of the works mentioned in that subsection lodge with the mining Commissioner for his approval in respect of such works the plan referred to in paragraph (a) of subsection (2) of section two hundred and thirty four.”

The defendants failed to show that they had lodged a plan with the Mining Commissioner and cannot therefore rely upon s 239. Section 239 is not applicable where no plan has been lodged with the Mining Commissioner.

Before me there is no proof that a plan was ever lodged by the first and second respondents to the Commissioner of Mines. The issue of whether the Mining Commissioner followed procedures on receipt of such plan therefore does not arise.

This leads me to the issue of the land in dispute, whether such land was cleared on or before the registration of the blocks and whether or not such land is the only portion suitable for farming.

From evidence from both parties it is common cause there is land which was cleared for farming purposes which land is inside the pegged area. The parties differ when such land was cleared. The plaintiff testified that such land was cleared in 2005 whilst the defendants testified

that, such land was cleared just before Pre-Trial Conference. The defendants testified that the field was being cleared in an existing claims block.

It is common cause that the farm in question was bought by the plaintiff's father in 2005. During that period it was the plaintiff's father who was in charge and later the plaintiff's brother. The plaintiff's evidence in respect to the clearance of land was fraught with inconsistencies. Under cross-examination he said land clearance is done over a period of time, suggesting that as late as during Pre-Trial Conference such land was still being cleared. I am of the view that such land was only cleared for purposes of clouding issues at trial. Such land fall under the land pegged for mining and the plaintiff has no right clearing such land. It has generally been conceded by the parties that the farm is for ranching and not cropping. The plaintiff can carry on farming activities in the way of cattle ranching.

Section 180 (12) gives the landowner or land occupier the right to graze stock or cultivate the surface provided it does not interfere with proper working of the mine. The clearing of land on land pegged for mining in so far as it was interferes with proper mining activities was unlawful. As I indicated above the defendants have failed to discharge the onus on them to show that such mining activities were proper

What did not come out clearly in the evidence is the distance between the cleared field and the homestead. The law is quite clear that the prospecting operations are not to interfere with the landowner's business activities hence the spelling out of land subject to prospecting. Prospecting cannot be done within 450 metres of the principal homestead, prospecting cannot be done on land under cultivation or within 15 metres thereof; See s 31 of the Act.

However the plaintiff had the onus to show that such land is located within 450 metres from the principal homestead. Without such evidence the plaintiff failed to discharge that onus. However this is a matter that the Mining Commissioner of the area should look into. The Mining Commissioner can visit the farm and ascertain the correct facts on the ground. I cannot over emphasize the need for the landowner and farmer to co-exist peaceful and to have good relations so that both business activities can thrive. Section 345 of the Mines and Mineral Act gives this court powers to refer any matter to a Mining Commissioner for investigation and report. It provides;

“(1) Except where otherwise provided in this Act, or the High Court shall have and exercise original jurisdiction in every civil matter, complaint, or dispute arising under this Act

and it in the course of any proceedings and if it appears expedient and necessary to the Court to refer any matter to a Mining Commissioner for investigation and report, the Court may make an order to that effect.”

I am of the view that despite my ruling this is a proper matter for such referral.

In the result I order as follows;

- 1) That the defendants are precluded from carrying out any mining operations without complying with the law
- 2) The 3rd defendant is directed to ensure that all legal processes are carried out before the defendants can resume operations.
- 3) That the defendants pay costs of suit.

Uriri Attorneys at law, plaintiff's legal practitioners
Lawman Chimuriwo Attorney at Law, 1st & 2nd defendants' legal practitioners