

STANLEY FARMS (PRIVATE) LIMITED

versus

MAVINGTON CHIDONGO

and

AMON KUNJE

and

GARIKAI MAFA

and

COSMAS SHUMBAIMWE

and

AMON TARUONA

and

TAKESURE CHIDONGO

and

NETSAI MAKONYE

and

MATTHEW MANDALELA

and

MOSES MUGARI

and

RAVIOUS MUSHAYANGONI

and

TAVENGWA NYIKA

and

NCELE PAUL

and

PHILIMON PAUL

and

CLEOPAS PHIRI

and

WALLAS PHIRI

and

COLLEN TAVENGWA

and

WASTING TIME

and

ANDREW TSOKA

and

TARUVINGA ZIVANAI

and

OLIVER BWITITI

and

LIVINGSTONE NYAMADZAWO

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 11 & 19 June 2019

Opposed application

A. Demo, for the applicant
I. Mataka, for the respondents

CHIKOWERO J: This is an application for civil contempt of court brought in terms of Order 43 r 388 of the High Court Rules, 1971.

On 16 May 2017 the applicant, under case number HC 12326/15, obtained an order against all the respondents.

The order was read in court on 16 May 2017 in the presence of all the parties after the parties' legal practitioners had made submissions before MANGOTA J. It was an opposed application.

The relevant part of the order reads as follows:

“WHEREUPON, after reading documents filed of record and hearing counsel

IT IS ORDERED THAT:

1. MAVINGTON CHIDONGO, AMON KUNJE, GARIKAI MAFA, COSMAS SHUMBAIMWE, AMON TARUONA, TAKESURE CHIDONGO, NETSAI MAKONYE, MATTHEW MANDALELA, MOSES MUGARI, RAVIOUS MUSHAYANGONI, TAVENGWA NYIKA, NCELE PAUL, CLEOPAS PHIRI, WALLAS PHIRI, COLLEN TAVENGWA, WASTING TIME, ANDREW TSOKA, TARUVINGA ZIVANAI, OLIVER BWITITI, LIVINGSTONE NYAMADZAWO (the said respondents) and those that claim through them, be and hereby ejected/evicted from Dorith More and Stanley (the farms).
2. The said respondents and all those that claim through them, be and hereby interdicted from entering the farms.
3. The said respondents be ordered to pay the costs of suit on legal practitioner and client scale.
4. The Officer Commanding Zimbabwe Republic Police for Mashonaland West, or his lawful deputy, be and is hereby ordered/compelled to give all the assistance required by the Sheriff or his lawful deputy to eject/evict from the farms the said respondents, and all those that claim through them.”

The returns of service attached to the founding affidavit reflect the following 20th respondent was evicted over two days, 27 and 28 June 2017.

Likewise, the eviction of 21st respondent was effected over 29 and 30 June 2017.

On 30 June 2017 the Sheriff discovered that all the other respondents, barring three, had moved out of the two farms on their own.

The identity of the three was not disclosed by the Sheriff.

However, the respondents moved back on the two farms.

This precipitated another eviction, carried out on 10 December 2018.

The Sheriff's return of service for the latter eviction reads as follows:

"Eviction effected with the assistance with (*sic*) Chegutu Police. Only few heavy items which require crane to uplift were left at one homestead. Waiting for payment to be made to complete removal of the aforementioned items"

Applicant complains that after the second eviction the respondents are back on the farm yet again.

The returns of service filed of record by the Sheriff prove that personal service of copies of the application for contempt of court was effected, at the two farms and on 31 January 2019 on the following respondents, namely, 1st, 6th, 10th, 13th, 17th and 19th. This accounts for six of the total twenty one respondents.

Further returns of service filed of record by the Sheriff also show that, on the same date and on the two farms, service was effected through responsible persons.

In this regard service was effected on 5th, 12th, 18th and 21st respondents through a daughter who withheld her name, 19th respondent whose national registration number was recorded, 19th respondent and through the wife Mrs Nyamadzawo respectively. This then accounts for an additional four respondents.

Further, the Sheriff also served by affixing to the outer principal doors as there was no one present to accept the process. Those served through this manner, also on January 31st 2019 and at the two farms are respondents 7, 8 and 20.

This brings to thirteen the total number of respondents served with copies of the application.

Attempts to serve the process were made, at the farms, in respect of seven respondents. In all these cases the Sheriff's returns of service read:

"Attempted service. The .. respondent no longer resides at the given address of service."

The seven are respondents 2, 3, 9, 11, 14, 15 and 16.

Finally, there is deafening silence *vis-a-vis* either service or an attempt to serve in respect of respondent 4.

All the twenty one respondents have been accounted for as far as either service, attempt or the lack thereof is concerned.

This application was opposed by all the respondents.

The three requisites for the granting of an order for committal for contempt of court were not in issue. See *Lindsay v Lindsay* 1995 (1) ZLR 296 (S), *Macheka v Moyo* HB 78/03, *Samuel Knot Cawood and Anor v Dr MB Mangena and Ors* HB 41/2004, *John Strong (Pvt) Ltd v William Wachenuka* HH 44/10 and *JC Conolly and Sons (Pvt) Ltd v R C Ndhlukula and Anor* HB 43/15.

What was in dispute was whether the respondents had disobeyed the court order of 16 May 2017.

I mention this. At the hearing Mr Demo told the court that no order was being sought against 2nd and 3rd respondents. It was admitted that they were not in contempt of the court order.

The main opposing affidavit was deposed to by the 1st respondent. This is what he says in traversing the application on the merits.

“.. The applicant must not seek to abuse court process by lying through her lips (I believe it was meant to be “teeth”). After eviction we have never returned to the farm. I want to put it clearly that after our eviction, we had occasion to visit the Ministry of Lands Mashonaland West province who then advised us that we must wait for reallocation of alternative land. We are waiting for such and we have no intentions of settling at the Applicant’s farm again. We are law abiding citizens. The applicant must not just state facts without providing evidence that we stay at the farm.

Further I would also want to point out that the eviction itself was problematic in that it was half done. Annexure A3 to A4 which are Returns from the Sheriff are clear that eviction was not completed. I haven’t heard of an eviction of a person leaving all his livestock like chickens, goats, cattle and other movable and immovable properties. At the time of eviction we also has (*sic*) crops that are almost ripe. The few times that we send people to the farm is to check if our property is still there and safe. That is all. Not that we have returned to the farm.

Even these court papers when served they can be left with anyone to look for us and give us.” (underlining is my own).

On the basis of the returns of service, I entertain no doubt that the respondents 1, 6, 10, 13, 17 and 19 are back on the farms, in clear defiance of the court order. The court application for contempt of court was served on each of them, personally, on the farms. This was on 31 January 2019.

Equally, I am satisfied that the respondents 5, 12, 18 and 21 are also back on the farm, again in clear contempt of the court order.

The application was served on them, through responsible persons, at the farms. This was on 31 January 2019.

Likewise, I accept also that respondents 7 and 8, served through affixing to the principal outer door, are also residing at the farms.

These three sets of respondents chose not to disclose where they are staying. I am satisfied that it is where applicant says they are, corroborated by the returns of service.

I do not quarrel with the Sheriff's returns of service to the effect that respondents 9, 11, 14, 15 and 16 no longer stay at the farm.

I am prepared to proceed on the basis that respondents 4 and 20 no longer reside at the farms in question.

Apart from applicant's say so, and that in the Answering Affidavit, I have no documentary evidence tending to prove that respondent 4 still resides at one of the two farms.

As for respondent 20, the documentary evidence tendered is contradictory.

The return of service in respect of the application itself shows that the process was served on the outer principal door as there was no one to receive service of process. That on its own is not fatal to the applicant's endeavour to prove, on a balance of probabilities, that respondent 20 still resides at Stanley Farm, Chegutu.

Mr Demo produced the Sheriff's return of service of 3 May 2019 relating to removal of cattle belonging to respondent 20. It is true that the address for service is indicated as Stanley Farms Chegutu. But the remarks made by the Sheriff tell a different story.

This is what appears under that section:

"Remarks: 19 x cattle removed from Mr Oliver Bwititi's farm. Removed herd taken to L.M. Auctions Farm in Chegutu awaiting sale."

My findings in favour of respondents 4, 9, 11, 14, 15, 16 and 20 notwithstanding, it is not all over for the applicant.

All the respondents filed supporting affidavits associating themselves with the contents of first respondent's affidavit.

The portion of the main opposing affidavit I have quoted above shows that all the respondents (minus respondents 2 and 3) admit sending people to check on their property at applicant's farm.

It matters not that they admit doing so a few times. It is disobedience of the court order.

If they still have property there, more than two years after the granting of the court order, their remedy is to make an arrangement with the applicant to collect the property from the farms. In doing so, it is not necessary that the respondents appear at the farms.

In fact, the mere presence of the property there to this day is evidence that they do not want to let go of use or occupation of applicant's farms, more than two years after they were evicted therefrom.

This is corroborated by the fact that the eviction had to be done not once but twice. And the Sheriff had to be assisted by the police.

I am aware that service of the court application for contempt of court needed to have been personal. That is what Order 5 r 39 (1) of the High Court Rules, 1971 requires.

That provision is meant to ensure that, before the court grants an application such as the present, evidence would need to be before it to show that the respondent is aware of the application. That is particularly so where respondent is in default. See *Mangwiro v Chombo N.O 2016 (2) ZLR 575 (H)*.

Here all the respondents knew of the existence of the application. They strenuously opposed the granting of the relief.

So the non-compliance with r 39 (1) by the Sheriff changed nothing.

I will therefore grant the relief sought, with amendments.

It is ordered that:

1. The 1st, 4th – 21st respondents are declared to be in contempt of court for failure to abide by the terms of the Order of this court under case number HC 12326/15.
2. In the event of any of respondents 1st, 4th – 21st failing to comply with paras 1 and 2 of the Court Order of 16 May 2017 under HC 12326/15 within forty eight hours of the granting of this order, then such respondent is to be committed to Kadoma Remand Prison for one year.
3. The 1st, 4th – 21st respondents shall jointly and severally the one paying the others to be absolved pay the applicant's costs of suit on the legal practitioner and client scale.

Chambati Mataka & Makonese, 1st, 4th – 21st respondents' legal practitioners