

PETROS MOYO
versus
ROBERT NCUBE

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 12 SEPTEMBER 2016 AND 15 SEPTEMBER 2016

Civil Appeal

Ms H Makusha Moyo for the appellant
Respondent in person

MATHONSI J: The starting point in this appeal is to restate what I said in *Mathuthu v Chegutu Municipality & Others* HH 502/14 that:

“The authority, dignity and respect of courts of law should never be demeaned, prejudiced or undermined. It behoves the subject to bow to the decision of the court and, where there exists a remedy, to then pursue that remedy elsewhere. This is extremely important for the proper administration of justice.”

The appellant and the respondent are unfriendly neighbours occupying Plots number 12 and 13 Helenvale, Umguza respectively but have been fighting tooth and nail since year 2012 over a boundary dispute even though there are clear pegs marking each of the plots. The dispute over the demarcation of the plots forced the appellant to sue out a summons in the magistrates court of Bulawayo in case number 6187/12 complaining about the respondent’s actions of erecting a homestead on his own plot. He sought an order evicting the respondent from that part of the land falling within the precincts of plot 12 Helenvale Umguza.

The respondent initially contested the action averring in his plea that there had been no boundary dispute between the parties until DDF and the Ministry of Lands officials came and re-pegged the plots resulting in the disputed 30 metre strip of land falling within Plot 12 belonging to the appellant. He further averred that the parties had agreed that he would compensate the appellant for the strip by ceding an equivalent portion to the south of his plot to the appellant given that he had built structures on the strip belonging to the appellant.

Believing that the respondent had not a *bona fide* defence, the appellant filed a summary judgment application. The respondent still contested the application, surprisingly stating that:

“Never at any given time did I refuse or imply to refuse to leave the plaintiff’s plot, for when I did the construction it was *bona fide* and a fact that can be confirmed by lands officers or the responsible authority.”

The parties then filed a consent order signed by both of them which was then granted by the court on 10 January 2013. It reads:

“IT IS HEREBY ORDERED THAT:

1. Respondent be and is hereby ordered to relocate a portion of his homestead and cease carrying any agricultural activity on, any fields that fall within applicant’s plot by the 31st August 2013 without fail.
2. The parties are hereby ordered and directed to complete the construction of their plot’s boundary fence by the 31st August 2013 without fail.
3. The parties be and are hereby ordered to keep peace towards each other.
4. In the event that any of the parties herein fail, refuse or neglect to comply with paragraph 1 and 2 of this order, the messenger of court, Bulawayo be and is hereby empowered to enforce this order including but not limited to the eviction of respondent and enforcing the construction of the boundary fence as alluded to in paragraph 1 and 2 herein above.
5. No order as to costs.”

It is common cause that after the consent order was granted the respondent did not relocate his homestead and that the appellant had to issue a writ of ejection against him. It is common cause that the messenger of court executed the writ by evicting the respondent between 15 and 19 September 2014. He stated in his return of service:

“Full eviction carried out, defendant present, premises handed over to Mr P Moyo.”

The eviction process involved the demolition of the respondent’s homestead and he confirmed at the hearing of this appeal that indeed the messenger of court demolished the homestead constructed on Plot 12 belonging to the appellant.

It is also common cause that prior to the eviction, the pegs demarcating the plots had been affirmed by the Ministry of Lands. In a letter to the officer in charge of Saurstown Police Station on 2 September 2014 the District Lands Officer had stated:

“REF: ILLEGAL OCCUPATION OF PLOT NO. 12 HELENVALE M

Sir, please be informed that our office received a complaint from Mr Petros Moyo I.D No 08-244845 B 39 over the illegal occupation of his plot, Plot 12 Helenvale M. Plot no. 12 Helenvale M was offered to Mr Petros Moyo by the Ministry of Lands and Rural Resettlement in the year 2002. Pegging of Plot 12 was done successfully by the Ministry on the 13th and 14th of August 2014. The pegging confirmed that the two plot holders Mrs Thalitha Mhlanga and Mr Robert Ncube who are Mr Moyo’s neighbours are within the boundaries of Plot 12. Mr Moyo is also in possession of a court order issued sometime in 2013, of which the two illegal settlers were supposed to vacate his plot by the 31st of August 2013. May you please assist him in whatever way possible.

Thank you.

P Ndlovu
District Lands Officer.”

It is common cause that after eviction carried out in September 2014, the appellant erected a boundary fence marking the distinction between Plots 12 and 13 and that in December 2014 the respondent re-occupied the same land from which he had been evicted through a court order. He rebuilt a homestead there and resumed tiling the land falling within Plot 12 belonging to the appellant. He says he did that because he did not agree with the boundary marked by the Ministry of Lands. He confirms that he did not go back to court to overturn the court order for eviction granted by consent. He merely resorted to self-help.

These are the facts that confronted the court *a quo* when an application for contempt of court arising out of the respondent’s defiance of an eviction process was made. In its judgment the court *a quo* misdirected itself on the facts. It stated at page 7 of the record;

“The applicant stated that after the court order was granted by consent the respondent was served by the messenger of court and full eviction was effected. On the 17th of September 2014, the applicant employed officials from the Ministry of Lands and Rural Resettlement who pegged the plots and clearly demarcated each respective plot and created boundaries. The respondent fearfully returned sometime in December 2014 and has resumed building domestic habitation and has resumed agricultural activities. The respondent on the other hand argued that the reason why he did not comply with the court order is that applicant invited officials from the Ministry of Lands they pegged the place afresh and set new boundaries and they removed the pegs from their proper spot and placed the plot (*sic*) at their preferred plots.”

The court then went on to find a dispute of fact which it said could not be resolved on the papers and without referring the dispute to trial, it out rightly dismissed the application with costs. It concluded at page 8 of the record:

“I am of the considered view that the conflicting positions of the parties are irreconcilable on the papers in several aspects, the applicant’s affidavit does not clearly establish whether the boundaries demarcated by the Ministry of Lands and Rural Resettlement were the same boundaries from the initial order or they erected new boundaries respondent also avers that they were new boundaries different from the ones that were agreed upon. I therefore conclude that there are material and significant disputes of fact that can only be resolved by calling of court evidence in trial proceedings. It is my view that the applicant should proceed by way of action. For the above reasons I therefore dismiss the application with costs.”

The appellant was unhappy with that out come and launched this appeal against the whole judgment of the court *a quo* on the grounds *inter alia* that the court *a quo* failed to appreciate that the respondent had taken the law into his own hands by re-occupying the land after lawful eviction. It also failed to appreciate that no fresh demarcations were made by the Ministry of Lands after the eviction of the respondent and as such there were no genuine disputes of fact.

I have said that the court *a quo* misdirected itself on the facts of the matter. It was in possession of letter written by the District Lands Officer on 2 September 2014 to the effect that pegging had been done on 13 and 14 August 2014 which confirmed the boundaries and that the respondent encroached onto the appellant’s land (record page 64). That pegging was undertaken before the eviction took place.

Indeed the court *a quo* was in possession of a return of service by the messenger of court showing that eviction had been carried out on 15, 17 and 19 September 2014 (record p 66). When the eviction was carried out the boundaries had already been determined by the pegging. The respondent was then evicted in terms of a court order following boundaries confirmed by a pegging process conducted on 13 and 14 August 2014.

Clearly therefore the pegging referred to by the court *a quo* could not be an excuse for re-entering the land 3 months later in December 2014. Much less could such pegging found a dispute of fact as could not be resolved on the papers in an application for contempt of court

anchored on a defiance of an eviction carried out in terms of a court order more than a month after that pegging occurred. The so called dispute of fact was illusory.

While it is true that the resolution of the dispute without doing an injustice to the other party is one of the prime considerations in allowing or disallowing the use of application procedure, the respondent must at least disclose that there are material issues in which there is *bona fide* dispute of fact capable of being decided only after *viva voce* evidence has been heard. See *Ex-Combatants Security Co v Midlands State University* 2006 (1) ZLR 531 (H) 534G; *Da Matta v Otto N.O* 1972 (3) SA 858 (A) 882I; *Railings Enterprises (Pvt) Ltd t/a Paroan Trucking v Dowood Services (Pvt) Ltd t/a Bradfield Motors and Others* HB 53/16.

In any event, even where there exists a material dispute of fact, the court should take a robust and common sense approach to the dispute and endeavour to resolve it. If it succeeds then the matter ends there. If it does not, then it still has an election to either dismiss the application or refer the matter to trial for a resolution of that dispute. The court should only dismiss the application where the dispute must have been apparent when the applicant embarked on application procedure. See *Zimbabwe Bonded Fibre Glass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S) 339 C – D.

In my view there was no dispute of fact at all which the court could not resolve. The respondent was evicted long after the pegging which he threw into the fray to cause confusion. When he moved back onto the land from where he was evicted he was not being propelled by any pegging but by a contemptuous attitude towards the court that ordered his eviction.

Every citizen of this country is obliged to obey the orders of the courts. That is the essence of the rule of law: see *Mapfumo v Director of Housing and Community Service and Others* HH 274/14. As stated by ROMER LJ in *Hadkinson v Hadkinson* (1952) 2 ALLER 567 (CA) at 569C;

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it even extends to cases where the person affected believes it to be irregular or even void.”

See also *Mpofu v Mlilo* 2002 (1) ZLR 160 (H) 163 B –C.

A person who disobeys a court order is in contempt of court. Where a court order is carried into execution by the eviction of the respondent and the respondent returns to the property from where he was evicted there can be no ambiguity. He is simply in contempt and no amount of argument over imagined boundary disputes can change his disdain of a court order.

In the result it is ordered that:

1. The appeal is hereby upheld.
2. The respondent is hereby found to be contempt of court for having refused to comply with the court order directing him to vacate a portion of the appellant's property namely Plot number 12 Helenvale Umguza, that the respondent is currently inhabiting.
3. The respondent is hereby fined US\$500-00 which is wholly suspended on condition the respondent vacates the applicant's Plot number 12 Helenvale Umguza by the 30th October 2016.
4. This order shall operate as a permanent warrant authorizing the messenger of court, the police and other law enforcement agents to arrest and detain the respondent or anyone claiming through him on any future instance should they violate the court order granted by the magistrates court on 10 January 2013 under case number M. C 6187/12.
5. The respondent shall bear the costs of suit in the court *a quo* and of this appeal.

Bere J agrees.....

Ndove Museta and Partners, appellant's legal practitioners