

HARARE AND DISTRICT HELLENIC
COMMUNITY
versus
CREMION CLAUDIOUS MAPFUMBA
and
ZIMBABWE ELECTRICITY AND
TRANSMISSION AND DISTRIBUTION
COMPANY
and
CITY OF HARARE

APPLICANT

1st RESPONDENT

2nd RESPONDENT

3rd RESPONDENT

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 7, 8 November 2012 and 27 March 2013

Opposed Application

Ms S Njerere, for the applicant
T Magwaliba, for the first respondent

BERE J: It has never ceased to amaze me how some of our citizens have developed this insatiable desire for litigation even in circumstances where clearly the odds are heavily stacked against them. This is one such a case and such conduct must be discouraged.

The facts which are common cause in this case can be summarised as follows:

Sometime in 2001 the applicant purchased from the third respondent stand 18879 Harare Township. The applicant duly took transfer of the purchased stand under deed of Transfer 3745/2001. Annexure 'B' to this application confirms the transfer in question.

The applicant purchased the property with a view to constructing a school at the most opportune time and for quite some time the land stood as a vacant one.

Sometime in 2011 the applicant established that the first respondent had drilled a borehole on its property and was drawing water therefrom supplying the first respondent's residence which is about 1,5 kilometres away from the property in issue.

The applicant also established that the first respondent had installed an electricity distribution point to expedite the aforesaid extraction of water from its property.

The subsequent correspondence exchanged between the applicant and the first respondent failed to dissuade the first respondent from his unsanctioned activities on the

applicant's property. In fact the first respondent was adamant he would continue to harvest water from the applicant's property.

Further correspondence to the second respondent to remove its electricity distribution point constructed on the applicant's property at the behest of the first respondent did not yield any positive results.

When dialogue had failed to resolve the impasse between the applicant and the first respondent the applicant issued the instant court process seeking *inter alia* to have the first respondent interdicted from drawing water from its property and to have him evicted.

When served with the application the first respondent maintained with his intransigence in opposing the relief sought by the applicant.

Whilst acknowledging that the applicant owned the stand from which water was being extracted, the first respondent made it abundantly clear that he had no intention of stopping the extraction of water arguing that his project was above board having been sanctioned by the third respondent. In his quest to defend his position the first respondent stoutly stated as follows:

“14.10

I aver that whilst the applicant owns the place, there is a clear indication of my innocence and *bona fides*. I have not sought to take the law into my own hands as alleged. Whatever I did was with the blessings of the City of Harare whom I all along thought they own the land and whom I genuinely believed and still believe were legally competent to authorize my project. As said above there is every indication of acquiescence on the part of the applicant as one of its members knew about the installation of the borehole. I have no interest in the applicant's land, just the water.”¹

It has not and it could not possibly have been denied by the first respondent that the applicant is the owner of the property on which he has for quite sometime been harvesting or extracting water. The first respondent does not deny that the whole infrastructure to extract this water was done without the consent or permission of the applicant which holds title to the property.

A deed of title confers a real right to the holder therein. As Harry Silberberg puts it:

“A real right is a *jus in rem*. It establishes a direct connection between a person and a thing in the sense that the holder of a real right is entitled to control the use of a thing within the limits of his right. In other words, a real right is enforceable against the world at large – i.e. against any person who seeks to deal with the thing to which a

¹ The first respondent's opposing affidavit, para 14.10 at p 37 of consolidated index

real right relates in any manner which is inconsistent with the exercise of the holder's right to control its use..."²

Given the undeniable fact that none of the cited respondents could have denied the applicant's entitlement to stand 18879 Harare Township of Salisbury Township lands, which ownership is confirmed by deed of transfer 3745/2001 dated 3 May 2011, it is not possible that the third respondent could have had the right at law to interfere with this property without the consent and or authorization of the applicant. Any purported authorization of the first respondent to conduct any activities on the applicant's property was therefore a nullity and could not have conferred to the first respondent any greater right than the legitimate holder of title.

There is no doubt that initially the first respondent may have believed that his "borehole" was sitting on an unoccupied council land or council reserve area as evidenced by his letter to council on 20 September 2010.

The first respondent's initial position was understandable but the court is extremely concerned with his intransigence even after the irrefutable truth about the status of the property dawned on him and the fact that his borehole and its accessories were sitting on the applicant's property. He continued to conduct his activities with reckless abandon.

Quite clearly, aware of the correct position, the first respondent through his counsel has sought to justify his continued interference with the applicant's property. It is such conduct which this court finds to be extremely reprehensible.

It would amount to promoting dark justice if a man were to "invade" one's private property and when one is shown title to that property by a legitimate holder of that title, the invader is then allowed to raise all sorts of spurious arguments like in this case.

Civilised people, the world over, must not be allowed to embark on such levels of lawlessness.

Proprietary rights of individuals particularly where such rights are confirmed by the title deeds must not be tempered with lest the whole fabric of private property regime is eroded.

As a court, I am frightened by the first respondent's counsel that sought to oust the jurisdiction of this court by making ill-advised reference to s 3 of the Water Act. Clearly, those were hysterical submissions and I have not allowed such to detain or obstruct me in my

² The law of Property, Harry sieberberg, published by Butterworths, Durban, 1975, page 30.

endeavour to do justice to the applicant's unassailable case. The Water Act is not authority for an individual to occupy other person's property without the owner's authority and do as they wish.

What the applicant has sought to achieve in this case is merely to assert its rights over the property in question and the first respondent was ill-advised in resisting that action.

To show its displeasure in the conduct of the first respondent, an appropriate order of costs shall be granted. This will also help in discouraging frivolous and vexatious litigation as in this case.

I am satisfied that the applicant's case is more than compelling and it ought not to have been opposed by the first respondent.

From the time a letter of demand was dispatched to the first respondent, the first respondent had ample opportunity to reflect on the case and take the necessary steps to mitigate legal costs. The first respondent surprisingly chose to be combative and for this he cannot avoid being laden with a punitive order of costs.

Consequently I order as follows:

1. The first respondent be and is hereby restrained and interdicted from drawing water from the borehole situated by the respondent on the applicant's property being stand 18879 Harare Township of Salisbury Township lands.
2. The first respondent be and is hereby ordered to remove the borehole and its pumping equipment and the steel structure from the applicant's property within ten working days of the grant of this order failing which the Deputy Sheriff is hereby ordered and directed to do so with the first respondent meeting the Deputy Sheriff's costs.
3. The first respondent be and is hereby ordered to restore to its original condition the applicant's property and to fill in the borehole within ten working days of the grant of this order failing which the Deputy Sheriff is hereby ordered and directed to do so with the first respondent meeting the Deputy Sheriff's costs.
4. The first respondent be and is hereby ordered to pay costs on the legal practitioner and client scale.

Honey & Blanckenberg, applicant's legal practitioners
Moyo and Maguranyanga, 1st respondent's legal practitioners