CHIDO MATEWA
versus
MAKONI RURAL DISTRICT COUNCIL
and
INTERNATIONAL ORGANISATION FOR MIGRATION

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 18 September 2014 and 14 January 2015

Civil Trial

Ray H. Goba, for the applicant
C. Warara, for the respondents

NDEWERE J: The plaintiff is leasing Dagbreek farm from the State since 6 February, 2004. The first defendant is Makoni Rural District Council, a local authority in the area that Dagbreek farm is situated. The second defendant is the International Organisation for Migration, a non-governmental organisation.

On 16 April, 2012, the plaintiff issued summons for the payment of:-

(a) US$100 000-00 being damages for loss of property and vandalism.

(b) US$150 000-00 being damages for unlawful interference with farming activities at Dagbreek Farm and loss of crops.

(c) Payment of interest on the aforesaid sum at the prescribed rate from date of demand to date of full and final payment.

(d) Costs of suit at attorney and client scale.

On 28 May 2012, the first defendant filed its plea. It denied authorising use of the farm, but said it authorised use of a 20 metre servitude which passes through the plaintiff's farm. It also said the Civil Protection Act allows it to use any land to save lives of the public when they are in danger. It denied inviting people to steal or destroy. It said the plaintiff acquiesced by her silence and is therefore estopped from complaining over the issue.

The second defendant did not defend the action.

The background of the matter is that between 2006 and 2009, the first defendant authorised the second defendant to use Dagbreek Farm, Nyazura, as a Distribution Centre for food to needy villagers in the area. The plaintiff said she was neither consulted nor informed about the decision by the first defendant; she just saw the second defendant coming to her farm to distribute food and villagers from surrounding villages converged on her farm to receive the food. Her evidence was that throughout this period, she moved from office to office to get help on this issue because her property was being vandalised by people who were coming to the farm during the distribution, with some remaining on the farm thereafter. Her evidence was that she sought intervention from the councillor for her area, Minister Muchinguri, former Minister Mutasa and the Ministry of Lands, but without success. She said she approached the second defendant in Harare, in Mutare and even sent a letter to the second defendant's headquarters in Geneva, but no steps were taken to alleviate the challenges she was facing on the property because of the people coming to the farm as a result of the food distribution. She said eventually, after narrating the degree of her losses, the Ministry of Lands advised her to go to court. Upon receiving this advice from the Ministry of Lands, she wrote a letter to the second defendant, as the Distributor at her farm, holding it accountable for the destruction of her property on the farm. She received a reply not from the second defendant, but from the first defendant, on 14 December, 2011. That letter absolved the second defendant from any wrongdoing and the letter confirmed that Dagbreek Farm was a Distribution Centre and that the first defendant had authorised the second defendant to use Dagbreek as a Distribution Centre.

The plaintiff said that was the first time that she got to know that the first defendant was involved. Although she had engaged the Councillor of her area, that Councillor never told her that in fact the designation of her farm as a Distribution Centre was a Council decision.

Thereafter, the plaintiff issued summons against both the first and the second defendants for the amounts claimed.

She gave evidence on the damage she sustained on the property which included thefts of cattle, and interference with ZESA equipment and failed crops caused by a failure to irrigate owing to the vandalism of ZESA equipment. She said at one point she lost 35 head of cattle on one day and they were never recovered. Her evidence of the missing cattle was corroborated by Lovemore Ngwenya, a neighbour, who was questioned by the police on the issue.

She said the first defendant should not have authorised the use of her farm because there were other public areas suitable for the purpose like Folkington Primary School which has been used as a polling station previously. Her evidence that Folkington Primary School could have been used instead of her farm was corroborated by Lovemore Ngwenya who was the School Development Association Chairperson since 2007. Her evidence was that by using her farm, the first defendant opened it up to thefts and vandalism which continue up to the present day because the very act of designating the farm as a Distribution Centre made people believe that the farm had been repossessed by the State and was now "no man's land" as it were and people were doing as they pleased on the farm. She produced a bundle of documents full of invoices and receipts explaining the actual damage she suffered as a result of the vandalism and said what she claimed in the summons was actually less than the loss.

Two witnesses were called to corroborate her evidence on the distribution point in the farm, the missing cattle and failed crops and the plaintiff's case was closed.

The first defendant applied for absolution from the instance. The court then invited both parties to make written submissions on the application. The court received submissions from both parties. I have had occasion to consider the pleadings, the evidence led on behalf of the plaintiff and the submissions from the parties.

Both the plaintiff and the first defendant referred to the case of *Supreme Service Station 1969 (Pvt) Ltd* vs *Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR 5 (A) where BEADLE CJ stated as follows:-

> "The test therefore, boils down to this; is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff?"

BEADLE CJ went further and said:-

> "- rules of procedure are made to ensure that justice is done between the parties, and, so far as possible courts should not allow rules of procedure to be used to cause an injustice……."

In this instance we have the plaintiff saying the first defendant authorised use of her farm and did not do anything to avert the plunder and destruction of her property. This assertion is corroborated by the first defendant's own letter to the plaintiff dated 14 December 2011. In that letter, the first defendant confirms authorising the use of Dagbreek Farm. It calls it "Dagbreek Distribution Point" and confirms that Dagbreek was a Distribution Centre.

There is no mention of any servitude at all. The letter confirms authorising use of Dagbreek farm then denies any vandalism.

The fact that the first defendant in its plea says it authorised use of a servitude and in its submissions calling for absolution after hearing the plaintiff's evidence on the issue it maintains that it authorised use of the servitude and not the whole farm means there is a dispute of fact on which land or part of land the first defendant authorised. It is only fair that the first defendant be called upon to give evidence on this issue, so that the court has all evidence before it makes a final determination. I am fortified in this view by what BEADLE CJ said in the Supreme Service Station case *(supra*) referred to by both parties. On pp 5-6 of the report, the court said;

> "If the defence is peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance."

As regards the issue of what land or part of land was authorised, the first defendant is the only one in the know. It is the one which authorised the use. At this stage the court does not even know the form of the authorisation. It is only fair that the first defendant testifies on that issue for it to be properly ventilated.

A related matter is the number of times the distribution was done. The plaintiff's evidence was that she just would see people milling within her farm; she had no knowledge of the duration of the distribution or the intervals. Indeed, even in her summons, she says between 2006 and 2009. The first defendant has been telling the court that the distribution was once a month, but up to now, there is insufficient evidence to confirm the once a month assertion. This is another factor which is "peculiarly within the knowledge of the defendant." The first defendant was the authority giving permission and the second defendant was the distributor. It is best that the court determines these questions of fact after hearing all evidence from both sides.

The first defendant has cited the Civil Protection Act, [*Cap 10:06*] in para 2 of its plea as the basis for using the plaintiff's farm. In the written submissions on the absolution from the instance application, the first defendant went further and cited s 23 of that Act.

I have looked at s 23 of the Civil Protection Act, [*Cap 10:06*]. It has onerous provisions for the State which begin with a Declaration of Disaster by the President in terms

of s 27 for three months which may be extended; communication of the declaration to Parliament in terms of s 28 and service of written notice to the person possessing the land. Since the first defendant is relying on the Civil Protection Act, [*Cap 10:06*], the steps which were taken to comply with ss 23, 27 and 28 are facts which are "peculiarly within the knowledge of the first defendant." So the first defendant will have to give evidence on these aspects of the case as well before a final determination can be made.

Section 23(3) of the Civil Protection Act gives the possessor of the land room to raise objections and if the authority persists in wanting to seize the land, then it goes to the Administrative Court. Section 23 (6) says the land seized shall be "promptly returned in the condition in which it was at the time of such taking of possession or control" while section 23(7) provides for adequate compensation.

So the court is eager to hear what the first defendant did in compliance with s 23 above in its evidence because that section provides for service of written notice upon the possessor of the land yet in the present case, the plaintiff testified that the first defendant did not even inform the plaintiff throughout the period it allowed the second defendant to use Dagbreek farm as a Distribution Centre.

Sections 23(6) and 23 (7) refer to the land being returned as it was and to compensation. In essence, that is what the plaintiff is claiming in this case, that her farm be returned to what it was before the first defendant and the second defendant used it as a food distribution centre. The spirit behind s 23 is to help the needy while at the same time preserving the possessors' property rights so from a factual point of view, the court expects evidence from the first defendant on what it did in fulfilment of the provisions of s 23 of the Civil Protection Act which it is relying on in its defence because that evidence is "peculiarly within" the first defendant's knowledge.

Section 23 (10) says if the property is owned by the State then the authority seizing the land must get the consent of the Minister responsible for land. The evidence before me so far is that it is the Ministry of Lands which eventually advised the plaintiff to bring the matter to court after she had advised them of the degree of the damage to her property. So once again, the first defendant will have to give evidence on this issue of obtaining the Minister's consent since it is the one relying on s 23 of the Civil Protection Act [*Cap 10:06*].

So there are a lot of factual issues which cannot be given a final determination without hearing the first defendant's evidence because the outstanding evidence is peculiarly within the first defendant's knowledge.

Given the facts outlined above of the first defendant turning Dagbreek Farm into a Distribution Centre without the plaintiff's prior knowledge or consent, I am of the view that the first defendant owed the plaintiff a duty of care. It was reasonably foreseeable that huge numbers of hungry and needy villagers of up to 300 or 400 getting into the farm using scotch carts and hired cars to carry donated goods would compromise the security of the plaintiff's property on the farm; leading to vandalism and theft of the plaintiff's property during the food distribution or afterwards. This duty of care is even more when a party is a public entity like the first defendant and when regard is had to the provisions of s 23 of the Civil Protection Act [*Cap 10:06*].

As pointed out in *Goode* v *SA Mishal Fire and General Insurance Co. Ltd* 1979 (4) SA 301 at 305.

> "Negligence is conduct which involves an unreasonable risk of harm to others. It is the failure in given circumstances to exercise that degree of care which the circumstances on the occasion demand."

The first defendant created a situation where it designated Dagbreek Farm as a distribution centre, without notifying the plaintiff as required by law, without her consent and without even her knowledge. This situation created an "unreasonable risk of harm" to the plaintiff through vandalism and theft of her property. The situation the first defendant created behoved it to act with a high degree of care to ensure the protection of the plaintiff's property from harm from the hungry villagers getting in and out of the farm. It had chosen not to involve the plaintiff in the management of this situation by not even informing her of its decision, thus assuming responsibility for the goings on at the farm. In *Goode vs SA Mutual Fire and General Insurance Co*. (*supra*) the court said:-

> "If the conduct of a person who owes a duty of care falls, even in the slightest degree, below the standard of a reasonably prudent man, he is guilty of negligence."

In my view, the first defendant assumed a duty of care in designating Dagbreek without the plaintiff's consent or knowledge, as a distribution centre. So far it appears as if it failed to adequately protect the farm's infrastructure and property against vandalism occasioned by the uncontrolled movement of hungry people in and out of the farm. However, until the first defendant has testified and told the court the steps it took in the

exercise of its duty of care, after designating Dagbreek a food distribution centre, the court cannot make a final determination on whether the first defendant took reasonable steps to discharge its duty of care. So on this issue again, the first defendant's evidence will be instructive.

On the quantum of damages, the plaintiff gave her evidence well, supported with documentary proof where possible. The evidence revealed more damage than what she claimed in the summons. She explained the difference in her claim and her evidence as having been caused by the fact that initially she was too emotionally disturbed by what had happened at the farm but when she regained her composure, she began to look for all the documentary evidence of the loss. Her documentary evidence was largely unchallenged. So on quantum, the court is satisfied that the plaintiff has made a case for her losses, sufficient to allow the trial to proceed.

The application for absolution from the instance is therefore dismissed for the above reasons.

The plaintiff applied for costs on a higher scale but no justification was given to the court on why the punitive higher scale should be used against the first defendant.

I will therefore award costs in the ordinary scale to the plaintiff.

Venturas & Samkange, Applicant's Legal Practitioners
Warara & Associates, Respondents' Legal Practitioners