BRADHA ENGINEERING (PVT) LTD

versus

GODWIN GOMWE

and

FINAL HOPE HOUSING COOPERATIVE

(Herein represented by (INNOCENT MANANGO)

and

JOSIAH TONGOGARA HOUSING COOPERATIVE

(Herein represented by CLEVER MUSA)

and

TAWANA (TI)

and

BRIGHT MUNEMO

and

MATEYO D

and

CITY OF HARARE

HIGH COURT OF ZIMBABWE

MTSHIYA J

HARARE, 3, 5 & 10 June 2015

**Urgent Chamber Application**

*T. Dzvetero,* for the applicant

*J Ndomene,* for the 1st -6th respondents

*B Furidzo,* for the 7th respondent

 MTSHIYA J: This is an urgent application wherein the applicant prays for a spoliation order in the following terms:

 “TERMS OF THE FINAL ORDER

 That you show cause why an order in the following terms should not be granted;

1. The interim relief granted by this Court on the …… day of ….. 2015 be and is hereby confirmed

INTERIM RELIEF

Pending the return day, it is hereby ordered that;

1. Applicant, and those claiming possession through him, is hereby declared to have peaceful and undisturbed possession of and use of 95 stands being stands numbers 8838 to 8930, 8736 (Church stand) , 8737 (Creche Stand) and open space stand.
2. 1st -6th Respondents are hereby ordered to return Applicant status quo ante prior to this spoliation such that Applicant is returned its peaceful, quiet and undisturbed possession, occupation and use of 95 stands being stands numbers 8838 to 8930, 8736 (Church stand), 8737 (Creche Stand) and open space stand.

SERVICE OF THE PROVISIONAL ORDER

1. Applicant’s legal practitioners shall be and are hereby granted leave to serve this provisional order upon Respondents”.

 The parties first appeared before me on 3 June 2015. I urged them to discuss an amicable settlement and postponed the matter to 5 June, 2015. Settlement failed and I had to hear arguments.

 Mr *Furidzo,* for the seventh respondent, submitted that the matter was not urgent because the events complained of occurred on 8 January 2015. Furthermore, he argued, the matter was *res judicata* because it had been settled through a consent order on 2 February, 2015.

 Mr *Ndomene* for the 1st-6th respondents associated himself with the seventh respondent’s submissions.

 Mr *Dzvetero,* for the applicant, disagreed with the respondents. He correctly argued that spoliation proceedings are generally treated as urgent. (See *Karori (Private) Limited and Anor* v  *Mujasi* HC 824/07). He said, in the main, all the applicant had to prove was peaceful and undisturbed possession of the property and unlawful deprivation of such possession.

 In order to determine whether or not the matter is urgent, it will be necessary to be guided by the background thereof.

 The applicant is a property developer. In 2011, the seventh respondent allocated it land for development; namely “land known as the remainder of Warren Park, situated in Westlea Township along Bulawayo and Tynwald Roads depicted on the seventh respondent’s General Plan TPX 1352”.

The land initially allocated to the applicant covered 292 stands. However, in 2013, following a change of reservation in respect of the land in question, the stands were reduced to 196.

A dispute then arose between the parties, with the seventh respondent arguing that the applicant was only allocated stands 8738 to 8837 covering 9.1 hectares. The applicant, on its part, insisted that it was allocated the entire land covered by General Plan TPX 1352 and hence its claim for stands 8838 to 8930, comprising the church, crèche and the open space. It is these stands that form the subject matter of the case now before me.

 On 2 February 2015, when the applicant approached this court with a similar application, the following consent order was granted.

 “IT IS ORDERED BY CONSENT THAT:

1. The applicant hereby withdraws its application against 1st Respondent and tenders costs.
2. The 2nd Respondent be and is hereby interdicted from allocating, selling or leasing stand numbers 8738 to 8837 measuring 7,2829 hectares being part of the remainder of Warren Park Township depicted under General Plan TPX 1352.
3. The occupation of stand numbers 8738 to 8837 measuring 7,2 829 hectares being part of the remainder of Warren Park Township depicted under General Plan TPX 1352 by any person without allocation of same by Applicant be and is hereby declared unlawful.
4. In the event of any persons, claiming occupation of stand number 8738 to 8837 measuring 7,2 829 hectares being part of the remainder of Warren Park Township depicted under General Plan TPX 1352, not vacating from the said land within 48 hours of this order, the Sheriff or his lawful deputy be and is hereby empowered to evict such persons.
5. The Applicant and the 2nd Respondent will bear their own costs in respect of this application”.

 The consent order covered stands 8738 to 8837. That in a way was confirmation of the allocation of that land to the applicant. That order did not concern itself with stands 8838 to 8930.

Whilst the parties agree that there was still a dispute over stands 8838 to 8930, the consent order, as already stated, was silent on same. The applicant insists that it has not been adequately compensated for the reduction of the area of land originally allocated to it and hence its continued hold on the 96 stands. (i.e. stands 8838 to 8930).

The seventh respondents argues that the 96 stands were never allocated to the applicant and that the applicant never took possession of same. The stands, according to the seventh respondent, have since been allocated to a number of cooperatives.

 Notwithstanding the position taken by the seventh respondent, the papers before me confirm that General Plan TPX 1352, which the applicant worked on, includes the 96 stands. The seventh respondent accepted payments from the applicant in respect of fees required for the servicing of all the stands covered under General Plan TPX 1352.. The receipts indicate that payments were indeed in respect of all stands covered under General Plan TPX 1352, namely stands 8736-8930. (i.e. inclusive of stands 8838 to 8930).

On 19 August 2014, the seventh respondent wrote to the applicant confirming part of the fees required for servicing the stands. The letter written to the applicant reads as follows:

“To: Bradha Investments

 Harare

 19 August 2014

 RE: **APPROVAL FEES – WATER RETICULATION DESIGNS: STANDS**

 **8736-8930 WARREN PARK TOWNSHIP\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Item | Description | Quantity | Rate (US$) | Amount |
| 1 | Design fixed fees>20 No. stands | 1 | 200.00 | 200.00 |
| 2 | On site infrastructure400-800m2800-1000m21000-2000m2>2000m2 | 1632372 | 5.007.009.0012.00 | 815.00161.00 63.00 24.00 |
| 3 | Construction inspectionStage inspection | 3 | 500.00 | 1500.00 |
| 4 | Developer charge400-800m2800-1000m2Institutional | 163239 | 12.0025.00150.00 | 1956.00 |
|  |  |  |  | 575.001350.00 |
|  |  |  | **Sub Total** **VAT****Total payable** | **6644.00** **997.60****7641.00** |

 Eng. M.P. Moyo

 **Projects and Planning Manager**”

 The above letter and the approvals granted in favour of the applicant clearly refer to stands 8736 to 8930 (i.e the entire land covered by the General Plan). There is also evidence that the above fees were in fact paid by the applicant. This means the applicant was already effecting works on the entire land allocated to him. He could not, in my view, do so without being in possession and control of the land. The fact that the court order of 2 February 2014 was silent on the 96 stands does not necessarily mean that the applicant was not in peaceful possession and control of same. True, there was a dispute but the applicant was already enjoying peaceful possession of the stands under General Plan TPX 1352. The applicant is therefore entitled to approach the court for the protection of its peaceful possession of the stands.

It is also true that the applicant avers that invasions on the land commenced in January 2015. However, as accepted by both parties, the parties cited in the court order of

 2 February 2015, were only the applicant and the seventh respondent. The 1st – 6th respondents were not parties, to that court case, with a withdrawal having been made in respect of the first respondent.

 In building up its case, the applicant has given a historical background which incorporates events of 8 January 2015. There appears to have been a continued disregard of the law on the part of the 1st – 6th respondents, leading to the need for the applicant to file this application in respect of Stands 8838 to 8930.

With respect to the current application, the applicant states:

“26. As of the 25th of May 2015, despite a final court order having being granted to interdict the 1st Respondent under the aforesaid application the 2nd – 6th Respondents under the affiliation of the 1st Respondent have been on a rampage of disturbing Applicant’s possession of the property in question.

27. The property in question was invaded by the 2nd – 6th Respondents purporting the property in question to have been given to them for purposes of carrying out Housing Cooperatives’ activities.

28. It is reiterated that the invasion in question, though being mobilized by the aforesaid Respondents, is being effected by a large number of bouncers totalling up to approximately 30-40 men.

29. The bouncers in question have been on an incessant rampage of interrupting and intercepting anyone who attempts to access the residential development site belonging to the Applicant.

30. The aforesaid Respondents have effectively occupied 96 stands, of the property in the possession of the Applicant, on Applicant’s development site. The purportedly represented Cooperative are Final Housing Cooperative cited herein as the 2nd Respondent and Josiah Tongagara Housing Cooperative cited herein as the 3rd Respondent.

31. I believe these cooperatives are being used as facades to advance the 1st -6th Respondents’ malicious schemes of unlawfully dispossessing Applicant of the stands in question without observing due process.

32. As a result of the invasion the continued peaceful and undisturbed possession of the Applicant and those claiming occupation from him has been seriously compromised”.

It is of course not correct to infer that the first respondent was included in the consent

order. The point being made, however, is that the 1st respondent *in casu*, is the leader of the 2nd – 6th respondents.

The above activities of the 1st – 6th respondents were not denied.

Mr *Nkomene,* for the 1st – 6th respondents, associated himself with seventh

respondent who admitted that the said respondents were unlawfully occupying the land. I cannot see how unlawful acts cannot require urgent action. To that end the question of delayed action does not arise (See *Botha and Anor* v *Bannet* 1996(2) ZLR 73 SC). The matter is therefore urgent. Any breach of the law, in my view, necessarily calls for urgent action. The 1st – 6th respondents have no right to be on the land possessed by the applicant. Their unlawful entry onto the land has been confirmed by the seventh respondent. Their occupation of the land has not followed the due process of law.

 I have already made a finding that the applicant has always been in peaceful possession of the 96 stands. The unlawful activities of the 1st – 6th respondents have therefore clearly dispoiled him. This is so because in spoliation the applicant has to prove that:

1. it was in peaceful and undisturbed possession of the property; - and
2. the 1st – 6th respondents deprived it of the possession forcibly or wrongfully against his consent.

The applicant has proved the above.

In *Mitsotso & Ors* v *Commissioner of Police & Anor* 1993 (2) ZLR 329 (HC), Robinson J, quoting other authorities on the subject of spoliation, had this to say;

“The general principle was stated by Innes CJ in *Nino Bonino* v *de Lange* 1906 TS 120 at 122 thus:”

‘It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute’.

As explained by Millin J in *De Jager & Ors* v *Farah & Nestadt*  1947(4) SA 28 (W) at 35, a case where demolition of premises was undertaken without legal process:

‘What the court is doing is to insist on the principle that a person in possession of property, however unlawful his possession may be and however exposed he may be to ejectment proceedings, cannot be interfered with in his possession except by the due process of law, and if he is so interfered with the court will restrain such interference pending the taking of action against him for ejectment by those who claim that he is in wrongful possession. The fact that the applicants have no legal right to continue to live in this slum and would have no defence to proceedings for ejectment, does not mean that proceedings for ejectment can be dispensed with, nor does it make any difference to the illegality of the respondents’ conduct that the occupation by the applicants carries with it penal consequences’.

In that case the court held that by their conduct in proceeding to demolish certain premises, which were dilapidated, verminous and general unsanitary, without legal process in order to secure the ejectment of the occupiers, the respondents had committed acts of spoliation and they were therefore interdicted from further demolishing those premises.

As stated by Diemont J in *Fredericks & Anor* v *Stellenbosch Divisional Council* 1997(3) SA 113(C) at 117C:

 ‘This court is not concerned with the nature of the applicants’ occupation. What it is concerned with is that the respondent should not take the law into its own hands … Such conduct cannot be countenanced or condoned’”.

The passages quoted above layout the principles of law applicable *in casu* where the

applicant was unlawfully dispossessed of property. The 1st – 6th respondents cannot be allowed to take the law into their hands. It is imperative that this court should intervene in order to protect the applicant’s rights.

The seventh respondent has alleged that the 96 stands have been allocated to some

cooperatives. That indeed may be the case, but, *in casu,* the applicant has only taken issue with the unlawful acts of the 1st – 6th respondents – which unlawful acts have been confirmed by the seventh respondent. I refuse to accept that the seventh respondent can use the unlawful invaders to evict the applicant whom it granted possession years back. If indeed the seventh respondent wants to evict the applicant from the land, the law is at its disposal.

 Given the clear evidence that the applicant has been in possession of the stands, I do not think there is need to debate the issue of possession any further except to note that the applicant is holding onto the stands in order to secure a benefit, namely adequate compensation from the seventh respondent.

The 96 stands were not part of the consent order of 2 February 2015. The issue of *res judicata* or estoppel does not therefore arise.

 In the circumstances, I am satisfied that the applicant’s case for a spoliation order has merit. The relief sought should be granted.

 I note that no costs are prayed for in the provisional order. I shall therefore not award any costs.

Accordingly, I grant the following provisional order in favour of the applicant:

 TERMS OF THE FINAL ORDER

 That you show cause why an order in the following terms should not be granted;

1. The interim relief granted by this Court on 10 June 2015 be and is hereby confirmed

INTERIM RELIEF

Pending the return day, it is hereby ordered that;

1. The Applicant, and those claiming possession through it, be and are hereby declared to have peaceful and undisturbed possession and use of 96 stands, namely stands 8838 to 8930, comprising the church, creche and open space.
2. The 1st -6th Respondents be and are hereby ordered to restore the Applicant to the status quo ante prior to spoliation such that the Applicant enjoys its peaceful, quiet and undisturbed possession, occupation and use of the 96 stands referred to in 1 above.

SERVICE OF THE PROVISIONAL ORDER

1. Applicant’s legal practitioners shall be and are hereby granted leave to serve this provisional order upon Respondents.

*Antonio & Dzvetero* applicant’s legal practitioners

*Maposa Ndomene & Masalamba*, 1st -6th respondent’s legal practitioners

*Kanokanga and Partners*, 7th respondent’s legal practitioners