

MUTSAWASHE (ZAVEA)
versus
NOAH CHIRARA
and
VICTOR MHLANGA
and
ANDREW MUGOMEDZI

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 7 and 9 July 2020

Urgent Chamber Application

G Tapera, for applicant
S. Zvavanoda, for respondent

TAGU J: This is an urgent chamber application for a Spoliation Order against the respondents to restore the status *quo ante* wherein the applicant was in peaceful and undisturbed occupation of certain piece of land being 50 hectares of land in Saturday retreat- green belt- Ushewekunze, Harare for the past 13 years since September 2007.

Background facts

In September 2007 the late Resident Minister for Harare Province David Karimanzira verbally allocated the applicant Mutsawashe (ZAVEA) 50 hectares of land in Ushewekunze and by then the whole land was a forest/jungle. The said late Minister David Karimanzira introduced applicant to the District Administrator for Highfield, Mr. Nyaruwata who in turn instructed the Deputy District Administrator Mrs. Gondo together with Agritex officer Mrs. Chakasara to allocate applicant the said land measuring 50 hectares. The applicant was taken to the leadership of Ushewekunze Housing Co-operative under Ushewokunze consortium. The applicant paid ZWL\$25 000.00 to clear the land in order to turn it into a suitable area for agriculture. Members of the applicant have since then for the 13years been carrying out farming activities on the said land without any disturbances.

However, sometime on the 8th and 9th of June 2020 the respondents acting in common purpose unlawfully and without a court order or following due process of the law forcibly deprived the applicant of possession of the said 50 hectares of land without the applicant's consent. The respondents proceeded to allocate stands to some of their members and buyers some of whom have commenced construction without any approvals from the City Council. The applicant promptly reported the matter at Southly Park Police Station under RRB Number 93/6/20 on the 10th of June 2020. However, all efforts by the police officers to stop the respondents were in vain. The police officers then advised the applicant to seek legal guidance from lawyers and to approach the Court for an appropriate remedy. The legal practitioners then filed an urgent chamber application under case number HC 3160/20 on the 20th of June 2020. The matter appeared before Hon. Judge MUREMBA on the 26th of June 2020 but the matter was struck off the Court's roll on two technicalities. The first being that the resolution authorizing the deponent was nit current. The second being that the deponent said he was the alter ego of the applicant.

Having rectified the technicalities the applicant refiled the present application on the 29th June 2020. The provision order sought is couched in the following terms-

**“FINAL ORDER SOUGHT
IT IS ORDERED THAT**

1. The 1st, 2nd and 3rd Respondents and all those claiming occupation through one or all of them be and are hereby prohibited from trespassing, entering and or interfering with Applicant's operations on certain piece of land being 50 hectares of land in Saturday retreat-green belt Ushewekunze, Harare without a valid court order.
2. The 1st, 2nd and 3rd Respondents and all those claiming occupation through one or all of them be and are hereby ordered to allow the Applicant and its assignee to continue with their normal operations on certain piece of land being 50 hectares of land in Saturday retreat –green belt Ushewekunze, Harare.
3. The 1st, 2nd and 3rd Respondents be and are hereby ordered to pay costs of suit on an attorney client scale, jointly and severally the one paying the other to be absolved.

**PENDING THE DETERMINATION OF THIS MATTER THE APPLICANT IS GRANTED
THE FOLLOWING RELIEF
INTERIM RELIEF**

Pending the return day, it is ordered

1. The 1st, 2nd and 3rd Respondents and all those claiming occupation through one or all of them be and hereby ordered to restore possession to Applicant of certain piece of land being 50 hectares of land in Saturday retreat-green belt – Ushewekunze, Harare.
2. An order that the 1st, 2nd and 3rd Respondents and all those claiming occupation through one or all of them be and are hereby ordered to stop construction operations on certain

piece of land being 50 hectares of land in Saturday retreat-green belt- Ushewekunze, Harare.

SERVICE OF THE PROVISIONAL ORDER

This order may be served by the Deputy Sheriff of the High Court or the Applicant's Legal Practitioners. In the event that the Respondents breaching any of the terms of this provisional order the Deputy Sheriff and if need be with the assistance of the Zimbabwe Republic Police be and are hereby authorized to effect this order."

The respondents opposed the application basically on the basis that the Applicant was never in peaceful and undisturbed possession of the land in question. They averred that the respondents and other members who have not been cited in these proceedings are the ones who have been in occupation and possession of the land under the Ushewekunze Cooperative since 2005. They submitted that in the unlikely event that the provisional order is granted for a spoliation order, then the rights and interests of the occupants who are in possession of the land will be violated contrary to the provisions of section 74 of the Constitution of Zimbabwe Amendment (Number 20) Act 2013 which guarantees the right of freedom from arbitrary eviction which is aptly captured as follows: "No person may be evicted from their home, or have their home demolished, without an order of the Court made after considering all relevant circumstances." Further, they argued that the urgency in this matter is self-created since it took the respondents almost 12 days to file the present application. Further they alleged that the requirements of an interdict have been pleaded instead of spoliation.

Let me hasten to mention that the issue of urgency was not raised as a point in *limine* but was said during arguments. However, it is trite that the law protects the diligent and not the sluggard. What constitutes urgency was clearly stated in *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188 (H) per CHATIKOBO J where he said-

"What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arise, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been delay."

In *casu* the supporting affidavit of XEBIO CHAITEZVI clearly contains the actions taken by the applicant before filing the court applications. If there was a delay it was clearly explained. I therefore found that the requirements of urgency were met. Not only that, this is an application

for a spoliation order. By its very nature spoliation applications are urgent. So this issue need not detain this court any further.

This is an application for a spoliation order. The requirements for such an application are well known. These are that the applicant was in peaceful and undisturbed possession of the thing. That applicant was unlawfully deprived of such possession. See *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-op & Ors 19*. The respondents also referred the court to the case of *Bernard Mahara Mutanga v Tsitsi Mutanga (Nee Mangwadu)* HH-247/13.

In the present case the Applicant has been in peaceful and undisturbed possession or occupation of the land in question since September 2007. If indeed the respondents and other parties not cited were indeed in possession of the said piece of land since 2005 as the respondents claim then the question is why did they dispossess the applicant on the 8th or 9th of June 2020? They should by now have constructed some structures. This court is not at this stage concerned with the ownership of the land in question but whether the applicant was in peaceful and undisturbed possession. In *casu* the respondents dispossessed the applicant without a court order. The issue of ownership will be determined on the return date. The requirements of spoliation have been established and the application will succeed. The respondents seem to be concerned about the other people who are not before the court. The court is only concerned with the named three respondents.

In the result I will grant the following provisional order.

IT IS ORDERED THAT

FINAL ORDER SOUGHT

1. The 1st, 2nd and 3rd Respondents and all those claiming occupation through one or all of them be and are hereby prohibited from trespassing, entering and or interfering with Applicant's operations on certain piece of land being 50 hectares of land in Saturday retreat-green belt- Uashewekunze, Harare without a court order.
2. The 1st, 2nd and 3rd Respondents and all those claiming occupation through one or all of them be and are hereby ordered to allow the Applicant and its assignees to continue their normal operations on certain piece of land being 50 hectares of land in Saturday retreat-green belt Ushewekunze, Harare.

3. The 1st, 2nd and 3rd Respondents be and are hereby ordered to pay costs of suit on an attorney client scale, jointly and severally the one paying the other to be absolved.

INTERIM RELIF GRANTED

Pending the return day, it is hereby ordered.

1. The 1st, 2nd and 3rd Respondents and all those claiming occupation through one or all of them be and are hereby ordered to restore possession to Applicant of certain piece of land being 50 hectares of land in Saturday retreat –green-belt Ushewekunze, Harare.
2. The 1st, 2nd and 3rd Respondents and all those claiming occupation one or all of them be and are hereby ordered to stop construction operations on certain piece of land being 50 hectares of land in Saturday retreat-green belt- Ushewokunze, Harare.

SERVICE OF PROVISIONAL ORDER

This order may be served by the Deputy Sheriff of the High Court or the Applicant's Legal Practitioners. In the event that the Respondents breach any of the terms of this provisional order the Deputy Sheriff and if need be with the assistance of any member of the Zimbabwe Republic Police be and are hereby authorized to effect this order.

Tapera Muzana & Partners, applicant's legal practitioners
Chiturumani & Zvavanoda Law Chambers, 1st, 2nd and 3rd respondents' legal practitioners.