

TECLA SINYORO
versus
DEBRA MURAPE
and
USHEWEKUNZE HOUSING CO-OPERATIVE SOCIETY (PVT) LTD
and
SHERIFF OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 7 July and 26 July, 2017

Urgent Chamber Application

H Bhaureni, for the applicant
Chitsanga, for the respondents

MATANDA-MOYO J: This is an application for a spoliation order. Applicant in her founding affidavit submitted that she is the widow to the late Misheck Sinyoro. The late Misheck Sinyoro was allocated stand 282 by the second respondent. They have been staying on the property since 2004. When her husband died in 2008 she continued occupying the property, and took it over. She averred that she had been in peaceful and undisturbed possession of the property up to the 25th June 2017. On 25 June 2017 the respondents brought bricks on the same stand and commenced digging foundations on the stand. That of which they did without applicant's consent. Applicant submitted that by so doing respondents have unlawfully deprived the applicant of her possession of the stand. Applicant averred that since the respondents have taken the law into their own hands and dispossessed her of the stand, she is entitled to a spoliation order.

The first respondent opposed the granting of the relief sought. They raised preliminary points that;

- a) The application does not comply with r 241 of this court's rules and as such there is no application before this court. On the merits the first respondent submitted that she was

allocated the piece of land in 2009 by the owners of the land with blessing of second respondent. In 2015 applicant came onto the stand. First respondent made a report to the police but the police refused to take the matter as criminal as they indicated it was civil. First respondent denied applicant was despoiled. The first respondent submitted that since applicant also averred that she is the lawful owner of the stand in question, then she is obliged in law to sustain her claim failure to do so should result in her application being refused.

1st respondent also challenged the urgency of the matter. She averred that the applicant has known since 2015 that first respondent intended to put a structure on the stand and failed to act then. She should not be allowed to bring this application on an urgent basis. First respondent prayed for dismissal of applications with costs on a legal practitioner client scale.

The facts of this matter are that the applicant's late husband was the first beneficiary of stand 282. Receipts and affidavits from neighbours testified to that. On the other hand receipts on file show that first respondent in 2010 was paying subscriptions for stand 282 as well. First respondent claimed to have been allocated stand by owners of the land, who are Crest Breeders. She was however paying her contributions towards the stand to second respondent according to receipts filed. First respondent alleged that she took occupation of the stand in 2009. She alleged applicant came onto the stand in 2015 following her husband's death. She then said she made a police report of trespass. The police revealed that after investigations they considered that the matter was one of double allocation of stand and refused to take up the matter as the police believed the matter was civil. Apart from that evidence no further evidence was placed before the court showing that indeed first respondent was on site since 2009.

Applicant has placed evidence of neighbours who testified that indeed applicant had been on site since 2004. This court has no reason to doubt such affidavits. The second respondent has also placed evidence before this court that it recognizes applicant's allocation. No such evidence was placed in support of first respondent. However first respondent produced receipts where she was paying for the same stand. I am of the view that first respondent was allocated the same

stand after the stand had already been allocated to the applicant. I agree with the police findings that there was a double allocation.

On who had physical possession of the stand all along, I am of the view that physical possession was with the applicant. She has managed to demonstrate so through her own evidence and neighbour's evidence. The first respondent has been aware that the applicant was on the ground. That explains why she made a report to the police. First respondent also failed to provide the nature of her report to the police. The most probable version is that when first respondent realised that the applicant was in occupation of the stand she had bought, tried to wrestle it from her by making a police report. If first respondent was in occupation when applicant took occupation, she would have approached the court for spoliation. Her lack of action suggests that it was applicant who had possession. I therefore accept the applicant's version of events that first respondent on 25 June 2017 brought bricks on the stand and started digging foundations. I am therefore satisfied that the matter is urgent.

The respondent urged this court to dismiss this application on the basis that it does not comply with r 241. The applicant applied for condonation which I have granted in view of the fact that no prejudice was occasioned to the respondents by the non-compliance.

The law relating to spoliation is now settled. Applicant need to prove the following;

1. that applicant was in peaceful and undisturbed possession of the property; and
2. that the respondent deprived him of the possession forcibly or wrongful against his consent."

See *Kama Construction (Pvt) Ltd v Cold Comfort Farm Cooperative & Others* 1999 (2) ZLR 19 (SC), *Botha & Another v Barrett* 1996 (1) ZLR 73 (S) and *Solomon Zawe & Others* SC 54/14.

Once applicant proves the above the respondent has the following defences;

1. that the applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession; and
2. that the dispossession was lawful and did not constitute spoliation.

The applicant has shown that she was in peaceful and undisturbed possession of stand 282 from as far back as 2004. It was only on 25 June 2017 that first respondent brought bricks and started digging foundations that the first respondent did despite having found applicant in

occupation of the stand. The applicant did not allow the first respondent to get into the stand and commence construction. Applicant has thus successfully proven the requirements for spoliation.

On the other hand the first respondent has failed to show that the applicant was not in peaceful and undisturbed possession of stand 282. First respondent has also not shown that she occupied stand 282 in terms of the law. She has not attempted to evict applicant from the stand. Her report to the police is confirmation that applicant was in occupation of the stand before her. First respondent moved onto the stand without any court order and hence her occupation amounts to despoiling the applicant unlawfully.

First respondent submitted that the applicant pleaded more than the requirements for a purely possessing remedy as contemplated by the *mandament von spolie*. First respondent submitted that applicant's application ought to be dismissed on that basis.

I do not agree. The applicant in my view was simply trying to show that she was in possession of the property. Having been allocated the stand, and having taken occupation way back in 2004, applicant was in possession of the property. She brought in then issue of the 8 roomed house to show that she had even constructed that structure, which was destroyed under Murambatsvina. Even a look at the order sought by the applicant, it is apparent that she seeks only the remedy of spoliation.

It is correct that the remedy of spoliation is final in nature and cannot be sought on an interim basis. Counsel for the applicant agreed and sought to amend relief sought so that the remedy sought is final in nature. Since the evidence submitted met the requirements I granted the amendment.

The respondent has therefore failed to show any justifiable grounds for refusal of the order sought.

In the result I order as follows;

1. That the first respondent be and is hereby ordered to forthwith restore to applicant possession, occupation and undisturbed use of stand 282 Ushewokunze Housing Co-operative.
2. That first respondent and all those claiming through her vacate forthwith from stand 282 and first respondent to remove her building materials therefrom.

3. Should first respondent fail to vacate forthwith, the third respondent is hereby authorised and empowered to attend to the eviction and removal of first respondent and her property from 282; and
4. That first respondent pays costs of suit.

Chivore & Partners, applicant's legal practitioners

Mutandiro, Chitsanga & Chitima Attorneys, respondent's legal practitioners