Case 1: HC 7273/21
BENSON MUDANGANDI
versus
CHARTWELL MATIZANADZO
and
NEHANDA HOUSING CO-OPERATIVE
and
REGISTRAR OF CO-OPERATIVES

Case 2: HC 398/22
CHARTWELL MATIZANADZO
and
BENSON MUDANGANDI

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 6, 9 & 20 June 2022 and 4 July 2022

Opposed Applications – Spoliation and Interdict

Case 1
Applicant in person
1st Respondent in person
2nd & 3rd Respondents in default

Case 2
Applicant in person
Respondent in person

MUSITHU J:

INTRODUCTION

Case 1 and Case 2 were consolidated so that they are heard at the same time. They involve the same parties and the same property, which is at the centre of the dispute. The applicant and respondent in Case 1, who are also the applicant and the 1st respondent in case 2 are both self-actors. I was seized with case 2, while case 1 was pending before another judge. I came to know of case 1 when the parties appeared before and the respondent in case 2 expressed concern why case 2, having been filed later than case 1, was being heard first. I adjourned proceedings and requested the Registrar to furnish me with the record for case 1.

On perusal of the record, I realised that in case 1, the applicant sought a spoliation order primarily against the 1st respondent (who I shall refer to as the respondent in the judgment). That matter had been set down to a later date which was about two weeks away. After consulting with the judge seized with the matter, it was agreed that both matter be heard together ideally to avoid potentially conflicting decisions by the same court. The subject matter of the dispute in both cases is a piece of land known as Stand No. 4669 Nehanda Housing Co-operative, Dzivarasekwa Extension, Dzivarasekwa, Harare, measuring 2 2 210m^2 in extent (hereinafter referred to as the property). In Case 1 the applicant seeks the following relief as set out in the draft order:

"IT IS ORDERED THAT

1. The 1st Respondent and those claiming occupation through him shall be and is hereby ordered to restore the status quo ante over stand number 4669 Nehanda Housing Co-operative Dzivarasekwa Extension Harare.
2. Should the 1st Respondent and those claiming occupation through him fail to adhere by clause 1 of this order, which the Sheriff and or his lawful deputy shall be and is hereby authorises to enforce this order on behalf of the Applicant for remove and demolish the structures (s) erected to the stand number 4669 Nehanda housing co-operative Dzivarasekwa Extension, Harare.
3. Respondents shall pay costs of suit."

In case 2, the applicant seeks the following relief:

"IT IS ORDERED THAT:

1. The application for interdict be and is hereby granted.
2. The Respondent is hereby interdicted from making any development in any form, erect or construct on stand number 4669 Nehanda Housing Co-operative, Dzivarasekwa Extension, Dzivarasekwa, Harare.
3. The Respondent to pay costs of suit at a higher scale."

The applications in both cases were opposed.

FACTUAL BACKGROUND

Nehanda Housing Co-operative (the co-operative) is one co-operative that appears to be engulfed in perpetual turmoil. Its troubles range from having two executive management committees at the same time, two chairpersons, and the double allocation of stands with the beneficiaries asserting their allegiance to either of the two chairpersons and the two management committees. These troubles have been going on for quite some time, if endless litigation that has played out in the courts involving this co-operative is anything to go by. There is no indication that all these squabbles will go away anytime soon.

For want of a better descriptive word, the co-operative currently resembles a bastion of confusion and bad governance, as shall be clear from the circumstances of this case.

Regrettably, it is the beneficiaries who instead of enjoying the fruits of lifetime savings in the comfort of their houses, suffer immensely as a result of the endless boardroom squabbles involving the different factions of the executive management committees. The Registrar of Co operatives and the responsible Minister must assert their authority in order to bring some semblance of normalcy at this co-operative.

According to a certificate placed before the court, signed by the then Minister of Local Government, Public Works and National Housing, Dr I.M.C. Chombo, the co-operative was registered on 23 April 2004 as Nehanda Housing Co-operative Limited, in terms of s 17 of the Co-operative Societies Act[1] (the Act). The co-operative was allocated a portion of Quality Flowers Farm of Gillingham Estate, being 5 369 Stands as depicted in an approved plan of February 2004, for the purpose of developing a housing scheme for its members. That allocation was made in terms of the Housing Delivery Programme.

Case 1

The applicant in case 1 claims that on 9 September 2018, he entered into an agreement of sale with the co-operative in terms of which he purchased the property for US$26 520, which was paid on the signing of the agreement of sale. A further US$100 was to be paid to the law firm Ngwerume Attorneys at Law for the preparation of the agreement of sale. The co-operative was to tender transfer of the stand upon signing of the agreement of sale. Transfer of title was to be attended to by the said law firm. Further, the co-operative was to give the purchaser vacant possession of the property on the date of signing the agreement of sale. From that date, the purchaser was deemed to have assumed occupation.

The applicant claims that the respondent illegally occupied the property and dispossessed him. The respondent allegedly built a one roomed illegal structure in front of the applicant's 5 roomed cottage and a 16 roomed main house which is at the foundation level. The applicant attached pictures of the structures which indeed confirm the developments on the ground. As a result of this unlawful occupation, the applicant approached the co-operative, which on 30 November 2018 wrote a letter addressed *"To Whom It May Concern"*, confirming that the property was allocated to the applicant. The letter confirmed that the applicant was the owner of the a *"single share in Nehanda Housing Co-operative Society which is represented by stand number B4669 allocated to him by Nehanda Housing Co-operative Society in 2010,*

[1] [*Chapter 24:05*]

in compliance with section 40 of the Co-operatives Act Chapter 24:05. Any other person claiming title to the above stand is doing so illegally…".

The said letter was signed by one N Chabata in his capacity as the Vice Chairman of the co-operative. As a result of the clashes between the two, the applicant claims that the respondent reported him at Dzivarasekwa Police Station, leading to his arrest and incarceration. He was taken to court and placed on remand. It is not clear from the papers when exactly he was arrested and for what offence. He was released on bail, and subsequently found not guilty and acquitted at the close of the State case.

The applicant further claims that after the respondent erected the one roomed structure, at the property, the applicant approached the Harare Magistrates Court seeking an order for the eviction of the respondent under case No. 29763/18. He obtained a default judgment and the respondent was evicted from the property on 19 February 2019. The eviction is confirmed by the Messenger of Court's return of service attached to the applicant's application herein. The illegal structure was also demolished. The respondent however successfully applied for rescission of judgment before the same court.

The respondent proceeded to file a special plea to the applicant's claim. In the special plea, he averred that the matter was improperly before the lower court, as the dispute between the parties ought to have been referred to the Registrar of Co-operatives for resolution in terms of s 115 of the Act. A factional dispute involving the executive management committees of the co-operative was already pending before the Registrar of Co-operatives. The respondent also argued that the applicant's claim exceeded the monetary jurisdiction of the Magistrates Court which was pegged at $10 000 then. The value of that property then was $20 000.

In her ruling, the learned Magistrate observed that, whilst the defendant therein (respondent in *casu*), had failed to produce proof that he was indeed a member of the co-operative, it was clear that the Registrar of Co-operatives was seized with the dispute pertaining to the management and operations of the co-operative. The court noted the existence of factions at the co-operative and concluded that it could not safely make a finding that the respondent was not a member of the co-operative. The court further found that the applicant herein had tendered an agreement of sale showing that the property was valued at $26,520.00. The matter was therefore beyond the jurisdiction of that court. Having made those findings, the court upheld the special plea and dismissed the applicant's claim.

Sometime in 2020, the applicant instituted another eviction claim under case No. 3313/20. His claim was again granted in default. The applicant obtained a warrant of ejectment and execution. It would appear the respondent successfully applied for rescission of judgment before he was evicted. He filed a special plea to the applicant's claim. In the special plea he averred that the matter was *res judicata*, having been dismissed by the same court under case No. 29763/18. Further, the respondent argued that the dispute was still to be resolved by the Registrar of Co-operatives in terms of s 115 of the Act. He further argued that the lower court did not have jurisdiction to deal with the matter as had already been established by the same court. The court again dismissed the applicant's claim.

On 7 December 2021, the applicant wrote to the Registrar of Co-operatives expressing his concerns and frustrations at the manner in which the dispute was being handled considering that the respondent was not even a member of the co-operative. The letter accused the Registrar of abusing his office and conniving with the respondent. The applicant also accused the Registrar of having written a letter dated 7 October 2019 addressed to *"whom it may concern"*, in which that office acknowledged that the housing disputes at the co-operative were being resolved through an audit which was underway following a directive from the responsible Minister.

The letter urged members of the co-operative who were entangled in disputes of double allocations of stands to exercise restraint pending the conclusion of the audit. The applicant further threatened to make a report to the Zimbabwe Anti-Corruption Commission or the Police if the Registrar failed to respond within 48 hours. The applicant claims that he met the Registrar of Co-operatives on 14 December 2021. The Registrar is said to have agreed to be cited in any litigation proceedings in order to clarify his office's position on the matter.

The applicant claimed to have spent in excess of US$39 020, which amount included the purchase price and building costs. His efforts to resolve the matter were all in vain hence his decision to approach the court for the said relief.

In opposition the respondent averred that he started residing at the property in in 2000. He only got to know of the applicant in 2018. He further averred that the dispute between the parties was pending for resolution by the Registrar of Co-operatives through an audit which was underway. The court therefore had no jurisdiction to deal with the matter. The matter ought to be referred to the Registrar of Co-operatives. The respondent claimed that the Minister of Local Government, Public Works and National Housing had requested the co-operative to

accommodate the settlers who were residing on the land from the onset of the land reform programme. In a letter dated 26 October 2018 addressed to the co-operative by a representative of the Secretary for Local Government, Public Works and National Housing, the Ministry wrote:

> **"REQUEST TO ASSIST SETTLERS IN NEHANDA HOUSING COOPERATIVE**
>
> We are in receipt of a letter from settlers who are residing in Nehanda Housing Cooperative. The settlers claim to have taken occupation of the land in 2000 during the land reform programme. The group is appealing for assistance to be considered on the scheme.
>
> We are therefore appealing to you so that you assist them by allocating them stands where they have settled.
>
> Attached hereto, please find the list of settlers for your consideration."

The respondent's name was on that list. The respondent denied destroying anything on the property or being in unlawful possession of the property. He also denied that the applicant was allocated the property in 2010, since he made payments to the co-operative in January and February 2018. In any case, the agreement of sale relied upon was only signed in September 2018. The respondent prayed for the dismissal of the application with costs.

Case 2

The applicant claims to be the owner of the property, with exclusive rights over same. In making the claim, the applicant referred to the letter from the Ministry of Local Government, Public Works and National Housing dated 26 October 2018. The applicant denied that the respondent was in occupation of the stand. He merely constructed a cottage but was not residing at the property. The applicant accused the respondent of being violent and abusive towards the applicant. The applicant claims that the respondent had even gone to the extent of digging pit sand for sale from the property.

The applicant further accused the respondent of hindering the applicant's developmental efforts at the stand. The respondent had constructed a cottage without the applicant's approval. The applicant was being denied full enjoyment of the fruits of his property as a result of the respondent's conduct. The applicant averred that he had no other remedy available save to interdict the respondent from continuing with his activities.

In opposition the respondent took a preliminary point. He alleged that the applicant had not exhausted domestic remedies available. The application for the interdict had been made as a counter to his own application for spoliation under HC 7273/21. That application was pending and awaiting set down. He also averred that the applicant had not attached any evidence to

assert his claim of having exclusive rights to the property. The applicant had therefore lied under oath. Further, the applicant averred that the application was beset with material disputes of fact. These pertained to whether or not the applicant was the owner of the property in question. The disputes of fact were unresolvable on the papers.

The preliminary objection can be disposed of at the outset. The alleged domestic remedies that were not exhausted were not set out in the papers. I surmised that the respondent meant to argue that the applicant ought to have approached the Registrar of Co-operatives for resolution of the matter. However the nature of the relief sought does not exclude this court from exercising jurisdiction over the matter. The Registrar cannot grant an interdict in the mould of the one sought by the applicant. The only point which carried weight was the one pertaining to the existence of disputes of fact. I realised that the point applied in respect of both applications, and in the exercise of my discretion, I decided to invite the chairperson of the co-operative or his deputy to come and clarify the contentious areas that gave rise to the disputes of fact. I shall deal with this point later in the judgment.

The respondent admitted that he constructed a 5 roomed cottage as well as the main house which was at box level. He started construction after making the necessary payments to the co-operative. The respondent maintained that the applicant had no right to be on the property. The alleged letter from the Ministry to the co-operative was actually seeking assistance for the settlers who were not members of the co-operative.

The respondent denied that he was extracting pit sand from the property. He could not do such a thing on his own property. Rather it was the applicant who had illegally occupied the property prompting him to approach the court for a spoliation order. It was him who continued to suffer irreparable harm as a result of the applicant's unlawful conduct.

The Hearing

Having listened to the parties' submissions, it occurred to me that the two applications were resolvable by inviting the chairperson of the co-operative, and in his or her absence, the deputy to clarify who between the two parties was lawfully allocated the property in dispute. Since the names of the Chairperson or the deputy were unknown to the court and to the parties, I issued an order and directed the registrar to issue a *subpoena* inviting either of the two to appear before the court on 20 June 2022.

On 20 June 2022, a Mr Simba Moyo took the witness stand in his capacity as the chairperson of the co-operative. The applicant in Case 1 immediately stood up objecting that

Simba Moyo was not the Chairperson of the co-operative. He claimed that the rightful representative was seated in the gallery. That person was a Mr Andrew Marauka. It was at that stage that it emerged that there were two factions claiming to be the lawful executive management of the co-operative. The issue about which of the two factions was the lawfully constituted executive management committee was not before the court for determination. I therefore allowed the two gentlemen to give their testimony.

Simba Moyo stated that he was the legal chairman of the co-operative. He told the court that the land allocated to the co-operative was State land which could not be sold. This was in terms of s 80 of the Act. The land was allocated for free. Any disposal had to be approved by the Registrar of Co-operatives as the custodian of the land. The witness further told the court that the land was allocated to the respondent in Case 1. The respondent was a settler on the land together with his father from the early 2000s.

Moyo claimed to be the one who allocated the respondent the property after the respondent approached the Ministry of Small and Medium Enterprises for assistance. That Ministry was in charge of co-operatives at the material time. The responsible Minister had asked co-operatives to also consider allocating land to settlers who were already on the land when the co-operative was allocated the land. That communication was made in writing. The witness told the court as the chairperson of the co-operative, he had accepted all the settlers into the co-operative. The settlers were formerly allocated the stands in 2015. The names of the settlers were also in the records at the Registrar's office. The applicant's name was not amongst those names. The witness blamed the past office bearers for creating chaos by selling stands to people who were not members of the co-operative, and the applicant was one such person. He had personally warned the applicant not to make any developments on the land because it had not been lawfully allocated to him.

The witness further told the court that settlers were only required to pay development fees, and this explained why the respondent in Case 1 did not have any receipts from the co-operative. The position was also confirmed by the Minister responsible for co-operatives after the witness was arrested at the instance of the deposed management committee. The witness insisted that the respondent was in lawful occupation of the property since 2015 when he was formerly allocated that piece of land. The witness denied that the applicant ever stayed at the property from the time that he allegedly purchased it in 2018.

The witness further told the court that the issue of who was lawfully allocated the property between the two could only be resolved by the Registrar of Co-operatives in view of the factional fights between the past and present executive management committees. A letter of 24 February 2020 from the Ministry of Women's Affairs, Community and Medium Enterprises Development to ZACC commenting on the legitimate executive for the co-operative, had all but confirmed that the witness was the current chairperson of the executive management committee. The witness also claimed that court orders from this court had also confirmed that his executive management committee was the legitimate one.

The second witness Andrew Marauka appeared in his capacity as the secretary general of the co-operative by virtue of a special resolution passed by the executive management of the co-operative on 17 June 2022. The current chairperson of the co-operative was a Mr Mhute. Moyo was not known to them. He told the court that the audit instituted at the instance of the Registrar of Co-operatives was going to establish the genuine leadership of the co-operative.

The witness averred that the applicant in Case 1 is the one who was lawfully allocated the property, and the co-operative had the requisite paperwork to authenticate the position. As regards the status of the respondent, the witness stated that he received a letter from the Ministry of Local Government which requested the co-operative to consider allocating the respondent a stand, together with other settlers. The co-operative was still working out the logistics of allocating the respondent his own stand. The witness therefore denied that the respondent was in lawful occupation of the stand, since they were yet to process his case.

THE ANALYSIS

From the witness testimony, it is evidently clear that the dispute concerning the property is tied to the executive management dispute currently raging and involving the two feuding executive management committees. This issue about who between the two parties was lawfully allocated the property, which is also tied to the question of title is not one that this court can determine at this stage. This because of the nature of the relief sought by the parties in the two cases. Either of the parties will have to approach this court perhaps by way of an application for a *declaratur* for the determination of the parties' rights, title and interest in that property. That is in the event that the audit being carried out by the Registrar of Co-operatives does not resolve that issue. I will proceed to dispose of the two cases separately hereunder.

Case 1

In case 1, the applicant approached the court for spoliatory relief. In *Botha & Anor* v *Barrett*[2], GUBBAY CJ set out the requirements for spoliatory relief as follows:

> "It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:
> (a) That the applicant was in peaceful and undisturbed possession of the property; and
> (b) That the respondent deprived him of the possession forcibly or wrongfully against his consent….."

The applicant bears the onus to prove the alleged spoliation. He must show on a balance of probabilities that he was in peaceful and undisturbed possession, and that he was deprived of such possession unlawfully or through the use of force. The spoliatory relief serves as a tool for promoting the rule of law and a disincentive against self-help. The defences available to a claim for spoliatory relief are: denial; impossibility of restoration and counter spoliation.

From a consideration of the facts, it is clear that the applicant successfully caused the eviction of the respondent from the property sometime in 2019. That eviction was however set aside when the respondent obtained an order rescinding the default judgment that had led to his eviction. The court then dismissed the applicant's claim pursuant to the respondent's special plea.

In 2020, the applicant again attempted to evict the respondent without success. The court dismissed his claims for almost the same reasons it dismissed the earlier claim. The respondent remained at the property. It therefore means that the applicant has never enjoyed peaceful and undisturbed possession of the property. The parties have somehow co-existed at the same property to the extent that the applicant built a cottage and is in the process of constructing his main house, with the respondent present at the same property. No evidence was placed before the court to show that the applicant was deprived of possession through the use of force or unlawfully. The evidence rather shows an unhealthy co-existence between the two parties. As already shown, it is the chaos that characterises the management of the affairs of the co-operative that is responsible for this state of affairs.

For the foregoing reasons, it is the court's finding that the applicant failed to discharge the onus to prove the alleged spoliation.

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[2] 1996 (2) ZLR 73 (S) at 77E

Case 2

The applicant seeks a final interdict. The papers were inelegantly prepared, as no attempt was made to relate to the requirements of a final interdict. The requirements of a final interdict were explained by MUZOFA J in *Satond Investments (Private) Limited* v *Shava* as follows:

> "In an application for a final interdict as the one sought by the applicant the applicant has to establish firstly a clear right, secondly an actual or a reasonably apprehended injury and, thirdly, absence of any other remedy *Setlogelo* v *Setlogelo* 1914 AD 221. A *prima facie* right can only suffice in an application for a final interdict where there is a likelihood of irreparable harm being suffered if the relief is not granted Molteno Bros and other SA Rlys and Others 1936 AD 321 at 332 cited in *Boadi* v *Boadi and Anor* 1992 (2) ZLR 22 (HC)."[3]

Further down in the same judgment, the learned judge explained what amounts to a clear right as follows:

> "Whether the applicant has a clear right is a matter of substantive law. It must be a right that exists at law and can be protected. A clear right is one that is not open to doubt whatsoever."[4]

Has the applicant managed to establish a clear right to the property which is not open to any doubt? To answer this question, one has to look no further than the document that the applicant made reference to in order to assert his rights to the property. It is the letter of 26 October 2018 from the Ministry of Local Government that I have already referred to above. The letter does not state that he was allocated the property. It merely refers to him as a settler. It was an appeal to the co-operative to assist the settlers by allocating them stands where they had settled.

The only other evidence connecting the applicant to the property are the conflicting testimonies by Moyo and Marauka who appeared before the court as witnesses. The court cannot believe any of their testimonies with respect to the position of the two parties herein in the absence of any further corroborating evidence. It was clear that both spoke in support of their respective factions. The court finds that the applicant has failed to establish that he has a clear right that exists in the property which must be protected by the law. In the absence of a clear right, this court cannot find that the applicant will suffer irreparable harm, and that there is reasonable apprehension of harm. It has also not been demonstrated that the applicant has no alternative remedy. The application must therefore fall on that score.

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[3] At p2 of the judgment.
[4] p2 of the judgment

CONCLUSION

As already stated, the applicants in both applications approached the court for the wrong relief altogether. They ought to have approached the court rather for a determination of their rights, title and interest in the property so that the court could determine who between the two of them was lawfully allocated the property. Their respective applications touched on fairly complex and technical areas of the law, which ordinarily requires the expertise of legal practitioners. The court appreciates that both litigants were self-actors, and for that reason it shall not saddle either with an adverse order of costs.

Resultantly, it is ordered that:

Case 1

1. The application for a spoliation order be and it is hereby dismissed.
2. There shall be no order as to costs.

Case 2

3. The application for an interdict be and it is hereby dismissed.
4. There shall be no order as to costs.

Applicant in person
Respondent in person