FELIX FARAI KAMUSASA
and
MILDRED KAMUSASA
versus
WILSON MUGANDA
and
MINISTER OF LANDS, AGRICULTURE, WATER
AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 13 January. 2021 & 31 March 2021

Ruling on Points *in Limine*

FOROMA J: Applicants filed this application as an urgent application seeking a provisional order worded as follows:

> "Terms of the final order sought
> That the First Respondent, should show cause to this Honourable Court why if any a final order in the following terms should not be made.
> 1. That the First Respondent his agents workers or any person acting on his behalf or with his authority, be and is hereby permanently interdicted and restrained from allowing livestock to roam and or graze and or enter Plot 4 Helensvale Estate as appears on the new Sub-division lay out or any other property owned by the applicants
> 2. The Sheriff, or his lawful Deputy attach and impound any livestock found grazing in Plot 4 Helensvale Estate belonging to any person other than applicants.
> 3. That the respondent pay the costs of this application on attorney-client scale.
>
> Interim relief granted
> Pending finalisation of the matter in case number HC 7226/20:
> 1. That the First Respondent, his agents workers or any person acting on his behalf or with his authority be and is hereby interdicted and restrained from allowing livestock to roam and/or graze and or enter Plot 4 Helensvale Este as depicted by the new subdivision layout or any other portion of land owned by the applicants.
> 2. In the event that the First Respondent his agents, workers or any person acting on his behalf or with his authority contravenes this order any member of the Zimbabwe Republic Police be and is hereby authorised to arrest and charge such person with contempt of court.
>
> Service of the Provisional Order
> That service of this Provisional Order be effected by the Sheriff.
> The urgent chamber application is founded upon a claim by the applicants that on the 7th of January 2021 the First Respondent brought some cattle to graze on a piece of land which they "owns by reason of an offer letter by Second Respondent resulting in their daily herd being deprived of pasture and also being exposed to disease and cross-breeding causing the applicants' prejudice and irreparable harm".

The applicants' application is opposed by the First Respondent. Second Respondent indicated that it is not opposed to the relief sought in the application.

It is common cause that the first applicant and First Respondent were previously involved in a dispute in the High Court at Mutare in terms of which the first respondent sued the applicant for a spoliation order as a result of the first applicant unlawfully removing a fence erected by the First Respondent as boundary fence between Plot number 4 occupied by applicants and Plot 5 which First Respondent occupied. Applicants considered that the fence in question transgressed their piece of land (Plot 4 as offered to them by Second Respondent in July 2020). The dispute was resolved through an order by consent whose terms were as follows:

"Whereas the applicant filed an urgent application for spoliation order which was opposed by First Respondent (Felix Kamusasa) and not opposed by Second and Third Respondent (Minister of lands, Agriculture, Water, Climate and Rural Resettlement and Provincial Lands Officer Manicaland respectively) and the parties have agreed to settle the matter pending the resolution of ownership of Plot 4 and 5 Helensvale Headlands by the allocating authority. The following order is hereby made:-

It is ordered by consent that:

1. The applicant and First Respondent have agreed that the respondent is to erect the fence that he removed belonging to applicant on or before the 5th December 2020 leaving an allowance for the Centre Pivot for first respondent to circulate without any interference and thereafter first respondent is to close the opening after harvesting the tobacco crop.
2. The parties have also agreed that the first respondent is to be allowed to continue tending the tobacco crop he had planted until the same tobacco crop is harvested.
3. The parties have agreed that each party is to bear its own costs.

In opposing the applicants' application first respondent raised a number of points *in limine* namely:-

i. That the application filed by the applicants is defective as not complying with form number 29 as provided for by rule 241 and that the provisional order is also defective as not complying with form number 29 C.

ii. The application is defective in the sense that the affidavit by Felix Farai Kamusasa was not properly commissioned as there is no date.

iii. The application is not urgent as respondent was using the land in question all along even as at 27 November 2020 which is the date of the order by Consent aforesaid which provides that the allocating authority was to resolve the issue of ownership of Plot 4 and Plot 5 of Helensvale.

iv. The Second Respondent was incorrectly cited as its correct name should read Minister of Lands, Agriculture, Water Climate, and Rural Resettlement thus making the application fatally defective.

v. That the purported certificate of urgency by one Raymond Tendai Nyarungwe is fatally defective.

The parties who were represented by counsel filed heads of argument in which they addressed each party's position regarding the points *in limine*.

It is cardinal practice in all applications that the court disposes of the points *in limine* raised before considering the merits of the dispute. In particular in urgent chamber applicants where the issue as to whether the application is urgent or not is raised *in limine* it is incumbent upon the Judge at the hearing to determine the issue of urgency before going into the merits. This is because in the event that the Judge finds the matter not to be urgent the matter cannot progress further as the application has to be removed from the roll of urgent applications.

In casu although several points are raised *in limine* I will not deal with them in the order that the first respondent raised them. I propose to deal with the issue of urgency first as there might be no need to deal with the other point *in limine* should a finding be made that the matter is not urgent. However it is necessary to outline the applicant's response to the points *in limine* raised by the first respondent. It is worth noting that despite the first respondent's opposing affidavit having been filed on the 22 January 2021 applicants did not file any answering affidavit. Assuming that applicants required time to file any answering affidavit the consent of the respondent ought to have been sought at the very least and if such consent was withheld leave of the Judge could have been sought to file such answering affidavit as an oral hearing was not required on account of lockdown practice directions.

The applicants opted to proceed to file heads of argument without responding to the issues raised by First Respondent in any answering affidavit.

Be that as it may applicants disputed that the application was fatally defective on account of the failure to use the correct form. By reason of this attitude applicant did not consider seeking condonation.

In regard to the allegation that first applicant's affidavit was a nullity on account of it not being dated by the Commissioner of Oaths, applicants argued that the affidavit in support of the application filed with the Registry was duly dated thus nothing turned on the fact that the copy of the affidavit served on First Respondent may not have been dated.

The fact that the Second Respondent's name was incorrectly cited was not considered as material even though it was admitted and an indication was made that an application would be made to cite the second respondent's name correctly.

The applicants did not accept that the certificate of urgency was fatally defective as the error it contained (where the use of the word prepared instead of perused) was a typographical error which did not cause any of the parties any prejudice. Applicants also contended that the status of Raymond Tendai Nyarungwe was clearly indicated in the certificate of urgency.

Applicants did not address the issue of urgency raised by first respondent at all. It is significant to remind oneself that the parties resolved first respondent's urgent application for a *mandamen van* spolie instituted at High Court Mutare by consent. The said consent provided that the first applicant would re-erect first respondent's 5 stand barbed wire fence demarcating the first applicant's former plot 4 and plot 5. It is also significant to note that despite applicants having been re-allocated plot 4 now measuring 308 ha in July 2020 First Respondent claims that by that time he had already erected a new fence the subject of spoliation proceedings. This applicants concede in para 9 of plaintiff's declaration in HC 7226/20.

According to First Respondent when first applicant was offered 308 ha in the new offer of Plot 4 Hellensvale he (First Respondent) was already waiting for formal allocation of plot 5 Hellensvale as had been recommended by a Director in second respondent's Ministry and as subsequently endorsed by the late Provincial Minister for Manicaland (the late Gwaradzimba).

It is precisely the dispute on whether First Respondent ought not to have been allocated plot 5 that led to the disputed boundaries between first applicant and first respondent as the *defacto* occupier of plot 5 aforesaid.

Clearly therefore the Order by consent of the 27 November 2020 envisaged the resolution of the dispute in relation to "ownership" of plot 5 Hellensvale being resolved by the allocating authority.

Although the applicants argue that the ownership of plot 5 dispute was resolved by Second Respondent's sending officers to peg the new boundaries of applicants' new plot 4 measuring 308 ha as offered by second respondent this argument is not sincere for 2 reasons -

(a) Second Respondent could not have simply marked the beacons as a way of resolving the boundary dispute given the nature of First Respondent's claims to plot No 5 and

b) Besides, in para 1 of the Urgent Chamber Application filed on 13 January 2021 applicants acknowledged that there was still in existence a dispute between the parties (which is before the courts under case No. HC 7226/20) as well as the

> office of Second Respondent over the same subject matter. There is no other dispute over the same subject matter pitting applicants and First Respondent in Second Respondent's office save the one referred to in the Order by consent of 27 November 2020. For this reason first applicant cannot blow both hot and cold by claiming the resolution of the dispute by Second Respondent pegging the beacons while at the same time acknowledge as pending the same dispute in the urgent application *in casu*.

It is clear that first applicant conceded having despoiled first respondent in the Order by consent aforesaid.

The reality of the situation is that the anticipated resolution of the boundary dispute by the allocating authority has not yet taken place. For that reason first respondent maintains that he has not trespassed onto the first applicant's plot 4 which can only be the plot 4 whose boundary with plot 5 is subject of the disputed fence erected by the first respondent the cause of the dispute at the High Court Mutare. On 7 January applicants' legal practitioners addressed a letter to first respondent's legal practitioners demanding that first respondent does not graze his cattle in plot 4. In response first respondent's legal practitioner pointed out that not only did first respondent deny allegations made but pointed out that the Order by consent remained extant and applicants had no valid cause before second respondent as the allocating authority had resolved the so called "ownership" dispute. I put the word ownership in parenthesis as the land in dispute at the Mutare High Court was and could only be owned by the State and not by either of the disputants who could only lease the said land.

It is therefore clear that barring the resolution of the boundary dispute by Second Respondent as allocating authority as agreed to by the parties in the Order by consent aforesaid, the issue of the boundary dispute can never require urgent attention by any court.

In the circumstances I find that the applicants' application is not urgent and should be removed from the roll of urgent applications. In light of the finding that the matter is not urgent and that it should be removed from the roll of urgent applications there will be no need to consider the other points *in limine* raised.

Disposition

The matter is not urgent. It is hereby removed from the roll of urgent applications.

Kamusasa & Musendo, applicant's Legal Practitioners
Chibaya & Partners, 1st respondent's Legal Practitioners