CANAAN MUGUMIRA
versus
NEVER RUWENDE
and
TRUDY KABAYA
and
THE OCCUPANTS OF THE REMAINING EXTENT
OF KILMACDAUGH FARM IN ZVIMBA DISTRICT
OF MASHONALAND WEST PROVINCE
and
MINISTER OF LANDS, AGRICULTURE, WATER, CLIMATE
AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 15 July & 8 November 2022

Opposed Matter

T H Nyabeze, for the applicant
T S Mjungwa, for the respondent

MANGOTA J:

On 27 April, 2021 the applicant sued the respondents under HC 1789/21. He moved for the eviction of the respondents from the Remaining Extent of Kilmacdough Farm ("the property"). The property is in the district of Zvimba which is under Mashonaland West Province. He couched his draft order in the following terms:

> "IT IS ORDERED THAT:
> 1. The Application for eviction is hereby granted.
> 2. The 1st Respondent, 2nd and 3rd Respondents and all those claiming occupation through them be and are hereby ordered to vacate from the Remaining Extent of Kilmacdough Farm in Zvimba District of Mashonaland West Province within 30 days of the service of this court order on them; failing which the Sheriff for Zimbabwe or his deputy if need be with the assistance of the Zimbabwe Republic Police are hereby authorised to evict them."

Save for the first respondent ("the respondent") who filed his notice of opposition on 29 April, 2021 none of the respondents whom the applicant cited opposed the application.

The applicant paid heed to the respondent's *in limine* matter which related to the citation of the third respondent. The preliminary point which had been raised was that there was no third respondent who was before the court. He asserted, and correctly so, that the citation of the third respondent was defective. The third respondent, he insisted, could not be cited as '*The occupants of the Remaining Extent of Kilmacdough Farm in Zvimba District of Mashonaland West Province*'.

The concession of the applicant to the respondent's preliminary point in respect of the incorrect citation of the third respondent compelled him to file an amended draft order. He filed it on 15 July, 2021. The new draft order leaves the third respondent out of the equation. The stated matter leaves the applicant and the respondent in the equation. The motion for eviction, therefore, relates to the respondent only. Only because the second respondent did not react to the application which had been served upon him and no relief is being sought against the fourth respondent who was cited in his official capacity as the land acquiring and allocating authority who also did not oppose the application.

The applicant, it is noted, instituted the claim for the relief of *rei vindicatio* against the respondent. That form of relief is, in general terms, available to an owner of a thing which has been taken away from him without his consent and against his will. Case authority which makes reference to the principle which relates to the relief of *rei vindicatio* are many and varied. It is, for instance, stated in *Indium Investments (Pvt) Ltd* v *Kingshaven (Pvt) Ltd*, SC 40/15 that an owner is entitled to reclaim possession of his property from whomsoever is in possession of it. In stating as it did, the court was only re-emphasizing the principle which the court enunciated in *Stanbic Finance Zimbabwe Ltd* v *Chivhunga*, 1999 (1) ZLR 262 (H) in which it was stated that:

> "The principle on which *the actio rei vindicatio* is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent."

Rei vindicatio, as is evident, concerns itself not with possession. It concerns itself with ownership. It thrives upon the concept of ownership of the thing by its owner who has every right to retain possession of it from anyone who possesses it without the latter holding any title to it. Silberberg & Schoeman clarify the vindicatory relief in a clear and lucid manner. The learned authors state in their *Law of Property, 3rd edition*, p 273 that:

> "The principle that an owner cannot be deprived of his property against his will means that he is entitled to recover it from any person who retains possession of it without his consent."

The applicant does not claim to be the owner of the property which is the subject of the present proceedings. He asserts that he is the lawful occupier of the same. The question which begs the answer is whether or not he has the requisite *locus* to sue to evict the respondent from the property. *Locus*, simply taken, means the right to sue the respondent as he is doing. Can he, in short, evict the respondent when he has the right of occupation of the property only. His case in the observed set of circumstances is unique. Unique in the sense that an occupier of land who ordinarily cannot evict another from the land which he lawfully occupies has the *locus* which the court conferred upon him to sue as well as evict unlawful occupiers of the land which Government allocated to him. The position of the law on this aspect of the case was clearly articulated in *Commercial Farmers Union & 9 others* v *The Minister of Lands & 6 others*, 2010 (2) ZLR 576 (S) in which it was stated that:

> "An offer letter issued in terms of the Act is a clear expression by the acquiring authority of the decision as to who should possess or occupy its land and exercise the right of possession or occupation on it.
>
> The holders of offer letters, permits or land settlement leases have the right of occupation and should be assisted by the courts, the police and other public officials to assert their rights."

Whether or not the applicant should be assisted by the court to assert his rights to the property is a matter of evidence. For him to succeed in this application, therefore, he must show that he possesses an offer letter or a permit or a land settlement lease. These tenure documents are mentioned in s 2 of the *Gazetted Lands (Consequential Provisions) Act* [*Chapter 20:28*] ("the Act"). They regulate land tenure on State-owned land in Zimbabwe. The section in terms of which they are mentioned defines the phrase 'lawful authority' to mean:

i) an offer letter; or

ii) a permit; or

iii) a land settlement lease.

That the applicant has an offer letter which the fourth respondent issued to him in respect of the property requires little, if any, debate. He attached the same to his application. He marked it Annexure A. The annexure appears at p 6 of the record. It is dated 19 January, 2009.

It is on the basis of the annexure that the applicant seeks to evict the respondent from the property. He derives the *locus* to sue to evict the respondent from the annexure as read with the *dictum* which the court enunciated in *Commercial Farmers Union* v *The Minister case* (*supra*). His application is therefore well within the law. He has shown, on a preponderance of probabilities, that he has the right to sue and evict the respondent from the property.

The statement of the respondent is that he took occupation of the property or part of it with the consent of the applicant. He asserts that the applicant entered into a verbal lease of the property with him. He admits that the applicant is the lawful occupier of the property. He claims that the applicant allowed him to use the property in return for payment to him of two herd of cattle per year or the equivalent of the same in the form of money. He attached to his notice of opposition a written lease which he claims the applicant refused to sign. He denied that he invaded the property. He alleges that he has been paying rent to the applicant. He attached to his opposing papers Annexures A and B respectively.

The annexures appear at pp 23 and 25 of the record. The first 'A' is the agreement of lease which was purportedly entered into by and between the applicant and the respondent. I say purportedly because only the respondent signed it on 23 July, 2019. The applicant did not. The second 'B' are the rentals which the respondent allegedly deposited into the applicant's bank as rent for his use of the latter's property or part of it. It is dated 20 July, 2019. He apparently deposited USD8 000 into the same.

The applicant denies that he entered into any lease-verbal or written- with the respondent. He claims that he refused to sign the lease which, in his view, was crafted outside the law. He insists that there cannot be any valid landlord-tenant relationship where the same is *ultra-vires* the law. He admits that the respondent deposited into his bank a sum of money which was equivalent to six months' rentals. He did so on 20 January 2019, according to him.

The applicant's denial of the existence of the lease between the respondent and him is without merit. He, for instance, does not deny that the respondent paid USD8 000 into his bank. He, in fact, makes an assertion to an equal effect. He states, in para. 10 of his answering affidavit, that the respondent '*chose to forcibly transfer an amount which was equivalent to 6 months' rentals into' his account*'.

Whatever the applicant meant to convey by the statement is not the issue. The issue is that no one but the applicant disclosed his bank details to the respondent. He did so, in my view, for the specific reason that the respondent should deposit the money into his bank. The applicant cannot have me believe that the respondent guessed his banking details. This is a *fortiori* the case given the applicant's account number which appears in column eight of Annexure B. The number is specific to, and is known by, the applicant only. He is not suggesting that any person who is not himself gave the account number of his bank to the respondent. The probabilities are that he gave it to him to, as the respondent correctly asserts, enable him to deposit the monthly rent into the account for his use, or part use, of the property.

Having been found, as it has been, that the applicant and the respondent had a landlord-tenant relationship which existed between them, the question which begs the answer is, was that relationship valid at law. For it to be valid, the applicant should have secured the consent or authority of the fourth respondent to lease, in whole or in part, the property which the latter allocated to him. The stuck reality is that he did not. His assertion on the mentioned point is that the law criminalizes occupation by persons of State-owned agricultural land without lawful authority. He insists that the lease is both illegal and invalid by virtue of its illegality.

Neither the applicant nor the respondent ever suggested that the authority of the fourth respondent was sought let alone granted when the verbal lease was concluded between them. The long and short of the observed matter is that the parties entered into the lease in violation of the law. They violated s 3 (1) of the Act. This prohibits any person from holding, using or occupying gazetted land without lawful authority. The respondent can, in short, only hold, use or occupy the property when he holds an offer letter or a permit or a land settlement lease in respect of the property. Where he, as *in casu*, is in possession of none of the mentioned tenure documents, his presence at the property is illegal. He cannot, under the observed circumstances move me to support his continued stay at the property. Where I choose to sing in his corner as he is persuading me to do, when he is acting outside the law, I will be supporting an illegality. My conduct would therefore be in direct conflict with the obligations of my office which are to uphold the Constitution of Zimbabwe and all the laws which flow from it.

Section 5(2) (c) of the Land Acquisition Act prohibits the applicant from disposing of the land which was/is allocated to him without the written permission of the fourth respondent. The provision is peremptory in nature. It therefore has to be complied with to the letter and spirit.

It is trite law that a thing which is done contrary to the direct prohibition of the law is void and is of no force or effect: *Shierhout* v *Minister of Justice*, 1926 AD 99 at 109. *State* v *Gatsi*, 1994 (1) ZLR 7 (H) considered the nature and effect of statutory injunctions. It is in *sync* with Maxwell who, in his *Interpretation of Statutes, 7th edition*, p 316, states in clear and categorical terms that failure to comply with a peremptory requirement is usually presumed to entail a nullity.

It follows from the above-stated authorities that the lease which the applicant concluded with the respondent outside the law is null and void. The parties who concluded it did not have the consent of the acquiring and allocating authority to so contract in respect of the property which he allocated to the applicant. They, on their part, did not seek or obtain the authority of the fourth respondent. Because their contract is a nullity, nothing flows from it. No rights and/or obligations arise out of it. If an act is void, then it is in law a nullity. It is not only bad but incurably bad. It is automatically null and void without more ado and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse: *Macfoy* v *United Africa Co Ltd*, (1961) 3 All Er1169 (PC) at 1172.

The respondent has therefore no rights which he can enforce against the applicant who subsequently realized the folly of his disposition and made up his mind not to sign the contract which the respondent drew up. He made an effort to evict the respondent from the property which the fourth respondent allocated to him. His conduct remains *in sync* with the law. He should therefore be assisted to assert his rights to the land.

The applicant proved his case on a balance of probabilities. The application is, in the premise, granted as prayed in the amended draft order.

Tawenhave Machingauta, applicant's legal practitioners
Mlotshwa Solicitors, first respondent's legal practitioners