

WILLIAM DAVID CERLISLE WISE v ATTORNEY-GENERAL (1991) S.J. (H.C.)

HIGH COURT  
BWALYA B. M., J  
16TH DECEMBER, 1991.  
1989/HP/668

**Flynote**

Compulsory acquisition - Whether done in bad faith - Land Acquisition Act - Offer of compensation - National interest

**Headnote**

The Plaintiff came to Zambia in 1952 and inherited two farms from his uncle which were the subject matter of this action. The Plaintiff permitted the widow, after the death of her husband to continue farming in the name of the company E.F. Hervey Limited free of charge until September, 1982 when he granted the widow's company a lease for a period of 12 months. The company, now owned by Raymond Barret and his wife Lynn, refused to give up possession and succeeded in protracting the dispute in court until November, 1987 when the High Court adjudicated thereon and held in favour of the Plaintiff. The company secured two temporary stays of execution of the Judgment pending its appeal against the Judgment of the High Court to the Supreme Court. The Supreme Court, however, on two occasions, the first in November, 1988 and again in late December, 1988 dismissed the Defendant's application for stay of the order for possession pending the determination of the appeal. The effect of the order was that E.F. Hervey Limited were subject to removal from the farms by the Sheriff. A Writ of Possession issued by the High Court of Zambia was partially executed by the Sheriff of Zambia but E.F. Hervey Limited moved back the items removed by the Sheriff and for reasons best known to the Sheriff no further action was taken by him on the Writ of Possession. Instead, the Plaintiff an established resident was detained by immigration officers on the night of 9th January, 1989 and whilst in prison on 13th January, 1989 was served with the two Notices of Intention to Acquire the two farms. The Plaintiff was compelled to leave the country and did so shortly thereafter without regaining freedom.

**Held:**

- (i) The notices of intention to acquire property and to yield up possession were irregular and unlawful and therefore nullified;
- (ii) The compulsory acquisition of the said two farms was null and void ab initio;
- (iii) The Plaintiff was and continues to be the owner of the said two farms;
- (iv) The Plaintiff be awarded damages to be assessed by the learned Deputy Registrar

**Authorities referred to:**

- 1. Clark v Nash, 198 U.S. 361, 25 S. Ct., 676, 49 L ed. 1085
- 2. Mills v St. Clair County 8 How. 569, 12 L ed. 1201
- 3. Land Acquisition Act, Cap. 296, SS, 5, 6 and 17.
- 4. Halsbury's Laws of England 4th ed. Vol. 8 para. 50.
- 5. De Smith's Judicial Review of Administrative Action 4th ed. Stevens & Son Ltd, London pp. 335

For the Plaintiff: Mr. A.M. Hamir, Counsel of Messrs, Solly Patel, Hamir and Lawrence.  
For the Defendant: Mr. J.M. Mwanachongo, Principal State Advocate.

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**Judgment**

**BWALYA B. M., J.:**

This is the Plaintiff's claim by way of Writ of Summons whose details in the statement of claim are as follows:

1. By a will dated 18th January, 1979 the late Eric Falkenburg Hervey ("the deceased") bequeathed to his nephew the Plaintiff his leasehold properties being the remaining Extent of Farm Number 134a Mazabuka and Subdivision Number 1 of Farm 136a (the farm).
2. The deceased died on the 10th May, 1980 and on the 27th November, 1981 the executors of the deceased assented to the bequest of the farm in favour of the Plaintiff who thereby became tenant thereof from the President for a term of 100 years from 1st July, 1975.
3. That E.F. Hervey Limited was at the date of deceased's death in occupation and working on the said farms for its use and benefit and continues in such occupation up to the date hereof.
4. By an agreement made in writing the Plaintiff granted E.F. Hervey Limited a lease of the said farms excluding the main residence thereon for a term of 12 months from 1st September, 1982 at a rent of K2,500.00 per month payable monthly in advance and the said E.F. Hervey Limited undertaking to vacate the farms on 31st August, 1983.
5. That E. F Hervey Limited agreed thereto and continued in possession thereof but notwithstanding the Plaintiff's written notice to them on or about 20th June, 1983 they held over the farms and kept the Plaintiff out of possession thereof from and after 31st August, 1983 and in addition thereto failed and or neglected to pay the agreed rate of K2,500.00 per month for the period of 1st May, 1983 to 31st August, 1983.
6. That the Plaintiff commenced legal proceedings against E.F. Hervey Limited on 22nd September, 1983 for inter alia possession of the said farms arrears of rental and mesne profits.
7. That on the 18th November, 1987 the High Court for Zambia adjudged that the Plaintiff is the owner of the said farms entitled to possession thereof of and mesne profits from 1st September, 1983 to date of Judgment.
8. That E. F Hervey Limited appealed the decision of the High Court to the Supreme Court on the 18th December, 1987. It secured a stay of execution of the Order for possession for 6 months and a further 4 months thereafter
9. On the 24th November, 1988 the Honourable Mr. Justice M. S. Ngulube, Deputy Chief Justice in Chambers found no basis to stay execution on the award for possession of the farms as the two previous stays of execution were for the purpose of E.F. Hervey Limited harvesting and removing themselves and it would be totally inequitable to allow them to plant new crops and so again stretch their claim for further relief against the lower courts judgment in that respect.
10. That about the week following the said decision of the Deputy Chief Justice the then Right Honourable Prime Minister Kebby Musokotwane, MCC, MP., called the Plaintiff to his offices and informed him that one Raymond Barrett of E.F. Hervey Limited had made representations to him and the Plaintiff should permit him or his company to continue farming on the Plaintiff's farms.
11. The Plaintiff declined to agree to the request and placed his reliance on the decision of the Court as aforementioned.
12. Thereafter the Honourable Minister of water, Lands and Natural Resources MR. P. Malukutla, MCC, MP., requested the Plaintiff's attendance at a meeting at his Chambers. The Plaintiff attended the offices at which time he also found present there the said Raymond Barrett, one Patrick Katyoka and the Member of Parliament where the farms are located also there to attend the same meeting. The Minister was not present and the meeting aborted.
13. That E.F. Hervey Limited moved the full Bench of the Supreme Court to set aside the decision of the Honourable Mr. M.S. Ngulube, Deputy Chief Justice and the full Bench of the Supreme Court presided by the Honourable the Chief Justice, Annel Musenge Silungwe dismissed its motion on the 27th December, 1988.
14. On the 27th December, 1988 E.F. Hervey Limited withdrew the substantive appeal but did not serve notification thereof on the Plaintiff until after the 13th of January, 1989.
15. On the 9th of January, 1989 the Sheriff of Zambia and his Bailiff sought to enforce a Writ of Possession issued by the High Court for Zambia and on the same day Immigration Officers showed the Plaintiff a Deportation Order purported to have been signed by the Honourable Minister of State for Home Affairs who had earlier visited the said farms.
16. The Plaintiff was immediately detained in prison pending deportation. On the 3th January, 1989 he was served with two notices of intention to acquire property and to yield up possession in respect of the said farms pursuant to section 5 and 6 of the said Lands Acquisition Act 1970. Copies of the said notices were purported to be served on Raymond Hervey Barrett. The Plaintiff and Raymond Hervey Barret were required to yield up possession of the farms on or before the 12th March, 1989.
17. That E.F. Hervey Limited and Raymond Barrett had continued to be in possession and occupation of the said farms notwithstanding the Judgment of the High Court, the

Orders of the Supreme Court and the Writ of Possession issued by the High Court and executed by the Bailiff.

18. That the Defendant has dispossessed the Plaintiff of the said farms and purported to acquire the said farms from him and give the said farms to E. F. Hervey Limited. The Plaintiff's avers that the Defendant's actions undermine and render the adjudicating authority vested in the constitutionally-established judiciary nugatory.
19. The Plaintiff further avers that the Defendant's actions in compulsory acquiring the Plaintiff's said farms and giving it to E.F. Hervey Limited and or Raymond Barrett a private individual and institution whatever the terms of tenure is not and cannot constitute an acquisition in the national interest as envisaged in the Constitution and the compulsory Acquisition Act and is wholly in breach thereof.

The Plaintiff claims:

- i. (a) An Order and or Declaration that the notices of intention to acquire property and to yield up possession dated 13th January, 1989 served on Plaintiff's representative whereby the Defendant purported to compulsory acquire the Plaintiff's two farms pursuant to Section 5 and 6 of the Land Acquisition Act 1970, namely the remaining extend of farm 134a "Springs" and Subdivision 1 of Farm 136a both at Mazabuka, Southern Province of Zambia is wrongful, irregular and unlawful and of no legal effect whatsoever.  
  
(b) The compulsory acquisition of the said two farms pursuant to Section 5 and 6 of the Land Acquisition Act, 1970 is wrongful, irregular and unlawful.
- ii. An Order or Declaration that the Plaintiff is the owner of the said two farms.
- iii. An award of damages for wrongful compulsory acquisition of the said farms.
- iv. Further and other relief.

The Statement of defence is as follows:

1. Paragraphs 1, 2 and 3 are within the personal knowledge of the Plaintiff
2. The Defendant puts the Plaintiff to strict proof of the matters raised in paragraph 4 and 5 of the Statement of Claim.
3. Paragraphs 6,7,8 and 9 are within the personal knowledge of the Plaintiff.
4. The Defendant puts the Plaintiff to strict proof of the matters raised in paragraphs 10,11 and 12 of the Statement of Claim.
5. Paragraphs 13 and 14 are within the personal knowledge of the Plaintiff.
6. The Defendant admits that the Plaintiff was declared a prohibited immigrant, and was detained pending deportation. The Defendant further admits that the Plaintiff was served with notice to yield up possession.
7. The Defendant denies paragraph 7 of the statement of claim.
8. The Defendant denies that the Farms were compulsorily acquired for the purpose of giving them to E.F. Hervey Limited, but argues that the same were acquired in the interest of the Republic, and had nothing to do with court cases between the Plaintiff and Hervey Limited and Raymond Barrett.
9. (a) The notices of intention to acquire property, are legal, proper and made in good faith, and therefore valid.  
  
(b) The compulsory acquisition of the said two farms is neither wrongful, irregular nor unlawful, and therefore the land is now properly vested in the President.
10. As for damages, since compensation is being worked out under the Lands Acquisition Act, no damages can be awarded by the court. The proper course of action to take if dissatisfied with the amount compensation that will be paid will be to appeal to Parliament.

The Plaintiff did not give evidence because he was detained and then deported but called two witnesses. The Defendant was represented and in attendance but called no witnesses.

The facts emanating from the evidence, documents and pleadings before this court are as follows:-

1. The Plaintiff came to Zambia in 1952 and in return for devoting his life in assisting his uncle Eric Hervey on his farms in Zambia he was to inherit the said two farms and in May, 1980, upon the death of his said uncle he did inherit the two farms which are now the subject matter of this action.
2. The Plaintiff permitted the widow, after the death of her husband to continue farming in the name of the company E.F. Hervey Limited free of charge until September, 1982 when he granted the widow's company a lease for a period of 12 months.
3. The company now owned by Raymond Barret and his wife Lynn refused to give up possession and succeeded in protracting the dispute in court until November, 1987 when the High Court adjudicated thereon and held in favour of the Plaintiff. The company secured two temporary stays of execution of the Judgment pending its appeal against the Judgment of the High Court to the Supreme Court.
4. The Supreme Court, however, on two occasions, the first in November, 1988 and again in late December, 1988 dismissed the Defendant's application for stay of the order for possession pending the determination of the appeal. The effect of the order was that E.F. Hervey Limited were subject to removal from the farms by Sheriff. Writ of Possession issued by the High Court of Zambia was partially executed by the Sheriff of Zambia on 9th January, 1989 but on 10th January, 1989 E.F. Hervey Limited moved back the items removed by the Sheriff and for reasons best known to the Sheriff no further action was taken by him on the Writ of Possession.
5. Instead, the Plaintiff an established resident was detained by immigration officers on the night of 9th January, 1989 and whilst in prison on 13th January, 1989 was served with the two Notices of Intention to Acquire the two farms. The Plaintiff was compelled to leave the country and did so shortly thereafter without regaining freedom.

The evidence of PW 1 Munir Khan establishes the following:

- i. He testified in proceedings bearing Cause No. 1983/HP/1471 and had sight of Judge Ireen Mambilima's Judgment in those proceedings. The Minister of Lands was also aware of the Judgment of the High Court and Orders of the Supreme Court.
- ii. He had met representatives and officers of the company E.F. Hervey Limited namely Raymond Barrett and Patrick Katyoka on 3 to 4 occasions in his office.
- iii. The witness is aware that E.F. Hervey Limited has been in possession of the said two farms all along. Initially it was in possession because the notifications dated 13th January, 1989 permitted Raymond Barrett to continue occupying the farms until 12th March, 1989. Thereafter someone authorised them to continue occupying the farms until 26th June, 1989 when he formally allowed E.F. Hervey Limited continue farming. The company is still in occupation and possession of the farms.

The Defendant's position from the pleadings is that the farms in question were not acquired for the purpose of giving them to E.F. Hervey Limited but were acquired in the national interest totally divorced from the previous proceedings before the courts. However the Plaintiff parries this contention by arguing that this contention is necessarily suspect in the light of the Defendant's earlier denial that E.F. Hervey Limited is not in possession and occupation of the two farms. The Plaintiff further argues that the Defendant has not pleaded what national interest the farms were acquired for, nor has the defendant, attempted to lead any evidence in that regard and that even the Resolve, if any, has not been produced in Court. It is the Plaintiff's submission that it is incumbent upon the Defendant - the State, in this case to say the purpose for which property (the two farms) is compulsorily acquired.

It is further the Plaintiff's contention that it is not sufficient for the Defendant to state that because compensation is offered it need not stipulate the purpose of acquisition other than national interest or interest of the Republic. The Plaintiff also submits that in the absence of any evidence whatsoever, it could therefore be concluded that the use for which the two farms have employed for, as being the national interest or interest of the Republic, the Defendant (State) has in mind - the use by E.F. Hervey Limited.

In support of the foregoing contention and arguments which unfortunately were not challenged by the Defendant, the Plaintiff cited several authorities which I shall refer to in the course of the Judgment. In spite of the cross-examination of the Plaintiff's witnesses the evidence of the Plaintiff remained unchallenged and uncontradicted.

This case hinges on the question of whether the said compulsory acquisition of the two farms was done mala fides (in bad faith)? The Plaintiff says it was done in bad faith. The Defendant gives a flat no and pleads that notices of intention to acquire property are legal proper made in good faith and therefore valid. Be that as it may, I proceed to examine the law and on the

question of bad faith vis-a-vis the Act in question.

The Lands Acquisition Act, Cap. 296 of the Laws of Zambia empowers the President of the Republic of Zambia whenever he is of the opinion that it is desirable or expedient in the interest of the Republic so to do compulsorily acquire any property of any description that is the general thrust of this act. The Act does not stipulate the purpose or purposes for such compulsory acquisition. I should hasten to say that the silence of the Act on the question of the purpose or purposes for which the State may compulsorily acquire property upon payment of compensation does not per se give the State a blanket compulsory acquisition without any cause or purpose. There is a plethora of case law in common law jurisdictions which shows that where no purpose has been indicated in the statute the courts will look at the intention of the legislature and invariably give an implied purpose. This is an indication that there can be no compulsory acquisition without cause or purpose.

Furthermore in common law jurisdiction the purpose for compulsory acquisition of property upon payment of compensation must be a public one and what constitutes public use frequently and largely depends upon facts surrounding the subject. It has been held that the letting of private property not for public use but to be leased out to private occupants for the purpose of raising money is an abuse of the power of eminent domain and may be redressed by action at law like any other illegal trespass done under an assumed authority. The issue of public use is a judicial question and one of law to be determined on the facts and circumstances of each particular case.

In the case before the evidence has shown that acquisition of the two farms and the allowing of E.F. Hervey Limited and Mr. Barret to remain in occupation of the said farm for agreed rent put the compulsory acquisition especially the purpose for such compulsory acquisition into question. It is needless in my view to over-emphasize that this transaction tainted the compulsory acquisition and is a pointer or indication that it could not have been done in good faith especially taking into account the facts and circumstances surrounding the compulsory acquisition. For instance the High Court and the Supreme Court made certain decisions in regard to the the subject matter, the detention and the deportation of the plaintiff are matters that I have taken judicial notice of and indeed the timing of the compulsory acquisition cannot be ignored albeit section 17 of the Land Acquisition Act, Cap.296 which reads:

"Where a notice to acquire any land under this Act has been published in terms of Section seven, the person entitled to transfer the land shall, notwithstanding anything to the contrary contained in any other law or in order of any court otherwise than under this Act, within two months of the publication of such notice transfer the same to the President."

Which the Minister of Lands and Natural Resources referred to in his correspondence with the Plaintiff's advocates. Taking the foregoing section into account and the total circumstances of this case and is what I may call a deliberate move by the Minister to negate the decision of the courts, the matter cannot be left to rest there. All these circumstances as shown in evidence of the Plaintiff and his submission, in my view and finding, amount to the exercise of discretion in bad faith.

In the case before me the compulsory acquisition of the two farms, as I find it, was solely for the interest of an individual company, E. F. Hervey Limited and its officers Mr. Barrett being one of them. The purported interest of the Republic is too remote, if at all, a reason and farfetched. It cannot be sustained in law. What the said company and its officers failed to acquire before the courts of law cannot be allowed to be acquired through intervention of the State (Executive) acting in violation of the rule of the law. I fully agree with the learned Counsel for the Plaintiff's submission in this regard that "such action scandalous and not acceptable in a democratic society like Zambia".

It is further clear from the facts and circumstances shown in evidence that there was not present and immediate need for the purported acquisition of the property in question in the national interest or interest of the Republic. In this regard the learned authors of Halsburys Laws of England 4th Ed. Vol. 8 para. 50:

Observed that there is no power of taking land in advance of requirements unless such power is specifically authorised by statute.

In the instant case the State has not to this day applied the farms for a public purpose.

As I have already found that the Defendant exercised his discretion in bad faith, the purported compulsory acquisition is null and void ab initio therefore the Plaintiff's claim succeeds having proved his case on a balance of probabilities. For the avoidance of doubt the declaration and order of the court is that:

- (a) The notices of intention to acquire property and to yield up possession dated 13th January, 1989 served on the Plaintiff's representatives whereby the Defendant purported to compulsorily acquire the Plaintiff's two farms under Section 5 and 6 of Lands Acquisition Act, Cap. 296 namely the remaining extent of Farm 134a "Spring" and sub-division 1 of Farm 136a both at Mazabuka Southern Province of Zambia are irregular and unlawful and therefore nullified;
- (b) The compulsory acquisition of the said two farms is null and void ab initio;
- (c) The Plaintiff is and continues to be the owner of the said two farms;
- (d) The Plaintiff is awarded damages to be assessed by the learned Deputy Registrar;
- (e) The Defendant is condemned in costs, in default to be taxed.

Judgment for the Plaintiff