



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING

Case No: HC-MD-CIV-ACT-OTH- 2018/03288

In the matter between:

MATHEUS JOSEPH

PLAINTIFF

and

JOSIA JOSEPH
JOSEPH ANTONIO
OIVA JOSEPH

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT

Neutral citation: *Joseph v Joseph* (HC-MD-CIV-ACT-OTH- 2018-03288) [2019]
NAHCMD 252 (18 July 2019)

Coram: USIKU, J
Heard: 18 July 2019
Delivered: 18 July 2019
Reasons released: 24 July 2019

Flynote: Land – *Communal Land Reform Act 5 of 2002* – Unlawful occupation – Eviction – Whether holder of land rights in respect of communal land has right to institute legal action for eviction – Court held that a holder of such rights has no *locus*

standi to institute legal action for the eviction of the defendants from any communal land.

Summary: The plaintiff, claiming to be a holder of customary land rights over certain piece of communal land, instituted legal action for the eviction of the defendants from such land. The defendants raised special plea of *locus standi* to the effect that the plaintiff has no *locus standi* to institute the eviction action in respect of any piece of communal land. The court upheld the special plea and dismissed the action with costs.

ORDER

1. The defendants' special plea of *locus standi* is upheld and the plaintiff's claim for the eviction of the defendants from a portion of land measuring 8.4 hectares situated at Onambome village in Ombadja communal area, in Omusati Region, is dismissed.
2. The plaintiff must pay the defendants' costs occasioned by the special plea of *locus standi* and such costs are to include costs of one instructing and one instructed legal practitioner.
3. The nature of the special defence raised in para 3.2 of plaintiff's plea to defendants' counterclaim amounts to a special plea.
4. The plaintiff's special plea to the defendants' counterclaim to the effect the defendants are not entitled in law to claim compensation from the plaintiff, is upheld and the defendants' counterclaim is dismissed.
5. The defendants are directed to pay the costs of the plaintiff, jointly and severally the one paying the other to be absolved, occasioned by the plaintiff's special plea.
6. The matter is removed from the roll and regarded finalised.

RULING

Usiku, J:

Introduction

[1] This matter concerns two issues, namely:

(a) The special pleas of *locus standi* and non-joinder raised by the defendants in respect of the plaintiff's claim, and

(b) A special defence raised by the plaintiff in his plea to the defendants' counterclaim to the effect that the defendants counterclaim against the plaintiff for compensation in respect of improvements allegedly effected by the defendants on communal land in respect of which the plaintiff holds customary land rights, has no basis in law.

[2] The special plea of *locus standi* raised by the defendants is to the effect that the plaintiff lacks standing to institute legal action for the eviction of the defendants from a piece of land situated in a communal area. In regard to the special plea of non-joinder, the defendants contend that the Government of the Republic of Namibia, the Minister responsible for land matters and the relevant land board, are interested parties in the eviction action instituted by the plaintiff and ought to have been joined in this action.

[3] In respect of the special defence raised by the plaintiff against the defendants' counterclaim, the plaintiff argues that the law does not permit the defendants to institute a claim against the plaintiff for compensation in respect of improvements allegedly effected on communal land.

Background

[4] In August 2018 the plaintiff instituted action for the eviction of the defendants from a portion of land measuring 8.4 hectares, situated at Onambome village in the Ombadja communal area in the Omusati Region. The plaintiff claims that he holds customary land rights in respect of that portion of land and that the defendants are in unlawful occupation and possession of that land. The plaintiff has demanded on several occasions that the defendants vacate the land but the defendants have failed and/or refused to vacate. Therefore, the plaintiff seeks eviction of the defendants and all persons holding under the defendants, from the land in question.

[5] It is common cause that Onambome village is in Ombadja communal area and is situated on communal land. It is also common ground that the plaintiff is not a Chief as contemplated in section 4 of the *Traditional Authorities Act 25 of 2000*, nor does he act herein as a representative of any Traditional Authority or land board.

[6] In regard to the plaintiff's action, the defendants launched a counterclaim alleging that they had, during the period of 2014 to 2018 effected improvements on the land in question, to the value of N\$800 000.00. The defendants claim that they are entitled to retain possession of the parts of the property in question until the payment by the plaintiff of the amount of N\$800 000.00. Therefore, the defendants now claim payment against the plaintiff of the amount of N\$800 000.00.

Plaintiff's position

[7] The plaintiff contends that he seeks to evict the defendants from his homestead which is located on communal land. The plaintiff further argues that the mandate of the Chief, Traditional Authority or land board to institute legal action for eviction, applies only to land in respect of which no rights are held in terms of section 28(1) and section

35(1) of the *Communal Land Reform Act 5 of 2002* (“the Act”). Where customary land rights are held by someone, the plaintiff argues, such holder may evict anyone who unlawfully occupies the land in respect of which he holds customary land rights.

[8] In regard to the defendants’ counterclaim for compensation in respect of improvements effected on the property, the plaintiff contends that the defendants’ claim is not permissible under section 40 of the Act. Bearing in mind that ownership of communal land vests in the State, the plaintiff argues, a claim for compensation cannot as a matter of law lie against the plaintiff.

The defendants’ position

[9] The defendants contend that the area that the plaintiff is seeking to evict the defendants from, is communal land as defined in the Act. In terms of section 43 read with regulation 35 of *the Regulations* made in terms of the Act, the right that the plaintiff relies upon for the relief sought against the defendants does not confer on the plaintiff a right to approach the court to seek eviction of the defendants. Therefore, the plaintiff does not have the requisite *locus standi* to institute legal action for the eviction of the defendants.

[10] As regards the special plea of non-joinder, the defendants submit that they only pursue this special plea in the event of the special plea of *locus standi* not succeeding. Because of the conclusion I have reached hereinafter on the issue of *locus standi*, I am not going to dwell on the arguments regarding the issue of non-joinder.

[11] In relation to the plaintiff’s special defence, the defendants contend that the plaintiff did not raise a special plea. The plaintiff only filed a plea on the merits of the counterclaim and raised “a *point in law*” addressing the merits of the counterclaim. The defendants therefore submit that they address the plaintiff’s *point in limine* only in the event that the court finds that the plaintiff has indeed raised a “special plea”.

[12] The defendants argue that section 40(1) of the Act does not preclude a claim for compensation for improvements against a holder of a customary land right. The defendants therefore submit that they are entitled to claim compensation from the plaintiff for necessary and useful improvements on the property.

Legal principles

[13] The primary power to allocate or cancel any customary land right in respect of any portion of land in the communal area of a traditional community, vests in the Chief of that traditional community, or where the Chief so determines, in the Traditional Authority of that traditional community.¹

[14] In regard to unlawful occupation of communal land, section 43 of the Act provides as follows:

'43(1) No person may occupy or use for any purpose any communal land other than under a right acquired in accordance with the provisions of this Act.....

(2) A Chief or a Traditional Authority or the board concerned may institute legal action for the eviction of any person who occupies any communal land in contravention of subsection (1).'

[15] Regulation 35 deals with the eviction of persons occupying communal land and provides that:

'35. Any person other than a Chief, a Traditional Authority or a board who evicts any person occupying communal land from communal land which he or she legally occupies is guilty of an offence.'²

[16] In *Kanguatjivi v Kanguatjivi* I309/2013 [2015 NAHCMD 106 (30 April 2015)] this court granted an eviction order sought by the plaintiff against the defendant from land

¹ Section 20 of the Act.

² Regulation 35 of the Regulations made in terms of the Communal Land Reform Act 2002 (Act No. 5 of 2002) Government Notice No. 37 dated 1 March 2003 GG No. 2926 as amended

constituting communal land. In that matter the court held that the plaintiff had a right to occupy the property in question, whereas the defendant had no such right.³

Furthermore, the court held that the plaintiff did not consent or permit the defendant to stay on the property.⁴ The provisions of section 43 of the Act were not considered in that matter.

[17] In *Ndevahoma v Shimwooshili (HC-MD-CIV-ACT-OTH 2017/03184) [2019] 32 (25 January 2019)* the plaintiff sought to evict the defendant from a piece of land on communal land alleging that the defendant breached the conditions in terms of which the plaintiff granted him permission to occupy the land. The defendant, among other things, raised a special plea on the ground, that the plaintiff had no *locus standi* to evict him from communal land.⁵ The court held, among other things, that in terms of section 43 of the Act, it is the Chief or a Traditional Authority or the board concerned that may institute legal action for the eviction of any person who occupies any communal land in contravention of section 43 (1). The court, therefore, came to the conclusion that the plaintiff had no *locus standi* to institute eviction proceedings against the defendant.⁶

[18] The party raising the special plea of *locus standi* bears the onus to prove the material facts underlying his/her special plea.⁷ The party instituting the eviction proceedings bears the onus to establish legal standing.⁸ Thus, the party instituting the claim in question must show that he/she has a right to institute the claim or that he/she is acting on the authority of an entity that has such right.⁹

[19] Where the issue of legal standing is argued separately, as is the case in the present matter, a lack of legal standing on the part of the plaintiff, if upheld, would finally

³ *Kanguatjivi v Kanguatjivi (supra)* para 15-16.

⁴ *Ibid:* para.16.

⁵ *Ndevahoma v Shimwooshil* para 12

⁶ *Ibid* para 53.

⁷ *Buhrmann & Partners Consulting Engineers v Garbade* 2016 (1) NR 125 at p131 E.

⁸ *Gross and Others v Pentz* 1996 (4) SA 617 (A) at p. 632 D-E.

⁹ *Council of the Itireleng Village Community and Another v Madi and Others* 2017 (4) NR 1127 (SC) at p.1135 A.

resolve the issue. This would obviate the need on the part of the court to determine other issues and the merits of the action.¹⁰

[20] Insofar as the issue of compensation for improvements is concerned, section 40 of the Act provides as follows:

'40(1) No person –

- (a) has any claim against a Chief, a Traditional Authority, a board or the State for compensation in respect of any improvement effected by him or her or any other person on land in respect of which such person holds or held a customary land right or a right of leasehold under this Act, including a right referred to in section 28(1) or 35(1); or
 - (b) may remove or cause to be removed from such land, or destroy or damage or cause to be destroyed or damaged on such land, any improvement when he or she vacates or intends to vacate the land, whether such improvement was effected by such person or any other person, but the board concerned, after consultation with the minister, may grant consent for the removal of any such improvement.
- (2) Subsection (1) is not to be construed as precluding the holder of a customary land right or a right leasehold who proposes to transfer his or her customary land right or right of leasehold to another person in accordance with the provisions of this Act from accepting, in accordance with an agreement entered into between such holder and that person, payment of compensation for any improvement on the land in respect of which the right is to be transferred.
- (3) Notwithstanding subsection (1), and except if compensation is paid in the circumstances referred to in subsection (2) or in terms of subsection (4), the Minister, after consultation with the board concerned, may, upon the termination of a customary land right or a right of leasehold, pay to the person whose right has terminated compensation in respect of any necessary improvement effected by that person on the land concerned.
-'

[21] Section 39 deals with appeals and provides as follows:

'39.(1) Any person aggrieved by a decision of a Chief or a Traditional Authority or any board under this Act, may appeal in the prescribed manner against that decision

¹⁰ Ibid p.1134 H.

to an appeal tribunal appointed by the Minister for the purpose of the appeal concerned.

(2) An appeal tribunal consists of such person or number of persons as the Minister may appoint who must be a person or persons with adequate skills and expertise to determine the appeal concerned.

(3) If two or more persons are appointed under subsection (2) the Minister must designate one of them to act as chairperson of the appeal tribunal.

.....’

Analysis

[22] In terms of section 19 of the Act, only two types of rights may be allocated in respect of communal land, namely: customary land rights and rights of leasehold.

[23] Section 43(1) provides that a person may not occupy or use ‘any’ communal land ‘*other than*’ under a right acquired in accordance with the provisions of the Act.

[24] Section 43(2) provides that a Chief, or a Traditional Authority or the board concerned may institute legal action for the eviction of ‘any’ person who occupies ‘any’ communal land other than under a right acquired in accordance with the provisions of the Act.

[25] It appears to me, from the provisions of the Act, that any person who occupies ‘any’ communal land in contravention of section 43(1) occupies such land unlawfully and is liable for eviction.

[26] However, it is also apparent from the provisions of the Act that the capacity of a holder of any of the rights set out under section 19 of the Act to institute legal action for the eviction of any person who occupies any communal land in contravention of section 43(1), is at best limited and at worst non-existent. In my opinion a holder of a customary land right (as the plaintiff claims to have in the present action) has no right to institute legal action for the eviction of any person, who occupies “any” communal land

over which he holds such a right. The litigation process in that regard must be instituted on behalf of the holder of such a right, by the Chief or the Traditional Authority or the board concerned, who would act as functionary of the holder of the right concerned.

[27] It, therefore, follows that in the present action, the proper person to institute legal action for eviction is the Chief or Traditional Authority or the board concerned. If the Chief etc fails or refuses to institute the action, the remedy for the plaintiff lies in an appeal against such the decision of the Chief etc in terms of section 39 of the Act.

[28] I am not in agreement with the proposition propounded by counsel for the plaintiff that the plaintiff has capacity to institute eviction proceedings in respect of the communal land over which he holds customary land rights. Such a proposition is not supported by the provisions of the Act and appears to ignore the fact that the capacity of a holder of land rights under the Act, to perform valid juristic acts (i.e acts to which the law attaches some consequences desired by the party or parties performing the acts) are limited. Indeed, in terms of regulation 35, a party, not being a Chief etc who purports to evict any person from communal land contrary to the provisions of section 43(2), exposes himself/herself to a possible commission of an offence.

[29] I respectfully differ with the decision in the *Kanguatjivi* matter, insofar as such decision appears to indicate that a holder of land rights under the Act has a right to institute legal action for eviction in respect of the land over which he/she holds such rights. In this matter, I would follow the decision in the *Ndevahoma* matter insofar as such decision underscores that the Chief etc is the legally recognised party authorised to institute eviction proceedings in regard to 'any' communal land.

[30] I would like to note that, it may be permissible in certain exceptional circumstances for a holder of land rights under the Act, to institute legal action for eviction, for example where there is no Chief, no Traditional Authority and no land board in existence. In such a scenario the plaintiff would be expected to plead facts, establishing the existence of special circumstances that entitles him/her to institute such

proceedings. I hasten to add that in the present matter, no such circumstances have been pleaded. Furthermore, the plaintiff has offered no acceptable explanation why the Chief etc should not have instituted the present action.

[31] I am, therefore, of the opinion that the defendant's special plea of lack of *locus standi* on the part of the plaintiff, is well raised and should succeed in this matter.

[32] I now turn to the issue of whether the plaintiff has raised a "*special plea*" in his plea to the defendants' counterclaim. At para 3.2 of the plaintiff's plea to the defendants' counterclaim, the plaintiff pleads as follows:

'In further amplification of the aforesaid denial, plaintiff pleads that the nature of this claim is not permissible by law, and it is contrary to and in violation of section 40 of the Communal Land reform Act 5 of 2002.'

[33] The plaintiff contends that the above paragraph amounts to a special plea and should be considered as such when the court considers the special plea raised by the defendants. The defendants contend that the above plea does not amount to a special plea.

[34] I am of the view that the essence of a special plea is that, it constitutes a preliminary defence which, if successful, will lead to the party raising the special plea, winning the case without having to deal with merits. The defence that the plaintiff raises above is that the defendants are not entitled as a matter of law, to the relief they claim. To address such a defence, one would have regard to what the law says without necessarily having regard to the merits of the case. In my opinion the defence raised by the plaintiff amounts to a special plea, insofar as it is of a nature that, if the court upholds it, the court would have to dismiss the defendants' counterclaim without considering the remainder of the defence raised by the plaintiff in this plea that canvass the merits of the defendants' counterclaim.

[35] I therefore hold that the special defence, raised by the plaintiff, as set out above amounts to a “*special plea*” and I would refer to it as a special plea herein.

[36] In their counterclaim the defendants institute legal action for compensation by the plaintiff in the amount of N\$ 800 000.00 for the improvements the defendants allegedly effected on the land in question.

[37] I have considered the provisions of section 40 of the Act as well as other provisions of the same Act. I am of the opinion that section 40 does not grant the defendants, or any person for that matter, any right to claim compensation for improvements effected on communal land.

[38] The defendants have only such rights as may have been conferred on them by the provisions of the Act. The right to compensation for improvements effected on communal land is not one of such rights.

[39] For the foregoing reasons, I am of the opinion that the special plea raised by the plaintiff against the defendants’ counterclaim has merit and must be upheld.

[40] In regard to the issue of costs I am of the opinion that the defendants are entitled to costs in respect of the special plea of *locus standi*. I am also of the view that the plaintiff is entitled to costs against the defendants in respect of his special plea to the effect that the defendants have no right to compensation in respect of improvements effected on communal land.

[41] In the result, I make the following order:

1. The defendants’ special plea of *locus standi* is upheld and the plaintiff’s claim for the eviction of the defendants from a portion of land measuring 8.4 hectares situated at Onambome village in Ombadja communal area, in Omusati Region, is dismissed.

2. The plaintiff must pay the defendants' costs occasioned by the special plea of *locus standi* and such costs are to include costs of one instructing and one instructed legal practitioner.
3. The nature of the special defence raised in para 3.2 of plaintiff's plea to defendants' counterclaim amounts to a special plea.
4. The plaintiff's special plea to the defendants' counterclaim to the effect the defendants are not entitled in law to claim compensation from the plaintiff, is upheld and the defendants' counterclaim is dismissed.
5. The defendants are directed to pay the costs of the plaintiff, jointly and severally the one paying the other to be absolved, occasioned by the plaintiff's special plea.
6. The matter is removed from the roll and regarded finalised.

B.Usiku
Judge

APPEARENCES:

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