

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WIN

Case No: HC-MD-CIV-ACT-CON-2017/03205

REASONS

In the matter between:

**KATOMBOLO BORNFACE MUKONO**

**PLAITIFF**

and

**COSMOS MASARASARA SIBESO**

**DEFENDANT**

**Neutral citation:** *Mukono v Sibeso* (HC-MD-CIV-ACT-oth-2017-03205) [2020]  
NAHCMD 27 (30 January 2020)

**CORAM:** NDAUENDAPO

**Heard:** 8 November 2019

**Delivered:** 30 January 2020

**Flynote:** Civil procedure - Eviction proceedings – From communal land - Special plea - s43 (2) of Act 2 of 2002 - The right to evict assigned to Chief; Traditional Authority and Board – Plaintiff lacks locus standi - Special plea upheld.

**Summary:** Plaintiff instituted eviction proceedings against the defendant. Plaintiff alleges that the defendant is illegally occupying land in communal area that was

allocated to him. Defendant raised a special plea to the effect that the plaintiff lacks locus standi to institute eviction proceedings.

*Held*, that in terms of s43 (2) of the communal land reform act 5 of 2002 only the chief; traditional authority or the board may institute eviction proceedings.

*Held*, further that the plaintiff lacks locus standi to bring the eviction proceedings.

*Held*, further, that the special plea is upheld with costs.

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## ORDER

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NDAUENDAPO, J

### Introduction

[1] On 7 November 2019, this court made an order upholding the defendant's special plea with costs. I intimated to the parties that my reasons for such an order will be released on 30 January 2020. Herein below are my reasons.

### Factual backgrounds

[2] On 31 August 2017 the plaintiff issued a summons for the eviction of the defendant or any other person in occupation of Kaseke village, Mahundu area, Zambezi Region.

[3] In the particulars of claim the plaintiff alleges that:

- 3.1 He is the lawful right holder of Kaseke village, Mahundu area, Zambezi Region, by virtue of a residential and grazing customary law right which his family acquired and exercised since 1958.
- 3.2 On 15 May 2017 plaintiff applied for the registration of the customary land right and the recognition of his customary land right over Kaseke village, Mahundu (the property).
- 3.3 During 2011 the defendant unlawfully took occupation of the property and plaintiff referred a dispute of unlawful occupation of its property by defendant to the Masubia Community Court. On 4 February 2014 the court confirmed the

plaintiff's customary land right over the property. Despite that judgment and the eviction notice served on the defendant, he remains in unlawful occupation of the property in terms of s 39 of Communal Land Reform Act 5 of 2002. The defendant appealed the judgment, but it was dismissed on 15 March 2017. Hence the issuance of summons in this court.

[4] Defendant raised a special plea (plaintiff lacks *locus standi*) and argued that: S 43(1) and (2) of the communal Land Reform Act 5 of 2002 provides:

'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, including a right referred to in section 28(1) or 35(1).

2. A Chief or a Traditional authority or the board concerned, may institute legal action for the eviction of any person who occupies any land in contravention of sub-section (1).'

#### Submissions by the defendant

[5] It is trite that the onus to prove the special plea lies on the party who raises it and in this case the defendant. The defendant submits that the plaintiff is not one of the three prescribed persons above, who *ex lege* are entitled to lodge and prosecute the eviction proceedings in terms of the said legislation. Moreover, in terms of the said Act, plaintiff does not have any certificate over the land in question and even at common law, plaintiff has also no title over the said land. Defendant further submits that although the plaintiff has a substantial and direct interest in the land concerned, that does not clothe the plaintiff with the authority to institute the present proceedings before court.

[6] In the premises, plaintiff not being a Chief, Traditional Authority and a Board and/or a holder of a certificate under the said legislation therefore has no legal standing (*locus standi*) to institute the eviction proceed.

#### Submissions by the Plaintiff

[7] The plaintiff submits that the customary right was granted before independence and before the Constitutional dispensation. Plaintiff's made an application in terms of section 28 and 44 of the Communal Land Reform Act 5 of 2002 for the recognition of the customary land right, both residential and crop farming.

[8] He further submits that section 28 of the Communal Land Reform Act 5 of 2002 states that subject to subsection(2), any person who immediately before the commencement of this Act held a right of the occupation or use of communal land, being a right of a nature referred to in section 21, and which right was granted to or acquired by such a person in terms of any law or otherwise, shall continue to hold that right, unless (a) such person's claim to the right to such land is rejected upon application contemplated in subsection (2); or (b) such land reverts to the State by virtue of the provisions of section (13).

[9] Plaintiff acquired his customary right in terms of the customary law of the Masubia customs and the said claim has not been rejected and the land has not reverted to the State.

[10] Plaintiff further contends that the primary power to allocate customary land rights vests in the Traditional Authority of that traditional community, upon the allocation of a customary land right, the Traditional Authority must notify the relevant land board of the allocation. Any allocation made by a Traditional Authority has no legal effect, unless such allocation is ratified by the registration in the appropriate register, in the name of the person it was allocated to and issues such person a certificate of registration.

[11] Plaintiff argues that the Supreme Court in *Agness Kasheela v Katima Mulilo town Council and 7 others*<sup>1</sup> supra emphasized that the constitutional dispensation, imposes an obligation on the state, including the judiciary, to respect the interest held by the affected communities in communal land, for most of whom it was and remain the only means of livelihood and survival. An obligation which involves

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<sup>1</sup> *Agness Kasheela v Katima Mulilo town Council and 7 others* (SA 15/2017) [2018] NASC 409 (16 November 2018)

recognition and respect for the rights of the members of the community to live on the land, work it and sustain themselves.

[12] Therefore the plaintiff has a substantial and direct interest in land over which he has been allocated a customary land right and the Communal Land Reform Act 5 of 2002, specifically section 43 does not deprive him of a right to bring an eviction. This court agrees with the plaintiff that he has a substantial and direct interest in land which was allocated to him, however the court must give effect to the provisions of the communal land reform Act of 2002. Section 43(2) clearly 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 land in contravention of sub-section (1).

[13] In *casu* the legal action to evict the defendant was not brought by either the Chief, Traditional Authority or the Board and therefor the plaintiff lacks locus standi to institute the summons. In *Ndevahoma v Shimwooshili and Others*<sup>2</sup>, the court said at para 37 the following:

‘Section 43 prohibits the unlawful occupation of communal land. Communal land may only be occupied or used in line with a right granted under the Act. This includes existing customary land rights (under section 28) and other rights to use communal land (under section 35). A person who occupies communal land without having the right to do so can be evicted by either a chief, Traditional Authority or a Communal Land Board can also take legal action to have a person evicted.’ (Emphasis added)

[14] In *Joseph v Joseph*<sup>3</sup> and Another, the court at para 26 held that:

‘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 a 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 present

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<sup>2</sup> *Ndevahoma v Shimwooshili and Others* (HC-MD-CIV-ACT-OTH-2017/03184) [2019] NAHCMD 32 (25 January 2019)

<sup>3</sup> *Joseph v Joseph* (HC-MD-CIV-ACT-OTH- 2018-03288) [2019] NAHCMD 252 (18 July 2019)

action) has no right to institute legal action for the eviction of any person, who occupies “any” communal land over which he holds such right. The litigation process in that regard must be instituted on behalf of the holder of such a right by the Chief or Traditional Authority or the Board concerned, who would act as functionary of the holder of the right concerned.’

The court continued at para 27

‘It therefore follows that in the present action, the proper person to institute legal action for evidence is the Chief or Traditional Authority or Board concerned. If the Chief etc. fails or refuses to institute the action, the remedy for the plaintiff is an appeal against such decision of the Chief etc. in terms of Section 39 of the Act July 2019) did not consider the Supreme Court judgment of Kasheela and principles laid therein.’

[15] Having regard to the provisions of s43(2) Communal Land Reform Act 2 of 2002 and the authorities I referred to above ,the defendant lacks *locus standi* to bring the eviction proceedings and the special plea was upheld with costs.

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**G N NDAUENDAPO**  
**Judge**

**APPEARANCES****FOR THE PLAINTIFF**

Ms Ndateelela Shilongo  
Of Sisa Namandje & Co. Inc.

**FOR THE DEFENDANT**

Mr. Dirk Conradie  
Of Conradie & Damaseb Legal Practitioners