

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case Title: Petrina Ndahekelekwa Kapofi v Miriam Hauwanga	Case No.: HC-MD-CIV-ACT-OTH-2020/04066
	Division of Court: High Court (Main Division)
Heard before: Honourable Lady Justice Rakow	Date of hearing: 27 April 2021
	Delivered on: 18 May 2021
	Reasons delivered on: 28 May 2021
Neutral citation: <i>Kapofi v Hauwanga</i> (HC-MD-CIV-ACT-OTH-2020/04066) [2021] NACHMD 266 (18 May 2021)	
IT IS ORDERED THAT: <ol style="list-style-type: none">1. The court condones the non-compliance by the defendant with the court order of 26 November 2020.2. The court further agrees that the appeal should be heard by the Ohangwena Communal Land Board as its decision will directly impact on the matter currently before court and the matter is therefore postponed for a status hearing on 6 July 2021 at 15h30.3. The parties are ordered to file a joint status report on or before 1 July 2021 setting out the progress with the matter before the Ohangwena Communal Land Board.	

Reasons for orders:Introduction

[1] The plaintiff/respondent initially issued summons praying for the eviction of the defendant/applicant from a piece of land which is under traditional management and to which she claims she holds the customary land rights as it was awarded to her by the Oukwanyama traditional authority. The applicant/defendant appealed this decision of the Oukwanyama traditional authority and has an appeal currently pending before the Ohangwena Communal Land Board.

[2] The applicant/defendant noted her intention to defend the matter after receiving the summons and a notice for a case planning hearing was issued by the court. The parties were invited to file a draft case plan, which they then did and which was subsequently made an order of court. The case plan indicated that the defendant must file her plea and counterclaim, if any, on or before 22 January 2021, which was then not filed on the said date. The matter was further referred to court connected mediation, but that session also has not yet taken place.

[3] Instead the applicant filed a one sided status report on 16 February 2021 indicating that the ownership dispute is currently being dealt with by the Ohangwena Communal Land Board and that they request the matter to be postponed for three months pending the outcome of the appeal serving before the Ohangwena Communal Land Board. The legal representative of the respondent also filed a status report in which they explained that the applicant/defendant indicated to them, when they requested them to accompany them to the mediation office to arrange for dates, that they were not willing to go for mediation as the appeal matter is still pending before the Ohangwena Communal Land Board. This situation then necessitated the applicant/defendant to bring an application to uplift the automatic bar placed on her for her failure to file her plea, in terms of rule 55.

The arguments

[4] For the applicant it was argued that she was automatically barred from filing her plea because she failed to do so in a timeous manner in terms of rule 54(3) and to uplift such a bar, she needs to apply in terms of rule 55 to this court, who can consider uplifting such a bar upon good cause shown, which is what she then did. It was further argued that the legal practitioner of the applicant spent some time trying to resolve the issues with the legal practitioner of the respondent but to no avail.

[5] The respondent alleges that she is the lawful owner of the piece of land which the applicant is currently occupying and therefore needs to proof ownership of the said land. This claim of ownership is what is currently being challenged before the Ohangwena Communal Land Board and such challenge should be allowed to be concluded before the issue of eviction is dealt with. The whole matter currently before court could fall away, depending on the outcome of the appeal to the Ohangwena Communal Land Board. It is for this reason that the request by the applicant to file her plea after the outcome of the appeal is known, should be allowed as this will directly have an impact on what she pleads.

[6] On behalf of the respondent it was argued that the applicant failed to show good cause as her reasons for failing to comply with the court order does not pass the reasonable man test. It was further argued that the applicant misconstrued the applicability of ownership of communal land as it only refers to customary right holders and not ownership and what is claimed by the respondent is that she is the customary right holder.

The law and its application

[7] Rule 55 reads as follows:

‘Upliftment of bar, extension of time, relaxation or condonation

55. (1) The court or the managing judge may, on application on notice to every party and on good cause shown, make an order extending or shortening a time prescribed by these rules or by an order

of court for doing an act or taking a step in connection with proceedings of any nature whatsoever, on such terms as the court or managing judge considers suitable or appropriate.

(2) An extension of time may be ordered although the application is made before the expiry of the time prescribed or fixed and the managing judge ordering the extension may make any order he or she considers suitable or appropriate as to the recalling, varying or cancelling of the consequences of default, whether such consequences flow from the terms of any order or from these rules. ‘

This rule gives a wide discretion as to what the judge can do, ultimately after good cause was shown.

[8] When deciding whether a relief from sanctions or adverse consequences will be granted, the court must further take into account the list of circumstances as set out in rule 56, but it is understood that it is not limited to only these circumstances. Rule 56 reads as follows:

‘56. (1) On application for relief from a sanction imposed or an adverse consequence arising from a failure to comply with a rule, practice direction or court order, the court will consider all the circumstances, including -

- (a) whether the application for relief has been made promptly;
- (b) whether the failure to comply is intentional;
- (c) whether there is sufficient explanation for the failure;
- (d) the extent to which the party in default has complied with other rules, practice directions or court orders;
- (e) whether the failure to comply is caused by the party or by his or her legal practitioner;
- (f) whether the trial date or the likely trial date can still be met if relief is granted;
- (g) the effect which the failure to comply has or is likely to have on each party; and
- (h) the effect which the granting of relief would have on each party and the interests of the administration of justice.

(2) An application for relief must be supported by evidence.

(3) The managing judge may, on good cause shown, condone a non-compliance with these rules, practice direction or court order.’

[9] Having taken into account the explanation put forward by the applicant for not filing the plea as well as that the application was made promptly and the effect that the delay

might have on the case and the other considerations mentioned under rule 56, it is important to note that the outcome of the appeal to the Ohangwena Communal Land Board could in effect finalize the said matter. If the respondent is declared the legal right holder, then she stands a very good chance to have her claim being upheld. If the respondent is declared not to be the legal rights holder but rather the applicant to be the rightful holder, then there is a real likelihood that the applicant's plea would reflect that and would have the matter finalized in her favour.

[10] In light of the above, I make the following order:

1. The court condones the non-compliance by the defendant with the court order of 26 November 2020.
2. The court further agrees that the appeal should be heard by the Ohangwena Communal Land Board as its decision will directly impact on the matter currently before court and the matter is therefore postponed for a status hearing on 6 July 2021 at 15h30.
3. The parties are ordered to file a joint status report on or before 1 July 2021 setting out the progress with the matter before the Ohangwena Communal Land Board.

Judge's signature	Note to the parties:
E Rakow Judge	Not applicable
Counsel:	
Applicants	Respondents
M Angula AngulaCo Inc Windhoek	M Mwandangi Mwandangi Attorneys Windhoek