



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

Case no: I 1384/2016

In the matter between:

**MICHAEL RUDOLF MUTRIFA**

**PLAINTIFF**

and

**VICTORINE TJOMBE**

**DEFENDANT**

**Neutral citation:** *Mutrifa v Tjombe* (I 1384/2016) [2017] NAHCMD 162  
(14 June 2017)

**Coram:** USIKU, AJ

**Heard on:** 09 May 2017

**Delivered:** 14 June 2017

**Flynote:** Husband and wife – Marriage in community of property – Whether customary land rights allocated to the Plaintiff in terms of the Communal Land Reform Act (No.5 of 2002) constitute part of the assets of the joint estate – Court holding that customary land rights not constituting part of the assets of the joint estate.

**Summary:** Husband and wife – Marriage in community of property – Defendant claiming that communal land rights allocated to the Plaintiff in terms of the Communal Land Act (Act No. 5 of 2002) constitute part of the joint estate and are subject to division on dissolution the marriage between the parties – Court holding that a customary land right is a personal right inseparable from its holder and does not constitute part of the assets of the joint estate.

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### **ORDER**

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- (a) The customary land rights allocated to the Plaintiff are the Plaintiff's exclusive property and do not constitute part of the assets of the joint estate.
- (b) The present action and the relief claimed, do not include a claim for compensation in respect of "improvements" made to land, which is not an asset of the joint estate. Therefore, the Defendant's remedy in respect of "improvements" made to such land lies elsewhere, and not in the present action.
- (c) The Defendant's claim to the effect that the 'land rights' constitute part of the assets of the joint estate, is dismissed with costs.
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### **JUDGMENT**

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USIKU, AJ:

#### **INTRODUCTION**

[1] This is a matrimonial matter in which the Plaintiff instituted a divorce action against the Defendant, seeking an order for restitution of conjugal rights, failing which a final order of divorce, together with certain ancillary relief.

[2] The Defendant entered an appearance to defend. The Defendant is not opposing the divorce, but opposes certain ancillary relief sought by the Plaintiff.

[3] Following the court-connected mediation proceedings, the parties settled most of the ancillary matters, including:

- (a) custody and control of a minor child;
- (b) maintenance in respect of the minor child;
- (c) division of the movable properties and
- (d) division of an immovable property situated in Arandis.

[4] The only issue that remains in dispute is whether or not certain customary land rights granted to the Plaintiff over a portion of communal land described as:

Certain: Immanuel post No. 1;

Measuring: 1.0 hectare;

Situate: In Kunene Region;

constitute an asset of the joint estate.

[5] The matter is now before me on a special case basis, in terms of Rule 63,<sup>1</sup> for adjudication of certain questions of law that are in dispute.

## **BACKGROUND**

[6] The parties got married to each other on the 14 November 1998 at Okahandja, in community of property, which marriage still subsists.

[7] On the 07 October 2004, the Plaintiff applied for recognition and registration of existing customary land rights, namely: a right to a farming unit and a right to a residential unit, in terms of *section 28 of the Communal Land Reform (Act No.5 of 2002)* ("the Act"), over the aforementioned property.

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<sup>1</sup> Rule 63 of the Rules of the High Court of Namibia, Government Notice No.4 of 2014.

[8] The application was approved, and the allocation of the aforesaid customary land rights was ratified by the relevant Communal Land Board on the 29 August 2013.

[9] The property in respect of which customary land rights exist, is about one hectare in extent, and consists of:

- (a) a three-bedroom brick house,
- (b) a kraal, and
- (c) fenced off camps, for grazing livestock.

[10] The parties differ on whether the customary land rights held by the Plaintiff over the aforesaid property, constitute part of the assets of the joint estate, or not.

#### **SPECIAL CASE AND ADJUDICATION UPON POINTS OF LAW**

[11] In view of the above facts, the parties agreed on a written statement of facts, and set out certain questions of law, in the form of a special case for adjudication.

[12] The questions of law set out by the parties for adjudication are:

(a) whether the customary land rights on Immanuel Post No.1, were awarded to both the Plaintiff and the Defendant?

(b) whether the customary land rights awarded to the Plaintiff accrues to the Defendant, by virtue of their marriage in community of property and whether, the improvements made on the land over which the land rights exist, are jointly owned by the parties, and how the same should be divided?

(c) whether the above Honourable Court has jurisdiction to distribute and/or re-allocate a customary land right, and make a determination on whether the improvements made to the land subject to the land right, follow the party to whom the land right is allocated? and

(d) whether the parties can jointly exercise the right of occupation, use and enjoyment of the land right , and if so, on what terms are they able to do so?

## **CONTENTIONS OF THE PARTIES**

### The Plaintiff's position

[13] The Plaintiff contends that he applied for the customary land rights in his individual capacity, and the allocation for the rights was granted to him personally, and not in favour of his family, as a collective.

[14] As a holder of the rights, he consented and permitted the Defendant to stay on the property during the subsistence of their marriage.

[15] The legal consequence of divorce is change in status of the former spouses. The Plaintiff does not envisage the parties to stay on the same property and share and enjoy the benefits of the same property after divorce.

[16] Should the Defendant wish to be allocated land rights, she must comply with the relevant provisions of the Act to obtain the same. Alternatively, should the Defendant feel aggrieved by the decision for allocation of the land rights in favour of the Plaintiff, as opposed to a "joint allocation", she had hoped for, she must have recourse to *section 39(1) of the Act*, and appeal against the decision of the land board to the Appeal Tribunal.<sup>2</sup>

[17] The Plaintiff argues further that certain property such as a statutory leasehold, usufruct etc, do not form part of a joint estate. Similarly, a customary land right does not become part of the joint estate, and the Defendant never became part-owner of the land right in question.

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<sup>2</sup> *Section 39(1)* provide 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 to an appeal tribunal appointed by the Minister for the purpose of the appeal concerned.'

[18] In regard to improvements on the property, the Plaintiff contends that the Defendant has no claim for compensation for improvements under the Act. Neither is she allowed to remove or cause to be removed from such land, destroy or damage, any improvements she claims to have effected, without the consent of the relevant land board.<sup>3</sup> Should the Defendant have any claim in respect of such improvements, the Plaintiff contends, she should take up such issue with the relevant land board or with the Plaintiff, as the claim for improvements is not an issue for this court to consider.

#### The Defendant's position

[19] The Defendant, on the other hand, argues that the allocation of the customary land rights were applied for and granted to the parties as a family, and same was registered in the name of the Plaintiff in his capacity as head of the household.

[20] The parties jointly made improvements to the land, and such improvements constitute the biggest asset, jointly owned by the parties, by virtue of their marriage in community of property.

[21] The effect of the Plaintiff's arguments is that the Defendant would, after divorce, vacate the farming and residential unit, which exercise the Defendant views as unjust.

[22] The Defendant proposes that, after divorce, the parties should continue to occupy the land and enjoy the benefits conferred by the land right, together.

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<sup>3</sup> Section 40(1) reads as follows:

'(1) No person -

(a) has any claim against a Traditional Authority, a board or the State for compensation in respect of any improvement effected by him or her or any 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 improvements 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'

## LEGAL PROVISIONS

[23] The *Act* regulates the allocation of communal land rights and provides for a framework for registration and keeping of records relating to land rights that have been allocated in communal areas.

[24] All communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas.<sup>4</sup>

[25] There is a Communal Land Board (“the land board”) established in each region where communal land exists. The land board is charged with the responsibility of communal land administration in the region for which it is established.

[26] Two types of communal land rights may be allocated under the *Act*, namely, customary land rights and rights of leasehold.<sup>5</sup>

[27] There are two types of customary land rights that may be allocated, namely: a right to a farming unit and a right to a residential unit. A person may apply to be allocated customary land rights in respect of more than one portion of land.

[28] The primary power to allocate any customary land right vests in the Traditional Authority of that traditional community.<sup>6</sup>

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<sup>4</sup> *Section 7(1) of the Act. Also see Article 100 of the Constitution, which provides that land that is not otherwise lawfully owned, belongs to the State.*

<sup>5</sup> *Section 19 of the Act.*

<sup>6</sup> Section 20 reads as follows:

*‘Subject to the provisions of this Act, the primary power to allocate or cancel any customary land right in respect of any portion on land in the communal area of a traditional community vests –*  
*(a) in the Chief of that traditional community; or*  
*(b) where the Chief so determines, in the Traditional Authority of that traditional community.’*

Also see *Vita Royal House v The Minister of Land Reform and 10 others* Case No. 109/2015 (7 November 2016), (Unreported) at para [12] where it was held that once a traditional community has established a Traditional Authority, the authorized body to act on behalf of the traditional community is the Traditional Authority, and not the Chief.

[29] Upon the allocation of a customary land right, the Traditional Authority notifies the land board of the allocation. If the board is satisfied that the allocation was properly made, it ratifies the allocation.

[30] After ratification, the land board causes the right to be registered in the appropriate register, in the name of the person it was allocated to and issues such person a certificate of registration.

[31] The right so registered endures for the natural life of the person in whose name it is registered.<sup>7</sup> On the death of the registered holder of the customary land right, such right reverts to the Traditional Authority for re-allocation to the surviving spouse, if any, of the deceased or to such child of the deceased or to any other person, as the Traditional Authority may determine, in accordance with customary law.<sup>8</sup>

## ANALYSIS

[32] It is common cause that not all assets owned by a party married in community of property fall within the joint estate. Assets excluded from falling in the joint estate include:

- (a) assets excluded from community of property by a will or a donation agreement;
- (b) assets subject to a *fideicommissum*;
- (c) non-patrimonial compensation;
- (d) usufruct etc.

[33] I have not been able to find reported or unreported judgment, and none was referred to me by counsel during argument, where the question whether customary land rights form part of the joint assets of a marriage in community of property, was considered.

[34] However, from the nature of the customary land right as set out in the *Act*, it appears to me that a customary land right is akin to a usufruct, in that:

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<sup>7</sup> Section 26(1) of the Act.

<sup>8</sup> Section 26 (2) of the Act.



- (a) it is granted in favour of a particular individual, and entitles the holder to have use and enjoyment of the property of another;
- (b) the holder does not acquire ownership of the property and must use the property in the manner it was intended to be used;
- (c) the right endures for the natural life of the holder;
- (d) upon the death of the holder, the right reverts to the owner for re-allocation;
- (e) if the right-holder makes improvements to the property, he/she is not entitled to compensation; though improvements made may be removed, under certain circumstances, provided the right-holder makes good any damage that their removal may cause.

[35] It appears to me, from the provisions of the *Act*, that a customary land right may not be allocated to more than one person jointly. Thus, the concept of joint-holdership, as claimed by the Defendant, does not find support in the provisions of the *Act*.<sup>9</sup> Had Parliament intended the same, it would have said so either expressly or by necessary implication. And had it done so, it would have made provision for what would become of the right in the event of the first-dying joint-holder or in the event of a joint-holder demanding a partition of the right (or the property).

[36] I am of the view that, the fact that a customary land right endures for the natural life of the holder makes it a personal right, inseparable from its holder, and cannot and does not, by operation of law, fall into community of property between husband and wife. Such right is, therefore, not an asset of the joint estate.

[37] It is common cause that the Plaintiff is the holder of the customary land right by virtue of the certificate of registration granted by the relevant land board, dated 29 August 2013. In view of the considerations set out above, it follows that the Defendant, (and other persons on the property), occupy the property, and enjoy the benefits of the customary land rights, with express or implied or tacit consent of the Plaintiff. Absent such consent, her occupation of the property would be unlawful.<sup>10</sup>

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<sup>9</sup> Compare with *Section 9(8) of the Flexible Land Tenure Act (No.4 of 2012)* where it is expressly provided that a 'starter title right' may not be held by more than one person jointly, except for persons married in community of property to each other.

<sup>10</sup> *Section 43 of the Act provides:*

[38] Having made the above analysis of the legal provisions, I now proceed hereunder to answer the questions asked, namely:

(a) Whether the customary land rights were awarded to both the Plaintiff and Defendant jointly?

The customary land rights were awarded to the Plaintiff alone, in his personal capacity.

(b) Whether the customary land rights awarded to the Plaintiff accrues to the Defendant by virtue of their marriage in community of property; and whether the improvements made on the land over which land rights exist, are jointly owned by the parties and how the same should be divided?

- (i) The customary land rights awarded to the Plaintiff do not accrue to the Defendant by virtue of their marriage in community of property.
- (ii) The action instituted and the relief claimed in the present proceedings do not include a claim for compensation or division in respect of 'improvements' made to the land, which is not an asset of the joint estate. The question of 'ownership' in regard to 'improvements' made to the land, requires an enquiry into a number of facts including:
  - the nature, extent and value of the "improvements" in question.
  - whether or not such 'improvements' have become part of the land by attachment to it, and therefore now owned by the owner of the land.<sup>11</sup>

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<sup>1</sup>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 communal land in contravention of subsection (1)'

<sup>11</sup> See *Shingenge v Hamunyela 2004 NR 1*, where it was held that certain fencing materials had acceded to the land by means of *inaedificatio*, and as a result became part of the land and the owner of the land acquired ownership thereof.

- whether or not the Defendant has already exhausted remedies provided for under *section 40 of the Act*, etc.

(iii) It, therefore, follows that the remedy of the Defendant in respect of the 'improvements' made to the land lies elsewhere, and not in the present action.

(c) Whether this court has jurisdiction to distribute and/or re-allocate customary land rights and make a determination on whether the improvements made to the land subject to the land rights follow the party to whom the land rights are allocated?

The primary power to allocate or re-allocate customary land rights vests in the relevant Traditional Authority, not in the court. On the issue of improvements to land, the observations made in the foregoing paragraph similarly apply here.

(d) Whether the parties can jointly exercise the right of occupation, use and enjoyment of the land rights and if so, on what terms are they able to do so?

The ability or capacity of the parties to jointly enjoy the land rights lies in their ability and willingness to agree on the terms upon which they wish to enjoy such rights, subject to the provisions of the *Act*.

[39] In the result, I find that a customary land right is a personal right, inseparable from its holder and does not form part of the assets of the joint estate. Accordingly, the Plaintiff, as the holder of such land rights, is entitled to exclusive enjoyment of the benefits conferred upon him under those rights.

[40] I therefore make the following order:

(a) The customary land rights allocated to the Plaintiff are the Plaintiff's exclusive property and do not constitute part of the assets of the joint estate.

(b) The present action and the relief claimed, do not include a claim for compensation in respect of "improvements" made to land, which is not an asset of the joint estate.

Therefore, the Defendant's remedy in respect of 'improvements' made to such land lies elsewhere, and not in the present action.

(c ) The Defendant's claim, to the effect that the land rights constitute part of the assets of the joint estate, is dismissed with costs.

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B Usiku  
Acting Judge

## APPEARANCES

PLAINTIFF

C Harases  
of Kangueehi & Kavendji Inc  
Windhoek

DEFENDANT:

A Weinecke  
of ENS Africa|Namibia (incorporated as  
Lorenz Angula Inc)  
Windhoek