

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: A 298/2015

In the matter between:

ZEDEKIA UAZENGISA
JOSIA UJAHA

FIRST APPLICANT
SECOND APPLICANT

and

WILLEM MUKUAMBI
ASSER MUKUAMBI
ROYAL HOUSE OF CHIEF KAMBAZEMBI
OLGA MUKUAMBI
MINISTRY OF LAND REFORM RESETTLEMENT
AND REGIONAL PROGRAMME

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT

Neutral citation: *Uazengisa v Mukuambi* (A 298/2015) [2017] NAHCMD 353
(06 December 2017)

Coram: USIKU, J

Heard on: 08 June 2017

Delivered: 06 December 2017

Flynote: Statute – Communal Land Reform Act, Act 5 of 2002 – Application to enforce decision of a Traditional Authority purporting to allocate communal land –

Court holding that applicants have not established a right capable of enforcement – Application dismissed.

Summary: The applicants applied to have a decision of a Traditional Authority purporting to allocate customary land enforced by this court – Court held that the applicant have not established a right capable of enforcement – Application dismissed.

ORDER

1. The applicants' application is dismissed.
2. The applicants are directed to pay the costs of the first and second respondents jointly and severally, the one paying the other to be absolved.

JUDGMENT

USIKU, J

[1] This matter concerns a dispute over a portion of communal land, measuring 3 square kilometers in extent, which portion of land currently forms part of land under the control of the first, second and fourth respondents.

[2] The applicants claim to be entitled to the portion of land in question, by virtue of a decision allegedly made in their favour by the Royal House of Chief Kambazembi, on the 23 January 2013.

[3] The applicants, therefore, approached this court, on notice of motion, for an order in the following terms:

- '1. Enforcing and implementing the order and decision of the Royal House of Chief Kambazembi granted on 23 January 2013,

2. That the Applicants be allowed to make necessary changes to gain access to land allocated as per order dated 23 January 2013,
3. Interdicting and prohibiting the Respondents to interfere with the rights of the Applicants as per order dated 23 January 2013 and the order of this court should it be granted,
4. Cost of suit (only if opposed).
5. Further and/or alternatively relief.'

[4] The first and second respondents opposed the application. There is no opposition filed by the third, fourth and fifth respondents. I shall therefore make reference to the first and second respondents as "the respondents" herein, except where the context indicates otherwise.

[5] The following facts are either common cause or not disputed:

- (a) the applicants and the first, second and the fourth respondents, all reside at Omurambamutima in the communal area of Otjituuo, Otjozondjupa region;
- (b) during November 2010, the applicants lodged a complaint with the Royal House of Chief Kambazembi that the respondents have fenced-off a big area of communal land, thereby depriving the applicants of grazing land;
- (c) the portion of the land in dispute is communal land.

Applicants' contentions

[6] The applicants contend that the Royal House of Chief Kambazembi ("the Royal House") is the recognized traditional authority with jurisdiction over the communal land in question. On the 23 January 2013 the Royal House took a "decision" that the Respondents should give 3 square kilometers portion of land, from the land in their possession, to the applicants. The said decision was communicated to the respondents by "letter" from the Royal House, dated the 01st February 2013, a copy of which is annexed to the applicants' founding affidavit, marked "JU2".

[7] The aforesaid letter states, among other things, that a “community court” took a decision that the Respondents should give 3 square kilometers of land in their possession to the applicants.

[8] That letter:-

- (a) is on letterhead of the Royal House;
- (b) is not addressed to any specific person;
- (c) does not specify which “community court” took the decision, or in terms of which law it took such decision;
- (d) does not indicate its author; and
- (e) is not signed.

[9] The applicants further state that during March 2013 and in year 2015, they installed a gate in the fence in respect of the land in dispute, in order for the applicants to gain access to the disputed land. On each occasion the said gate was removed by the respondents.

[10] The applicants reported the matter to the police, however, the police refused to take action, and advised the applicants to seek legal advice.

[11] The applicants further argue that the action taken by the respondents in fencing-in a large tract of land is illegal and violates relevant provisions of the Communal Land Reform Act, Act No. 5 of 2002 (“the Act”).

The contentions of the respondents

[12] The respondents, on the other hand, contend that the land in question was allocated by the Ovaherero Traditional Authority to Benestus Mukuambi, in March 1985. The said Benestus Mukuambi is the father of the first and second respondents. Benestus Mukuambi died in or about year 2008. Upon his death the customary land right over the land was allocated to his surviving spouse, Olga Mukuambi, the fourth respondent.

[13] In year 2010 the applicants started to lay claim over the relevant portion of the communal land in question. The applicants have not applied to be allocated relevant

land rights in respect of the portion in question and no land rights have been allocated to the applicants in terms of the Act. As such the applicants have no right to enforce. The respondents further argue that the applicants cannot ask for protection of rights that do not belong to them.

The relevant law

[14] The relevant law in respect of the dispute in question, is the Communal Land Reform Act. The Act regulates the allocation of land rights in respect of communal land. In terms of the Act all communal land vests in the State for the benefit of the traditional communities residing thereon.¹

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

[16] Two types of communal land rights may be allocated under the Act, namely: customary land rights and rights of leasehold. There are two types of customary land rights that may be allocated to an individual, namely:-

- (a) a right to a farming unit; and
- (b) a right to a residential unit.

[17] The primary power to allocate customary land rights vests in the Traditional Authority of that traditional community.² Upon the allocation of a customary land right, the Traditional Authority must notify the relevant land board of the allocation.³

¹ 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.

² Section 20 of the Act 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 [2], 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.

³ Section 24(2) of the Act.

Any allocation made by a Traditional Authority has no legal effect, unless such allocation is ratified by the relevant land board.⁴

[18] 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.

[19] The right so registered endures for the natural life of the person in whose name it is registered.⁵ 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.⁶

Analysis

[20] In the present matter the applicants do not state specifically the type of customary land right that they are seeking to enforce. They also do not state in explicit terms the type of customary land right that they claim was allocated to them by the relevant Traditional Authority, by virtue of the decision they seek to enforce.

[21] To the extent that the applicants claim that they are allocated a right to a 3 square-kilometres portion of land to enable them to acquire sufficient grazing land, they appear to claim that a customary land right, in a form of right to a farming unit, was allocated them.

[22] As was stated before, an allocation of a customary land right by a Chief or by a Traditional Authority has no legal effect unless such allocation is ratified by the relevant land board. That being the case, the applicants, therefore, cannot come to court to enforce an act that has no legal effect. The best that the applicants may do is to request their Traditional Authority which made the purported allocation, to forthwith notify the relevant land board about the allocation, to enable the land board to deal with the matter in accordance with the provisions of the Act.

⁴ Section 24(1) of the Act.

⁵ Section 26(1) of the Act.

⁶ Section 26(2) of the Act.

[23] To the extent that the applicants claim that the 3 square-kilometres portion of land that was allocated to them by virtue of “the decision” of the Traditional Authority, apparently “belongs to all residents”⁷ of the communal area of that traditional community, then it is not clear why the decision was made to specifically allocate such land to the applicants. If the respondents occupy the land in dispute contrary to the provisions of the Act, then the proper persons authorised to take appropriate action against the respondents are either the Chief, the Traditional Authority or the relevant land board, not anyone else.⁸

[24] Viewed against the provisions of the Act, it is apparent to me that the applicants have not established that they are entitled to the relief they seek. The applicants have not established a right enforceable by law, and therefore they cannot seek to enforce a right they do not have.

[25] For the foregoing reasons the applicants’ application stands to be dismissed with costs.

[26] In the result I make the following order:

- (a) the applicants’ application is dismissed.
- (b) the applicants are directed to pay the costs of the first and the second respondents jointly and severally, the one paying the other to be absolved.

⁷ See para.8.5 of the applicants’ replying affidavit, at page 93 of the record.

⁸ See the provisions of section 43 of the Act relating to illegal occupation of communal land:

‘Unlawful occupation of communal land

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, 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).’

Also see the relevant portion of section 44 of the Act in relation to unlawful erection of fences on any communal land:

‘Fences

44.(1) Any person who, without the required authorization granted under this Act, and subject to such exemptions as may be prescribed-

(a) erects or causes to be erected on any communal land any fence of whatever nature; or

(b) being a person referred to in section 28(1) or 35(1), retains any fence on any communal land after the expiry of a period of 30 days after his or her application for such authorization in terms of section 28(2)(b) or 35(2)(b) has been refused,

is guilty of an offence and conviction liable to a fine not exceeding N\$ 4000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.’

B Usiku
Judge

APPEARANCES

APPLICANTS

Mr T Andima
Instructed by Van der Merwe-Greeff Andima
Inc.
Windhoek

FIRST AND SECOND
RESPONDENTS:

Mr JR Kaumbi
Instructed by JR Kaumbi Inc.
Windhoek