

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2016/02421

In the matter between:

JOSEPHINE KAVEZERI

PLAINTIFF

and

FABIOLA KAVEZERI

DEFENDANT

Neutral Citation: *Kavezeri v Kavezeri* (HC-MD-CIV-ACT-OTH-2016/02421) [2018]
NAHCMD 205 (06 July 2018)

CORAM: PRINSLOO J

Heard: 21 and 22 March 2018

Delivered: 04 July 2018

Reasons: 06 July 2018

Flynotes: Ejectment — Action for ejectment — Necessary averments — Plaintiff need only allege ownership of property and occupation thereof by defendant — Onus on defendant to prove lawful occupation.

Summary: The plaintiff married the late Nehemia Kavezeri in 1987 in community of property. The plaintiff and the late Nehemia Kavezeri cohabitated at Erf 2404, Katutura, Windhoek, which property was transferred and registered into the name of the plaintiff's late husband during 1984. The defendant and the defendant's mother also lived together with the plaintiff and her late husband. However, the defendant's mother at one stage became extremely disobedient and ill-disciplined towards the plaintiff and her husband, to the point where the plaintiff's late husband instructed the defendant's mother to vacate from the property. Not long after evicting the defendant's mother from the premises, her husband also requested the defendant to vacate the premises.

In 2007, when the late Nehemia Kavezeri passed on, the plaintiff was furnished with a letter of authority in terms of Section 18(3) of the Administration of Estates Act, Act 66 of 1965¹ on 06 July 2007. In terms of the letter of authority the plaintiff was appointed as the estate representative of the late Nehemia Kavezeri.

Approximately four (4) years after the defendant was instructed to leave the premises, she returned with the reason being that she was pregnant and vulnerable and as a result, needed a place to stay at least until after birth. The plaintiff agreed that the defendant could stay at Erf 2404 Katutura Windhoek and an undertaking was made that the defendant would make monthly contributions to the expenses of the house in an amount of N\$ 350, which the defendant would pay directly into the municipal account of the house. However, it later transpired that the defendant ceased making contributions towards the expenses of the house, resulting in the plaintiff having to settle the debt incurred for municipal fees.

¹ As amended by Estates and Succession Amendment Act 15 of 2005.

The relationship between the plaintiff and the defendant deteriorated to the extent that the plaintiff had to stay away from the premises and as a result, the property deteriorated as well. The plaintiff then took the decision to file for an application to evict the defendant from the premises so that the plaintiff could once more manage the property accordingly.

Held – in order to eject a defendant from immovable property, a plaintiff need only allege that he is the owner of the immovable property and that the defendant is in occupation of the immovable property.

Held further that – In terms of the law of intestate succession, the principle applying is that in each line of succession, the succession will go to those in the line related to the nearest degree to the deceased, with in effect means that grand children of parents that are no pre-deceased will be excluded from inheriting.

Held further that – The rights and powers in connection with the liquidation and administration is vested in the plaintiff as the executrix of her late husband's estate and as such she is entitled to bring this action and seek the relief she does.

ORDER

- a) The defendant and all her dependents are evicted from the property, Erf 2404, Tiberias Street, Katutura, Windhoek, Republic of Namibia, with costs.
- b) In the event of the defendant's failing to comply therewith, authorizing the Deputy Sherriff to enforce the order.

RULING

PRINSLOO J:

Introduction:

[1] The general perception is that when an individual faces a difficult time in life, family would always be there to help the individual see it through and provide assistance to lessen whatever burdens carried. However, like everything in life, there are limitations and one should at some point start walking on your own two feet again. This matter is one such matter.

The parties:

[2] The parties before me is Josephine Kavezeri, the wife of the late Nehemia Kavezeri and the defendant, Fabiola Kavezeri, the granddaughter of the late Mr. Kavezeri. The plaintiff instituted this action in her capacity as the executor of the late estate of Mr. Kavezeri.

Background:

[3] The plaintiff in this matter instituted an eviction of the defendant from Erf 2404, Tiberias Street, Katutura, Windhoek and in the event of the defendant's failure to comply, authorizing the deputy sheriff to enforce the order. The defendant failed and/or refused to vacate the premises and opposed the application, bringing this matter before this court.

Plaintiff's evidence:

[4] Two witnesses testified in respect of the case for the plaintiff, ie. Josephine Kavezeri (the plaintiff) and Rikumbura Kavezeri. The evidence of the plaintiff is summarized in the following paragraphs.

[5] The plaintiff married the late Nehemia Kavezeri on 24 November 1987, in community of property. Before their marriage the plaintiff and the late Nehemia Kavezeri cohabitated at Erf 2404, Katutura, Windhoek, which property was transferred and registered into the name of her late husband during 1984.

[6] As the defendant grew older, the defendant and her birth mother became extremely disobedient and ill-disciplined towards the plaintiff and her husband, to the point where the plaintiff's late husband instructed the defendant's mother to vacate from the property. Not long after evicting the defendant's mother from the premises, her husband also requested the defendant to vacate the premises.

[7] Nehemia Kavezeri passed away on 10 March 2007 and the plaintiff was furnished with a Letter of Authority in terms of Section 18(3) of the Administration of Estates Act, Act 66 of 1965² on 06 July 2007. In terms of the letter of authority the plaintiff was appointed as the estate representative of the late Nehemia Kavezeri.

[8] Approximately four (4) years after the defendant was sent on her way by the late Mr. Kavezeri, she returned to the property. At the time the plaintiff was residing at a plot situated in the Otjinene constituency and her daughter, Rikambura Kavezeri³ ('Rikumbura') was residing at Erf 2404, Katutura, Windhoek. The apparent reason for the defendant's return was that she was in a vulnerable state, being pregnant and needed a place to stay until she had given birth. Rikumbura sought permission from her

² As amended by Estates and Succession Amendment Act 15 of 2005.

³ Biological daughter of Josephine Kavezeri and Nehemia Kavezeri.

mother, the plaintiff, to assist the defendant and as plaintiff did not stand unsympathetic towards the defendant she agreed to let the defendant stay.

[9] It was agreed between the defendant and Rikumbura that the defendant would make monthly contributions to the expenses of the house in an amount of N\$ 350, which the defendant would pay directly into the municipal account of the house. The defendant complied with this undertaking for three months until it transpired thereafter that the defendant no longer made the contribution as undertaken. During 2016 plaintiff confronted the defendant and enquired as to why the contributions ceased, the defendant retorted that the house belongs to her grandfather, thereby implying that there was no obligation on her to contribute to the expenses of the house. The defendant was residing at the property with her children.

[10] It was clear that the defendant had no intention of contributing towards the municipal account and the plaintiff had to approach the municipality to make arrangements for the paying off the outstanding debt as a result.

[11] According to the plaintiff the defendant became violent and attacked her on various occasions, to the point where the plaintiff obtained a final protection order against the defendant on 28 April 2014. During these proceedings an agreement was reached that the defendant would make monthly contributions towards the municipal services of N\$ 500, but according to the plaintiff the defendant took advantage of the fact that she was not being monitored and only made payments amounting between the ranges of N\$ 20 to N\$ 50 payments per month, leading to the municipal account spiraling out of control again. The plaintiff submits that the defendant stopped making payments altogether in 2015.

[12] During 2016, Rikumbura informed the plaintiff that the municipal account was in debt of in the excess of N\$ 10 000 and as a result thereof that the water services to the property was disconnected. When the plaintiff approached the defendant to enquire as

her non-payment, the defendant indicated that the court order (protection order) lapsed in 2015 and there was no further order for her to comply with.

[13] According to the plaintiff she raised fund to settle the debt once more with the municipality.

[14] Hereafter the defendant refused to make any contributions towards the house wherein everyone else who resided at the premises did. This then prompted the plaintiff to place padlocks on the taps to avoid the usage of water which would lead to further debts. The defendant refused to abide to the decision taken by the plaintiff and broke off the padlock on the tap and used the water uncontrollably without contributing to same.

[15] The relationship between the plaintiff and the defendant have deteriorated to the point where the plaintiff rather stay away from the house completely to avoid conflict. However, this caused the premises fall in a state of disrepair. Plaintiff stated she is failing to attend to its maintenance and upkeep due to the fact that she would rather stay away from the premises until the matter with the defendant is adjudicated and finalized.

[16] The plaintiff submits that what is important to her is to be able to administer her late husband's estate in peace and this cannot be achieved with the defendant's slipshod attitude. The plaintiff further submits that she has funds saved up to renovate the premises and it would be only just and fair if the defendant is evicted from the property.

[17] Rikumbura confirms the plaintiff's evidence as to the acrimonious relationship that existed between the plaintiff and the defendant. She also confirms that because of the problems that started between the plaintiff and defendant's mother the late Nehemia Kavezeri requested her to vacate the property in question and as the situation only worsened hereafter he also requested the defendant to leave the property.

[18] Ms. Kavezeri stated that all the other tenants in the house contributed towards the expenses at the house by paying rent, except for the defendant. This is causing disunity amounts the other tenants of the property.

Defendant's evidence

[19] The defendant in this matter is acting in person and failed to file a witness statement in term of Rule 92 and was limited to her pleadings in this matter.

[20] The defendant admitted that she resides in a room at Erf 2404 Teberias Street, Katutura, Windhoek and that there existed no lease agreement in this regard.

[21] According to the defendant her mother is the daughter of the late Nehemia Kavezeri and late Kangumbiro Kaveindira. She was living in the room given to her mother by her late grandfather and is under no contractual obligation to make any monthly lease payments. She however stated that she has been making payment in respect or rates and taxes and water bills.

[22] The defendant maintained that the estate the late Nehemia Kavezeri has not been finalized as yet and therefore the plaintiff cannot be the defendant's landlord, nor is the defendant the plaintiff's tenant at the aforesaid erf.

[23] Defendant admits that there was demand that she vacate the premises but states that despite demand she has not been served with any eviction order but maintains that the plaintiff is not entitled to such an order.

[24] Defendant denies that her grandfather, the late Nehemia Kavezeri ever asked either herself or her mother to leave the premises and when they left the property they

did so on their own accord. She states that her grandfather in fact insisted that she return home but she only did so after he passed on.

[25] During cross-examination the defendant maintained that she made her contributions as per the agreement but was unable to produce any proof of same to court. The defendant however conceded that she stopped her contribution in 2015. She states that during 2016 padlocks were placed on the taps and she had no access to the water nor did she have access to electricity.

[26] Since 2017 the defendant apparently left the premises but left her property behind as well as member of her family to look after the said property. Defendant was unable to say if this person made any contributions to the premises or paid any rent.

[27] The defendant remained insistent during cross-examination that she was a child of the house and not a tenant of the house and should be not be treated on the same terms as a tenant. Defendant confirms that she refuses to vacate the property as the room in question is her mother's room and therefor her room and the said room was given to her mother by her grandfather when he was still alive.

Final submissions

[28] In her final submissions on behalf of the plaintiff Me Shikali maintained that as a granddaughter of the late Nehemia Kavezeri the defendant has no right to property in question, also bearing in mind that the mother of the defendant is still alive.

[29] The plaintiff is the executrix to her husband's late estate and she has certain rights and powers in connection to the liquidation and administration of the estate.

[30] As the property in question was not disposed of by a will it will be distributed according to the relevant laws of succession. Ms. Shikali argued that the late Mr. Kavezeri's estate falls under Intestate Succession Ordinance and it is trite that the estate would generally be divided between the surviving spouse and the children of the deceased after the debts of the deceased are paid in full.

[31] She further argues that the principle of succession is that in each line of succession the succession will go to those in the line related to the nearest degree to the decease, i.e. the surviving spouse and the children of the deceased. Therefor the mother of the defendant and to the defendant.

[32] In conclusion it was argued that defendant fail to prove a bona fide defence and prayed that the defendant's defence be dismissed with costs.

[33] The defendant in turn in her heads of argument and final submissions raises a number of new issues that was not raised during the trial and on which the plaintiff and her witness was not cross-examined on. It can therefore not be considered at this late stage of the proceedings and I will not refer to any of those issues not previously raised.

[34] The crux of the defendant's argument is that plaintiff's action should be dismissed as she, the defendant, does not have alternative accommodation should she be evicted from the house.

[35] The defendant further submits that she has no problem contributing equally to the water and electricity of the house. The defendant further submits that it is unfair that the plaintiff only wishes for her to vacate the premises.

[36] The defendant in conclusion submits that her mother, who is also a child of the late Nehemia Kavezeri, is entitled to the house just as much as the other biological children.

The law applicable:

[37] The only issues to be decided on by this court is whether the defendant is in unlawful occupation of the property and whether the plaintiff is entitled to an order of eviction of the defendant.

[38] In order to eject a defendant from immovable property, a plaintiff need only allege that he/she is the owner of the immovable property and that the defendant is in occupation of the immovable property.⁴ The legal position was stated as follows by Trengove, J in the matter of *Akbar v Patel*.⁵

'According to our law, where a plaintiff's claim for the recovery of possession or for ejectment is based on his ownership of the property involved, his cause of action is simply the fact of his ownership coupled with the fact that possession is held by the defendant. (*Graham v Ridley*, 1931 T.P.D. 476; *Krugersdorp Town Council v Fortuin*, 1965 (2) SA 335 (T) at p. 336 and the authorities there cited). This principle, as far as I am aware, applies to any claim for ejectment founded on ownership, irrespective of the circumstances which have given rise to such claim. As long as the claim is based on the plaintiff's ownership of the property, the fact that it arises out of an inchoate transaction seems to me to be an irrelevant consideration as far as his cause of action is concerned.'

[39] In this court, the legal principles mentioned above in relation to ejectment were accepted in the matter of *Shimuadi v Shirungu* 1990 (3) SA 347 (SWA) where Levy J held that:

'It is trite that in order to eject a defendant from immovable property, a plaintiff need only allege that he is the owner and that the defendant is in occupation thereof. Should the defendant deny

⁴ *Krugersdorp Town Council v Fortuin* 1965 (2) SA 335 (T); *Ontwikkelingsraad, Oos-Transvaal v Radebe and Others* 1987 (1) SA 878 (T); *Akbar v Patel* 1974 (4) SA 104 (T).

⁵ 1974 (4) SA 104 (T) at 109.

any one of these elements, namely that the plaintiff is the owner or that the defendant is in occupation, the *onus* is on the plaintiff to prove the truth of the element which is denied. The plaintiff would succeed in discharging the *onus* of proof in respect of ownership by providing registered title deeds in his favour. An inference that plaintiff is the owner would then justifiably be drawn. Should the defendant dispute the validity of the title deeds or that ownership, despite the deeds, is of a 'nominal character' (*'nominale aard'*), as in the present case, the *onus* is on the defendant to prove this.'

Issues for determination:

Is the plaintiff entitled to an order of eviction?

[40] Whenever a deceased person leaves fixed property that has not been disposed of by a will, it must be distributed according to the relevant laws of intestate succession. The plaintiff's husband died intestate and therefor his estate will be dealt with in accordance with Intestate Succession Ordinance 12 of 1946 as amended,⁶ together with common law, as constituting the law of intestate succession. The 1946 Ordinance introduced a spouse's share in intestate succession, following South African legislation passed in 1934⁷ to similar effect. The ordinance amended the common law of intestate succession by providing that the surviving spouse of a deceased is declared to be an intestate heir of the deceased's spouse according to certain rules set out in that ordinance, which essentially provides for a surviving spouse to succeed to the extent of a child's share or a certain amount, whichever was the greater. The amount in question was subsequently increased in amendments to the ordinance in 1963 and again in 1982.⁸

[41] In terms of the law of intestate succession, the principle applying is that in each line of succession, the succession will go to those in the line related to the nearest

⁶ As amended by the *Intestate Succession Amendment Ordinance* 6 of 1963 and the *Intestate Succession Amendment Act* 15 of 1982.

⁷ *The Succession Act* 13 of 1934.

⁸ Does not exceed fifty thousand rand in value (whichever is the greater); [Section 1 (a) amended by Ord. 6 of 1963 and substituted by Act 15 of 1982].

degree to the deceased⁹, with in effect means that grand children of parents that are no pre-deceased will be excluded from inheriting. The mother of the defendant is still alive and well and therefore the defendant can lay no claim to the estate of the deceased.

[42] In the matter of *Lockhat's Estate v North British & Mercantile Insurance Co Ltd*¹⁰ Ramsbottom J described the duties of an executor of a deceased estate as follows:

'The duty of an executor who has been appointed to administer the estate of a deceased person is to obtain possession of the assets of that person, including rights of action, to realise such of the assets as may be necessary for the payment of the debts of the deceased, taxes, and the costs of administering and winding up the estate, to make those payments, and to distribute the assets and money that remain after the debts and expenses have been paid among the legatees under the will or among the intestate heirs on an intestacy. If, after the death of the deceased, an asset which formed part of the estate is damaged or destroyed by the wrongful act of some person, the executor has an action against that person to recover the loss sustained by the estate...'

[43] An executor is therefore not a mere procurator or agent for the heirs but is legally vested with the administration of the estate. An estate is an aggregate of assets and liabilities and a totality of the rights, obligations and powers of dealing therewith, vests in the executor so that he alone can deal with them.¹¹

[44] Immediately after letters of executorship have been granted to him an executor shall take into his custody or under his control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment. For this purpose the executor of the estate is vested with the administration of the estate in a representative capacity.

⁹ *The Law and Practice of Administration of Estates* by D Meyerowitz at page 273.

¹⁰ 1959 (3) SA 295 (A) at 302.

¹¹ Section 26(1) *Administration of Estates Act* 66 of 1965 as amended.

[45] The rights and powers in connection with the liquidation and administration is vested in the plaintiff as the executrix of her late husband's estate and as such she is entitled to bring this action and seek the relief she does.

Whether the defendant is in unlawful occupation of the property?

[46] In my view, the defendant is on her own version in unlawful occupation of the property.

[47] It is common cause between the parties that there was never a lease agreement in existence between the parties and that the defendant refused to vacate the property in spite of repeated demand.

[48] The defendant does not pay rent or contribute towards the expenses of the house as the other tenants do.

Conclusion

[49] It seems as though the relationship between the plaintiff and the defendant has broken down irretrievably and it would make no sense if they were to be ordered to co-habit with each other. Although the true nature of disagreement might never be known, it is clear that the differences between the plaintiff and the defendant cannot be reconciled.

[50] I am therefor satisfied that the plaintiff has proven her case on a balance of probabilities and in light thereof the defendant's defence is dismissed as unmeritorious.

[51] My order is therefore as follows:

a) The defendant and all her dependents are evicted from the property, Erf 2404,

Tiberias Street, Katutura, Windhoek, Republic of Namibia, with costs.

- b) In the event of the defendant's failing to comply therewith, authorizing the Deputy Sherriff to enforce the order.

JS Prinsloo

Judge

APPEARANCES:

PLAINTIFF:

L Shikale - Ambondo

of Shikale & Associates Inc., Windhoek

DEFENDANT :

In-Person