



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: I 389/2015

In the matter between:

NAOMI LIFETENI TUYENIKELAO IRUA HALIDULU

PLAINTIFF

and

THE COUNCIL FOR THE TOWN OF ONDANGWA

FIRST DEFENDANT

RUTH ANDJELE

SECOND DEFENDANT

THE MASTER OF THE HIGH COURT

THIRD DEFENDANT

Neutral citation: *Halidulu v The Council for the Town of Ondangwa* (I 389/2015)
[2019] NAHCMD 460 (7 November 2019)

Coram: PARKER AJ

Heard: 21, 23, 24 January 2019; 6, 8, 9, 10 May 2019; 18 June 2019; 17 July
2019; 18 September 2019; 22 October 2019

Delivered: 7 November 2019

Flynote: Land – Communal Land – Tenure of – Plaintiff allocated land (‘the property’) before Namibia’s Independence to habituate on and use – Schedule 5(3) of the Namibian Constitution created a right in favour of plaintiff over communal land that was succeeded to by the Government of the Republic of Namibia – Such right continued to exist, even though not registered in terms of the Deeds Registries Act

47 of 1937, when the land was transferred to the Ondangwa Town Council, a local authority council – Second defendant failed to establish any defence known to the law in her challenge plaintiff's ownership of the property – Court should accordingly protect plaintiff's right to the property by declaration – Consequently, plaintiff entitled to judgment.

Agnes Kahimbi Kashela v Katima Mulilo Town Council, Case No. SA 15/2017 (SC) applied.

Summary: Land – Communal Land – Tenure of – Plaintiff allocated land before Namibia's Independence by the Ondonga Traditional Authority in 1978 to habituate on and use – Plaintiff did habituate on and use the property, albeit intermittently – The property became part of the geographical and legal-administrative area of the Ondangwa Town Council in terms of the Local Authorities Act 23 of 1992 – Court finding that that statutory and administrative arrangement did not extinguish plaintiff's land tenure right over the property – Court finding evidence in support of plaintiff's case is cogent and credible and stood unchallenged at close of plaintiff's case – Second defendant testified and called witnesses to support her denial of plaintiff's ownership of the property and her assertion that the property belonged to plaintiff's late brother with whom she was married in community of property and the ownership thereof passed to her upon the husband's death – Court found that that evidence taken separately or cumulatively did not establish the deceased's ownership of the property – Accordingly, court finding that second defendant has not established any defence known to the law – Consequently, court granted judgment for the plaintiff.

ORDER

1. Judgment for the plaintiff.
2. It is declared that Erf No. 1184, Ondangwa was lawfully allocated to plaintiff by the Ondonga Traditional Authority in 1978 and that plaintiff has at all relevant times been the lawful occupier of Erf No.1184.

3. First defendant must at its own cost not later than 4 December 2019 transfer the property to plaintiff.
4. There is no order as to costs.

JUDGMENT

PARKER AJ:

Introduction

[1] This case comes a long way, and it has done the rounds: appointment of set down trial dates, a series of vacation of set down trial dates, postponement of trials, abortive mediation efforts, interlocutory applications, withdrawal of legal representatives and entry on the record of their replacements, etc. Mr Rukoro represents the plaintiff, and Ms Mainga the second defendant. Both counsel submitted helpful written submissions for which I am grateful. The Master of the High Court (third defendant) is cited in the proceedings but she chose not to participate in the litigation; so was the first defendant, the Ondangwa Town Council, a local council authority in terms of the Local Authorities Act 23 of 1992. The town council also chose not to participate in the litigation.

[2] Despite the long time that the case took to finally reach the trial stage and the sizeable number of witnesses, the determination of the dispute turns on a narrow and short compass and on primarily a question of law. The declaration sought by plaintiff in para 1 of her prayers in the Particulars of Claim ('POC') represents in microcosm all the series of relief sought by the plaintiff in the POC. Indeed, the consideration of prayer 1 is central to the determination of the primary question, which this court should answer in adjudicating on the dispute. It is the ownership of the property.

[3] In the POC, plaintiff seeks an order in the following terms:

- (1) An order declaring that Erf No. 1184 was lawfully allocated to plaintiff by the Ondonga Traditional Authority during 1978 prior to the proclamation and establishment of Ondangwa town and that plaintiff has at all material times been the lawful occupier of Erf No. 1184;
- (2) An order directing first defendant to transfer Erf No. 1184 to plaintiff, free of charge;
- (3) An order directing second defendant to vacate Erf No. 1184 Ondangwa; and
- (4) Granting plaintiff such further and/or alternative relief and that first defendant be ordered to pay costs of suit.

[4] Thus, on the pleadings, the declaration sought by plaintiff (prayer 1) is a claim for recovery of immovable property by the owner (ie plaintiff) from second defendant who is in possession of it. It is simply an *actio rei vindicatio*; and so, as Ms Mainga, correctly submitted, plaintiff must prove her ownership of the property. Thus, in order to succeed, plaintiff must establish the following, namely, that (a) she is the owner of the property, and was so, when summons was served on second defendant; and (b) second defendant is in possession of the property.

[5] From the evidence, I understand that the property, the subject matter of the instant dispute, now, ie since the proclamation of Ondangwa as a local authority council area, consists of Erf No. 1184 and Erf No. 1202; but in 1978 the property that was allocated to plaintiff by the Ondangwa Traditional Authority was just a piece of land (see Part (a) of this judgment).

[6] I shall consider item (a) first for obvious reasons that will become apparent shortly. It is, therefore, to item (b) that I now direct the enquiry.

Is second defendant in possession of the property?

[7] On the pleadings, that second defendant is in possession of the property is not in dispute; and so, the question should be answered in the affirmative. I proceed to consider item (a) that is, the issue of ownership.

Is plaintiff the owner of the property?

[8] In answering this question the court must have regard not only to the evidence but also to the law concerning -

- (1) communal land tenure in pre-Independence and post-Independence Namibia;
- (2) the effect of Schedule 5(3) of the Namibian Constitution respecting communal land; and
- (3) the interpretation and application of the following statutes respecting communal land:
 - (i) the Local Authorities Act 23 of 1992;
 - (ii) the Communal Land Reform Act 5 of 2002; and
 - (iii) the Deeds Registries Act 47 of 1937.

[9] As respects subparas (1) to (3) of the preceding paragraph 8, I can do no better than to find succour in, and apply, the principles of law well thought out and comprehensively set out in *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others*, Case No: SA 15/2017 (SC), *passim*. I shall apply the *Kashela* principles to the fact of the instant case as I go along.

[10] On the totality of the evidence placed before the court I make the following factual findings and conclusions thereunto in the following paragraphs, ie paras 11 to 18.

[11] Plaintiff's categorical and unambiguous evidence is that she was allocated the piece of land, ie now Erf No. 1184, by the headman of the area of

Ondangwa/Ondjondjo by the name Petrus Shiyufikeni. Her evidence is corroborated by a communication from the Ondonga Traditional Authority ('the Traditional Authority') – to the world at large – that plaintiff had been residing at that place since 1978. She used it for business, crop cultivation and as residential premises. She only stopped working the field when it was announced that the property in question would form part of the area to be declared as 'a municipality area'. Plaintiff's evidence and the corroboration thereof by the responsible authority, namely, the Ondonga Traditional Authority, remained unchallenged at the close of plaintiff's case. Nor could second defendant successfully challenge it, since on her own version, she came onto the scene, as it were, in February 1988.

[12] The only feeble challenge was mounted by Ms Mainga in her oral submission to the effect that the corroborative written communication from the Traditional Authority does not state that the portion of land was allocated to the plaintiff but merely states that she resided there; and further that there is no other letter from the Traditional Authority prior to the said letter. That is so; but all the four paragraphs of the corroborative communication should be read intertextually. If plaintiff merely resided there on the property but the property was not allocated to her, why would the Traditional Authority plead that, based on what the Traditional Authority had said in paras 1 and 2 of the corroborative communication, if part of the said property 'had been allocated to somebody else, we have no doubt that Municipality will allocate her another' property; and the Traditional Authority goes further to indicate the size that would be appropriate in the circumstances?

[13] The pleading by the Traditional Authority forms part of the *res gestae*, and in favour of plaintiff's position. The import of the Traditional Authority's corroborative written communication indicates clearly that the Traditional Authority was confirming facts that in their knowledge had existed before August 2011 when the corroborative letter was written. It has not been contradicted in the instant proceedings that no such facts had existed for the Traditional Authority to have confirmed them in August 2011.

[14] As to Ms Mainga's submission that plaintiff only resided there, my response will be to rehearse what Damaseb DCJ, writing the unanimous judgment in *Agnes*

Kahimbi Kashela, stated at para 63 in that judgment about allocation of communal land in the period before Namibia's attainment of Independence:

[63] I did not understand Mr Narib to question the proposition made by Mr Odendaal on behalf of Ms Kashela, that the representative authorities created by AG 8, or the Administrator General – both referenced in Schedule 5(1) – held the land in trust for the respective tribal communities over whom they had jurisdiction. They were required to allocate land to members of the tribal communities for habitation and use. Those rights, although not real rights as understood at common law, entitled the holders to live on, work the land and sustain themselves from it.'

[15] That is what plaintiff testified she did on the property after it was allocated to her by the Traditional Authority as long ago as 1978; and the Traditional Authority confirms her 'habitation and use' of the property, as mentioned previously. The communal land tenure rights of plaintiff to habituate at and use the property, 'although not real right as understood at common law, entitled the holder(s) to live on, work the land and sustain themselves (herself) from it' (see *Agnes Kahimbi Kashela* at para 63), even if, in the instant proceedings, plaintiff did habituate on and use the property occasionally but regularly in virtue of her teaching employment situation.

[16] The evidence that plaintiff acquired communal land tenure right over the property is fortified in no small measure by this unchallenged fact which Ms Mainga inexplicably dismissed out of hand without justification. It is this. When the property fell within the geographical and legal-administrative area of the Town Council and the Town Council expropriated Erf No. 1202, the Town Council did compensate plaintiff for her loss in terms of the Government's 'Compensation Policy Guidelines for Communal Land: Approved in terms of Cabinet Decision No. 17/15.09.09/003 of 15 September 2009' by donating to her Erf No. 3188, Extension 14, Ondangwa Town.

[17] Indeed, it is not disputed that when Ondangwa was proclaimed a town and a local authority council was established for it in terms of Act 23 of 1992, as I have intimated previously, the property became part of the land mass under the jurisdiction of the Town Council, but this administrative and statutory arrangement

did not extinguish plaintiff's communal land tenure rights over the property. 'The fact that the land (on which the property is situated) ceased to be communal land does not necessarily result in the occupier of land (in these proceedings, the plaintiff) losing the protection given by Schedule 5(3) of the Constitution' (*Agnes Kahimbi Kashela* at para 78, *per* Damaseb DCJ). And, *a fortiori*, the right did not need to be registered in terms of s 16 of Act 47 of 1937 for it to assume legal force. (*Agnes Kahimbi Kashela* at paras 57-61) these conclusions debunk Ms Mainga's argument, if I understood her, that plaintiff's right has not been registered. Such right did not need to be registered in terms of s 16 of Act 47 of 1937 to be enforceable (see *Agnes Kahimbi Kashela*).

[18] Based on these reasons, I am satisfied that on the totality of the evidence, plaintiff acquired exclusive communal land tenure right over the property and such right is protected by Schedule 5(3) of the Constitution. The conclusion is, accordingly, inescapable that plaintiff has proved her ownership of the property, which is in the possession of second defendant. All the assertion and evidence placed before the court by second defendant and in support of second defendant's case have been pulverised to dust under the sheer pressure of the cogent, credible and unchallenged evidence placed before the court by plaintiff and in support of her case.

[19] But that is not the end of the matter. Has second defendant alleged and established any defence known to the law? The defences that are available to second defendant are:

- (a) a denial of ownership;
- (b) a denial of possession;
- (c) pleading that, if defendant was in possession, if she had returned the property in question to plaintiff;
- (d) the *bona fide* disposal of possession;
- (e) allegation and proof of a right to possession; eg on the bases of a lease agreement; and
- (f) estoppel.

[See *Horn v Horn* (I 615/2016) [2018] NAHCMD 3(23 January 2018) at para 5.]

[20] In her plea, second defendant denies that plaintiff is the owner of the property and 'further pleads that at all relevant times, the above mentioned property belonged to the deceased (Nathaniel Kamati) and the second defendant after (second defendant) married the deceased'. Put simply, according to second defendant, second defendant traces her ownership of the property to the deceased, that is, by virtue of the fact that second defendant and the deceased were married in community of property. Thus, if I find that the deceased did not own the property that is the end of second defendant's defence.

[21] I now proceed to consider the evidence adduced to establish the deceased's ownership of the property, as alleged by second defendant.

Did the property belong to Nathaniel Kamati (the deceased)?

(i) Second defendant's evidence:

[22] In her plea, as I have intimated previously, the basis upon which second defendant relies to establish her allegation that the property was owned by Nathaniel is only this:

'...the deceased and second defendant constructed a shop and dwelling on the aforementioned property with their (our) own financial resources.'

[23] In our law, X constructing a 'shop and dwelling' (residential premises) on land that is not X's property cannot found X's ownership of the said property protectable by law. This proposition of law is so fundamental that there is no need to cite authority for it. In that event, the court may grant remedy to X 'for improvement brought about on the land' (see *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others*, Case No.: SA 15/2017 (SC) at para 70), but the remedy cannot include an order that X is the owner of the property.

[24] Furthermore, the greater part of evidence that second defendant herself gave has no probative value being hearsay evidence, because she could only rehash what the deceased might have told her and what others might have told her. The reason is that, as I have said previously – which was also Mr Rukoro’s submission – second defendant arrived on the property in question in 1988, that is, a good ten years after, as I have found, the Ondangwa Traditional Authority had allocated the property to plaintiff for her habitation and use. I pass on to consider other evidence adduced from second defendant’s witnesses in an attempt to establish Nathaniel’s ownership of the property and, *a priori*, second defendant’s property.

(ii) Nestory Kamati’s evidence:

[25] Most of Nestory’s evidence cannot by any stretch of legal imagination support second defendant’s case, inasmuch as it is predicated upon ‘as far as he can remember’. Such wild statement is worthless because it does not stand on any factual basis having probative value.

[26] Nestory’s other evidence is this: After the death of the deceased, a meeting known among the community as *Omwaale* was held and the plaintiff was present. The purpose of such meeting is to determine who takes care of any surviving minor and dependent children of the deceased and to distribute any property of the deceased among family members. At the meeting, the family decided that Erf No. 1184 be given to the second defendant and her last child, Shivute Kamati. According to Nestory, plaintiff did not claim that she was the owner of the property. In my view, in the first place, the family assumed without any legal basis – none was placed before the court – that the property was owned by Nathaniel; and what is more, the fact that plaintiff did not claim at the meeting that she was the lawful owner of the property matters tuppence, as a matter of law. In our law the court will accept a waiver of a right if the waiver is expressly made, especially a right guaranteed by the Constitution, as is in the instant proceeding. Such right cannot be waived by silence.

(iii) The evidence of Shivute Josua Vaino Ndapewa Kamati:

[27] Shivute's evidence that his grandmother informed him that Nathaniel owned the property is a textbook example of hearsay evidence, and it is rejected as such. It has no probative value.

(iv) Augusto Adolf:

[28] Adolf's evidence is essentially that Nathaniel moved into the residential premises on the property and thereby became his neighbour. Adolf's evidence – it is of no moment which one: whether Nathaniel started constructing a house on the property at the beginning of 1981 or at the end of 1982 when he resigned from the colonial defence force – cannot assist second defendant's case. Seeing X constructing a house on a piece of land and becoming your neighbour cannot, as a matter of law, lead to the conclusion, without more, that X is the owner of the land in question.

(v) Onesmus Kamati:

[29] His evidence is more or less a carbon copy of Nestory's evidence about the 'Omwaale'. What I said about plaintiff's silence at the meeting about her ownership of the property goes for Onesmus's evidence. Such evidence cannot lead to the conclusion that Nathaniel owned the property, it is, with respect, worthless.

Conclusion:

[30] In his submission, Mr Rukoro sought to punch holes in the evidence of these second defendant's witnesses on the basis of material contradictions or that their versions are false. I accept the principles of law relied on by Mr Rukoro. But in my opinion, the greatest, incurable demerit of the evidence of Nestory, Shivute, Augusto, and Onesmus is that they do not – taken separately or cumulatively – establish Nathaniel's ownership of the property. Besides, a great deal of their testimonies was pregnant with inadmissible hearsay evidence, as I have demonstrated.

[31] It follows that in my judgment, second defendant has not established any defence known to the law to support defendant's denial of plaintiff's ownership of the

property (see item (a) at para 19 above) on the basis that Nathaniel and second defendant owned the property.

[32] Based on these reasons, I am satisfied that plaintiff has proved her ownership of the property and therefore a right to the property, and second defendant has failed to prove any defence known to the law. Accordingly, the court should protect plaintiff's right to the property by a declaration. Consequently, plaintiff is entitled to judgment in her favour.

[33] It is noted that second defendant has not claimed any amount for improvements that she and Nathaniel might have brought onto the property (see *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* at para 70, referred to in para 23 above). That being the case, I do not think this court is entitled to consider any such improvements. There is no evidence on it for the court to consider.

[34] As to costs; plaintiff seeks no costs order against second defendant, and Mr Rukoro informed the court that plaintiff is not persisting in being awarded wasted costs for an earlier postponement at the behest of Ms Mainga that was to be argued.

[35] In the result, I order as follows:

1. Judgment for the plaintiff.
2. It is declared that Erf No. 1184, Ondangwa was lawfully allocated to plaintiff by the Ondonga Traditional Authority in 1978 and that plaintiff has at all relevant times been the lawful occupier of Erf No.1184.
3. First defendant must at its own cost not later than 4 December 2019 transfer the property to plaintiff.
4. There is no order as to costs.

C Parker
Acting Judge

APPEARANCES:

PLAINTIFF:

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