

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-MAT-2021/03688

In the matter between:

AKTOFEL DENGGEINGE

PLAINTIFF

and

MARTHA TUWILIKA NDINELAGO UUGWANGA

DEFENDANT

Neutral citation: *Dengeinge v Uugwanga* (HC-MD-CIV-ACT-MAT-2021/03688)
[2023] NAHCMD 163 (31 March 2023)

Coram: ANGULA DJP

Heard: 8 November 2022

Delivered: 31 March 2023

Flynote: Customary Law – Under customary law women did not have the right to obtain land in their own rights for their own use nor could they own properties, apart from personal properties of insignificant value – With the advent of the Constitution the status of the women have been significantly improved – There is no doubt that a customary land right in terms of the Communal Land Reform Act, 5 of 2003, has economic value and as such is an incorporeal right which forms part of the assets of the joint estate.

Summary: The issue for determination in this matter is whether the communal land right in respect of a piece of land situated in the communal area of Ekolyaanaambo Village, Ongwediva, Oshana Region (the 'land') registered in the name of the plaintiff, forms part of the assets of joint estate of the plaintiff and the defendant (the 'parties').

As regards to the land right, the plaintiff's stance is that that land right is, in law, a personal right and therefore does not form part of the parties' joint estate. The defendant contended contrariwise, maintaining that the land right forms part of the joint estate. The defendant therefore seeks an order that the land right be sold and the proceeds be divided between the parties in equal shares.

Held that, community of property has been described as a universal economic partnership of the spouses in which both spouses, irrespective of the value of their financial contribution, hold equal shares.

Held further that, the Supreme Court in *Kashela v Katima Mulilo Town Council* 2018 (4) NR 1160 (SC) rejected the notion that a customary land right is a personal right. It held that 'the right embedded in Schedule 5(1) is a *sui generis* right given under the Constitution' and that such 'right is enforceable by the courts of law'. In light of the *Kashela* judgment, which has a binding effect on the High Court pursuant to the provisions of Article 81 of the Constitution, *Mutrifa v Tjombe* [2017] NAHCMD 162 is no longer good law.

Held further that, it follows therefore that the plaintiff's argument that a customary land right is a personal right and thus excluded for the assets which constitute the joint estate of the parties is misplaced and is rejected.

Held further that, the parties attach economic value to the customary land right allocated to and registered in name of the plaintiff. The plaintiff is asserting that economic value to the exclusion of his spouse, the defendant. There is no doubt that a customary land right has economic value and as such is an incorporeal right which forms part of the assets of the joint estate.

Held further that, the relevant wordings both in the Constitution and the Married Persons Equality Act 1 of 1996, are unequivocal and do not require interpretation. Both state in clear language that spouses have equal rights during marriage and at its dissolution. In this connection, it would be wrong to interpret the provisions of the Communal Land Reform Act 5 of 2002, which interpretation has the result that a customary land right is excluded from a constitutionally entrenched equality of rights between spouses during marriage or at its dissolution.

Held further that, the Constitution is the source of all laws and must take precedence over other laws which are subordinate to it.

Held further that, if the proposition advanced on behalf of the plaintiff were to be upheld it would result in the perpetuation of the inequality between men and women residing in the communal areas. It would result in a substantial majority of all customary land rights allocated to men to the exclusion of women. Such a scenario would be untenable as it would be contrary to the relevant provisions of the Constitution as well as those of the Married Person Equality Act which advocate equality between spouses.

For those reasons the proposition cannot be accepted.

ORDER

1. The economic value of the customary land right registered in the name of the plaintiff forms part of the joint estate and falls to be divided in equal shares between the parties.
2. The plaintiff is to pay the defendant's costs.
3. The matter is finalised and is removed from the roll.

JUDGMENT

ANGULA DJP:

Introduction

[1] The issue for determination in this matter is whether the communal land right in respect of a piece of land situated in the communal area of Ekolyaanaambo Village, Ongwediva, Oshana Region, (the 'land') registered in the name of the plaintiff in terms of the provisions of Communal Land Reform Act 5 of 2002, forms part of the assets of joint estate of the plaintiff and the defendant (the 'parties'). The said communal land right will, for short, be referred to in this judgment as 'the land right'.

Factual background

[2] The parties were married to each other in community of property on 18 May 2001 at Swakopmund. The plaintiff instituted divorce proceedings against the defendant who defended the action. In the course of the proceedings, the parties reached a settlement agreement regarding, the custody of their minor children, as well as the division of the joint estate except in respect of the land right aforementioned. In the meantime a restitution of conjugal rights order has been issued, incorporating the settlement agreement concluded between the parties. The return date for the final order of divorce was due at the time of writing this judgment.

[3] As regards to the land right, the plaintiff's stance is that a land right is, in law, a personal right and therefore does not form part of the parties' joint estate. The defendant contended contrariwise, maintaining that the land right forms part of the joint estate. She therefore seeks an order that the land right be sold and the proceeds be divided between the parties in equal shares.

[4] It is common cause that improvement in the form of a four-bedroom house has been erected on the land.

Parties' respective submissions

On behalf of the plaintiff

[5] Mr Silungwe, for the plaintiff, submitted in his heads of argument that the plaintiff's land right is a personal right and as such is inseparable from the plaintiff. It therefore does not form part of the assets of the joint estate. Counsel relied for his contention on *Tjombe*¹ where it was held that the nature of a customary land right is akin to the common law right of *usufruct* in that: it is granted in favour of a particular individual; it entitles the holder to have the use and enjoyment of a property of another person; the holder does not acquire ownership of the property to which the right relates; the holder must use the property in the manner it was intended to be used; the right endures for the natural life of the holder; upon the death of the holder the right reverts to the owner for re-allocation; and if the right-holder makes improvements to the property, he or she is not entitled to compensation, the improvements may be removed under certain circumstances, provided the right holder makes good any damage that such removal may cause.

[6] The court further pointed out that an additional feature which makes a customary land right akin to a personal right is the fact that a customary land right may not be allocated to more than one person jointly, thus the concept of joint holdership, claimed by the defendant in that matter did not find support in the provisions of the Communal Land Reform Act 5 of 2002 (CLRA). The court then concluded as follows:

'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.'

Submissions on behalf of the Defendant

[7] Ms Ntelamo-Matswetu, for the defendant relied on the Supreme Court judgment in *Kashela*², where it was argued that a right to occupy a communal land was a precarious personal right which was not enforceable because it was not

¹ *Mutrifa v Tjombe* [2017] NAHCMD 162.

² *Kashela v Katima Mulilo Town Council* 2018 (4) NR 1160 (SC).

registered in terms of the Deeds Registries Act³. That argument was rejected by the court. Counsel then argued that the benefits and value that are attached to a customary land right accrued to the joint estate in that it confers on the other spouse rights of occupation, use and enjoyment of the property to which that land right relates including the value of improvement attached to such land.

[8] Before I proceed to consider counsel's respective submissions, I deem it necessary to briefly refer to the relevant Constitutional provisions as well as relevant statutory provisions so as to provide context for the discussion that follows.

Relevant Constitutional provisions

[9] Under customary law, women did not have the right to obtain land in their own rights for their own use nor could they own properties, apart from personal properties of insignificant value. With the advent of the Constitution the status of the women has been significantly improved. In this regard, Article 10 of the Constitution guarantees equality of all persons before the law. It further prohibits any form of discrimination on the ground of *inter alia* sex or social status. Article 23 recognises that women in Namibia have traditionally suffered special discrimination and accordingly they need to be encouraged and enabled to play a full, equal and effective role in the political, social economic and cultural life of the nation. Finally, Article 14, which is closer to the issue for determination in this matter, provides *inter alia* that 'men and women of full age ... shall be entitled to equal rights as to marriage during marriage and at its dissolution'. (Underlining supplied for emphasis).

Relevant provisions of the Married Persons Equality Act

[10] In an effort to comply with the spirit and ethos of the Constitution pertaining to the equality of women, the Legislature during 1996, promulgated the *Married Persons Equality Act*⁴, which, amongst other matters, abolished the marital power of the husband over his spouse and further amended the matrimonial law of marriages in community of property. In this regard section 5 of that Act provides that a husband and wife married in community of property have equal right to dispose the assets of

³ Deeds Registries Act 47 of 1937.

⁴ Married Persons Equality Act 1 of 1996.

the joint estate; to contract debts for which the joint estate is liable; and administer the joint estate.

[11] Furthermore, section 8 of that Act provides that an adjustment has to be made in favour of the wronged spouse where one spouse performs a transaction without the consent of the other spouse and as a result of such transaction, the joint estate suffers loss. Such adjustment may be made during the subsistence of the marriage or upon the division of the joint estate. The section sets out in detail how the adjustment is to be effected.

Relevant provisions of the Communal Land Reform Act (CLRA)

[12] It is necessary to point out that the CLRA repealed a number of pre-independence colonial legislations which regulated the life and affairs of the black communities who live in the communal areas. They are listed in Schedule 2 to the Act, dating back to 1936. The Supreme Court in *Kashela*⁵ undertook an enlightening historical devolution of the colonial laws which went hand-in-hand with the political devolution from colonial occupation of Namibia to its independence.

[13] The CLRA does not recognise private ownership of land situated in a communal area. In this regard section 17 of the Act provides that all communal land areas vest in the State for the benefit of the traditional communities residing in those areas. This section mirrors Article 100 of the Constitution which provides *inter alia* that ownership of the land vests in the State.

[14] Another provision of the CLRA which is relevant for the purpose of the present matter, is section 26 which provides that a customary land right endures for the natural life of the holder of such right and upon the death of the holder of the customary land right such right reverts to the Chief or Traditional Authority for re-allocation.

Discussion

⁵ *Kashela v Katima Mulilo Town Council* 2018 (4) NR 1160 (SC) paras 46-50.

[15] It is against the backdrop of the Constitutional and statutory provisions referred to above, that I proceed to consider the issue for determination in this matter, namely whether the customary land right registered in the name of the plaintiff forms part of the assets of the joint estate.

[16] I should point out at the outset that *Tjombe (supra)* and subsequent judgments upon which Mr Silungwe relied for his submission that a customary land right is a personal right were decided before the Supreme Court judgment in *Kashela*. Curiously Mr Silungwe did not refer to *Kashela* in his heads of argument. The Supreme Court in *Kashela* rejected the notion that a customary land right is a personal right. It held that 'the right embedded in Schedule 5(1) is a *sui generis* right given under the Constitution'. And that such 'right is enforceable by the courts of law'. In light of the *Kashela* judgment, which has a binding effect on this court pursuant to the provisions of Article 81 of the Constitution, *Tjombe* is no longer good law.

[17] It follows therefore that the plaintiff's argument that a customary land right is a personal right and thus excluded for the assets which constitute the joint estate of the parties is misplaced and is rejected.

No provision in CLRA for joint holders of a customary land right

[18] Another basis upon which the plaintiff sought to exclude the land right from community of property is the fact that there is no provision in the CLRA which sanctions a land right to be held jointly by the spouses. I should immediately point out in this regard that just as there is no provision in the CLRA which sanctions joint holders, there is equally no provision in the CLRA which specifically excludes a land right from being part of the spouses' joint estate.

[19] In my view the mere fact that a land right has been registered in the name of one of the spouses does not *per se* mean that such right has been excluded from the assets of the spouses' joint estate. The legal position is that it does not 'make any difference whether the acquisition is made in the name of the husband, or wife or of both jointly'.⁶ There are many instances where an asset forming part of the joint

⁶ Hahlo, R. 1985. *The South African Law of Husband and Wife* (5th Edition). Juta: Cape Town.

estate is registered in the name of one of the spouses but that asset forms part of the joint estate. For example, a motor vehicle is normally registered with Namibia Traffic Information System (commonly known as 'Natis') in the name of one of the spouses. It would be absurd to hold that by such mere registration that motor vehicle does not form part of the joint estate. Another example, if more examples are needed, are shares held in a company. Such shares are normally evidenced by a share certificate issued in the name of one of the spouses but the value attached to the shares accrues to the joint estate.

[20] In my view, there is no merit in the argument based on an absence of joint holdership in the CLRA to justify the exclusion of the land right from the assets constituting a joint estate. The argument is therefore dismissed.

The concept and meaning of properties being in community

[21] Hahlo⁷ describes the assets that fall into the joint estate as follows:

'The joint estate consists of all the property and rights of the spouses which belong to either of them at the time of the marriage or which were acquired by either of them during the marriage... Assets forming part of the joint estate are owned by the spouses in equal undivided shares.'

And further:

'As regards acquisitions *stante matrimonio*, whatever either spouse acquires during the marriage falls automatically into the joint estate, no matter whether it is acquired by onerous or gratuitous title; by contract or succession; in pursuance of a *condictio* or of a delictual claim; as a result of a legal or illegal activities. The salary the husband earns; the shirt and shares he purchases; the earnings of the wife and the jewels which she inherited from her mother; the tainted gains from gambling, fraud, theft or prostitution – all alike fall into the joint estate. Nor does it make any difference whether the acquisition is made in the name of the husband, of wife or both spouses jointly.'

⁷ Hahlo, R. 1985. *The South African Law of Husband and Wife* (5th Edition). Juta: Cape Town. p. 161.

[22] Community of property has been also described as a universal economic partnership of the spouses in which both spouses, irrespective of the value of their financial contribution, hold equal shares.⁸

[23] With those legal principles in mind, I proceed to consider whether the land right which has been held to be *sui generis* is capable of forming part of the assets constituting the joint estate.

[24] Section 21 of the CLRA states that a customary land right may be allocated in respect of a farming unit or a residential unit. According to *Silberberg*⁹ 'a person will assert that he [or she] has a right to a thing only if he [or she] attaches value to it and in general he [or she] will attach a value to those things which he [or she] desires to satisfy his [or her] wants and needs and in particular his [or her] economic wants and needs.'

[25] Applying the above stated legal principle to the facts of the present matter it follows, in my view, that the parties attach economic value to the customary land right allocated to and registered in name of the plaintiff. The plaintiff is asserting that economic value to the exclusion of his spouse, the defendant. In my view, a customary land right can therefore be classified as a *sui generis* incorporeal right.

Reasons why customary land right forms part of the joint estate

[26] One needs only to have regard to the wordings of Article 14 of the Constitution and section 5 of the Married Persons Equality Act, referred to earlier in this judgment, to conclude that a customary land right forms part of the joint estate. The relevant wordings of both the Constitution and the Married Persons Equality Act, are unequivocal and do not require interpretation. Both state in clear language that spouses have equal rights during marriage and at its dissolution. In this connection, I am of the firm view that it would be wrong to interpret the provisions of the CLRA, which interpretation has the result that a customary land right is excluded from the constitutionally entrenched equality of rights between spouses during marriage or at

⁸ *Mieze v Mieze* (I 1468-2012) [2013] NAHCMD 181 (28 June 2013).

⁹ Silberberg, H.1975. *The Law of Property*. Butterworths at page 2.

its dissolution. In this regard, it has been held that the Constitution is the source of all laws and must take precedence over other laws which are subordinate to it.¹⁰

[27] The Supreme Court in *Frank*¹¹ directed in this connection that when a fundamental right and freedom in Chapter 3 of the Constitution should be 'interpreted broadly, liberally and purposively ... to give to the article a construction which is most beneficial to the widest possible amplitude'... 'a generous, broad and purposive interpretation.'¹² The correct approach is therefore to read the provisions of CLRA dealing with the allocation and registration of a customary land right as being subject to Article 14 of the Constitution.

[28] In adopting that approach, I am of the view that the fact that section 26 which provides that upon the death of the holder of the land right, the right reverts to the Chief or Traditional Authority for reallocation to the surviving spouse of the deceased right holder, serves as a strong indication that spouses' equal rights in the land right, are recognised. This is because a surviving spouse is treated as if he or she were a 'preferential creditor' or that he or she is vested with a 'right of first refusal' in respect of the customary land right in that her or his 'consent' is required when the Chief or Traditional Authority considers reallocation of the land right. On this interpretation, I am of the considered view that the joint spouses' interests embedded in the economic value of the land right, have been recognised by the Legislature.

[29] The default legal position in respect of marriages in community of property is that all property acquisitions made during the subsistence of the marriage by either spouse fall automatically into the joint estate. It is common cause that the customary land right in the present matter was acquired during the subsistence of marriage. It is trite that during the marriage the parties own the assets of the joint estate in equal undivided shares. This common law position has been entrenched by Article 14 of the Constitution. In my judgment, there is no doubt that a customary land right has economic value and as such is a *sui generis* incorporeal right which forms part of the assets of the joint estate.

¹⁰ *MW v Minister of Home Affairs* 2016 (3) 707 para 46.

¹¹ *Immigration Selection Board v Frank* 2001 NR 107 at 175 – B.

¹² (*ibid*).

[30] To hold otherwise would have a retrogressive effect on the gains made since the advent of the Constitution and those achieved through the implementation of the provisions of the Married Persons Equality Act. In particular, it would contradict the specific provision of Article 14 of the Constitution which provides that 'men and women of full age ... are entitled to equal rights during the marriage and its dissolution'. Furthermore, a holding to the contrary would contradict the provisions of section 4 of that Act which provides that a husband and wife married in community of property have equal rights.

[31] In my judgment if the proposition advanced on behalf of the plaintiff were to be upheld it would result in the perpetuation of the inequality between spouses residing in the communal areas. It will further continue to perpetuate the irrational colonial discrimination as regards to property rights of spouses whose marriages were concluded north of the Police Zone and spouses whose marriages were concluded south of the Police Zone.

[32] It is a notorious fact, which this court is entitled to take judicial notice of, that according to customary practices and norms prevailing in the traditional communities residing in the communal areas, a man, as head of the family, would invariably apply to be granted a customary land right. If the application is granted such land right will invariably be registered in the husband's name. It is only in few isolated instances that a woman would apply for a customary land right. In such instances a woman would likely be unmarried, divorced or a widow.

[33] In this connection, one cannot be oblivious of the proprietary consequences of the marriages concluded north of the Police Zone which, according to the provisions of the Native Administration Proclamation 15 of 1928, the default position of such marriages, is that they automatically produce a proprietary regime of property being out of community of property, unless the parties had made a declaration prior to marrying that they want their property regime to be in community of property. It raises a legitimate question why such a system should continue to be maintained in modern Namibia?

[34] I am of the further view that should the proposition advanced on behalf of the plaintiff in this matter be accepted, it would result in a substantial majority of all

customary land rights allocated to men to the exclusion of women. Such a scenario would be untenable as it would be contrary to the relevant provisions of the Constitution referred to elsewhere in this judgment as well as those of the Married Persons Equality Act. For those reasons the proposition cannot be accepted and is rejected.

Conclusion

[35] In view of all the considerations, findings and conclusions made hereinbefore, it is my considered view and I accordingly hold that the customary land right allocated and registered in the name of the plaintiff forms part of the assets of the parties joint estate.

[36] The parties argued how the economic value embedded in the customary land right is to be accounted for in the division of the joint estate. The defendant suggested that the land be sold¹³ and the proceeds be divided between the parties. The plaintiff on his part, proceeding from the premises that a customary land right is a personal right, argued that the improvements cannot be taken into account in the division of the joint estate. Counsel submitted so relying on the Supreme Court judgment in *Joseph*¹⁴, where it was held that the improvement made to a leased land acceded to the land and thus became the property of the owner of the land namely the State. I do not understand the plaintiff's case to be that the land right which forms the subject matter of the dispute between the parties is a leased land right.

[37] As mentioned earlier at the commencement of this judgment, I was only called to determine whether a customary land right forms part of the parties joint estate. I have found that a customary land right forms part of the assets of the joint estate of the parties. I did not understand to have been called upon to determine how the economic value of that customary land right is to be divided between the parties. Should the parties not be able to reach an agreement how the economic value of the land right is to be divided, I am sure that their respective legal representatives will advise them of the legal avenues available.

¹³ Section 40(2) of the CLRA makes provision for a transfer of customary land right to another person against payment of compensation for the improvement on the land sought to be transferred.

¹⁴ *Joseph v Joseph and Joseph v Joseph* [2020] NASC 22 (30 July 2020).

Costs

[38] The defendant has succeeded in her opposition to the plaintiff's claim. Accordingly, the normal rule that the costs follow the result shall apply in this matter. The defendant is entitled to her costs.

Order

[39] In the result, I make the following order:

1. The economic value of the customary land right registered in the name of the plaintiff forms part of the joint estate and falls to be divided in equal shares between the parties.
2. The plaintiff is to pay the defendant's costs.
3. The matter is finalised and is removed from the roll.

H ANGULA
Deputy Judge-President

APPEARANCES:

PLAINTIFF:

R SILUNGWE

Of Silungwe Legal Practitioners, Windhoek

DEFENDANT:

H NTELAMO-MATSWETU

Of Ntelamo-Matswetu & Associates, Windhoek