

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: Eduard Bikeur and Kennedy Kaaronda and All other Occupants	Plaintiff Defendant	Case No: HC-MD-CIV-ACT-OTH-2023/01380	Division of Court: Main Division	Heard on: 15 February 2024
Heard before: Honourable Mr Justice Usiku		Delivered on: 7 March 2024		
Neutral citation: <i>Bikeur v Kaaronda</i> (HC-MD-CIV-ACT-OTH-2023/01380) [2024] NAHCMD 88 (7 March 2024)				
Order: <ol style="list-style-type: none">1. The defendant and all those holding occupation through him are evicted from the premises known as Erf No 2269, Katutura (Extension No 5), situated in the Municipality of Windhoek.2. The defendant and all those holding occupation through him are ordered to vacate the said premises not later than 12 April 2024, failing which, the deputy sheriff for the district of Windhoek is hereby authorized and required to carry out this eviction order.3. The defendant is ordered to pay the costs of the plaintiff.4. The matter is removed from the roll and is regarded finalised.				
Reasons for order: USIKU J:				

Introduction

[1] For the sake of convenience the parties are referred to as in the main action.

[2] This is an opposed summary judgment application brought by the plaintiff against the defendant. In the main case, the plaintiff instituted action in his capacity as the Estate Representative, for the eviction of the defendant from certain premises known as Erf No. 2269, Katutura, Extension No. 5, situated in the Municipality of Windhoek, ('the premises'). The defendant delivered a notice of intention to defend and subsequently the plaintiff lodged the summary judgment application.

[3] The defendant is a grandson of a certain Hiskia Kaaronda and is in occupation of the premises.

Background

[4] Hiskia Kaaronda became the registered owner of the premises on 3 May 1993. The said Mr Kaaronda died on 9 February 2007.

[5] In terms of a Last Will and Testament dated 27 March 2003 allegedly executed by Hiskia Kaaronda ('the deceased'), the testator bequeathed the premises to the plaintiff.

[6] During 2011, the plaintiff instituted legal action in this court under case number I 2730/2011 seeking, among other things, an order directing the Master of High Court ('the Master') to accept the Last Will and Testament dated 27 March 2003. On 28 June 2017 this court made an order directing the Master to accept the Last Will and Testament.

[7] In terms of the Letters of Authority dated 21 December 2021, the Master appointed the plaintiff as the Estate Representative in terms of s 18(3) of the Administration of Estates Act¹ with the power to take control of the assets of the estate, pay the debts of the estate and transfer the residue to the heir(s) entitled thereto by law.

[8] On or about June 2018, the plaintiff demanded that the defendant vacate the premises. The defendant has refused or neglected to do so.

¹ Act No 66 of 1965.

[9] On 17 March 2023, the plaintiff instituted the action seeking eviction of the defendant from the premises. On 30 June 2023 the defendant entered appearance to defend. Subsequently, the plaintiff brought the present application for summary judgment, contending among other things, that the defendant has no *bona fide* defence to the action and that the notice of intention to defendant has been delivered solely for the purpose of delay.

[10] The defendant opposes the application.

[11] On the day of the hearing of the summary judgment application the defendant filed a condonation application for the late delivery of his heads of argument. The heads of argument were due for delivery on 8 February 2024 but were delivered only on 15 February 2024, a few minutes before the hearing. The explanation furnished by the defendant, for the delay, is that his legal practitioner misdiarised the date for delivery of the heads of argument. The defendant submits that he has prospects of success in the main claim because he is a beneficiary of the deceased estate and has a vested right in the proper administration of the estate. Because of the reasons set out hereinafter, I am of the view that the defendant has no prospects of success in the main application. The application for condonation therefore stands to be dismissed.

Defendant's opposing affidavit

[12] In his affidavit resisting summary judgment, the defendant denies that the plaintiff is 'the plaintiff' in this matter and asserts that the plaintiff has no *locus standi* to bring the summary judgment in his personal name.

[13] It is not clear why the defendant denies the status of the applicant as 'the plaintiff' in this matter. The plaintiff is the person described as 'the plaintiff' in the particulars of claim. The particulars of claim describe that the plaintiff sues in his capacity as executor in the estate of the deceased. In addition, paras 13 to 16 of the plaintiff's affidavit in support of the summary judgment application sets out the capacity in which the plaintiff brings the present proceedings. In my opinion, the defendant's denial of those averments is bad in law and constitutes no *bona fide* defence to the plaintiff's claim.

[14] In the affidavit resisting the summary judgment application, the defendant asserts that the Last Will and Testament relied upon by the plaintiff is a forgery. The defendant contends that the

signature on the purported Will is not that of the deceased and consequently the deceased died intestate. The defendant therefore asserts that he is entitled to reside on the premises on account that his mother, who is now also deceased, was a biological daughter of the late Hiskia Kaaronda, and as such the defendant is an heir of the estate. The defendant attached to his affidavit a copy of a forensic report dated 23 May 2022 in support of the claim that the signature on the will purported to have been executed by the deceased is a forgery.

[15] Even if it were to be accepted that the defendant is a beneficiary of the deceased estate, it is the executor (or Estate Representative) of the deceased estate who is, in law, the owner of the assets during the period of the administration of such estate². The executor is the only person who may for instance bring a vindicatory claim in respect of the estate assets. An executor is the representative of the deceased estate and as such is vested with the assets of the deceased estate. He/she is not a representative of an heir and the heir has his/her own action if he/she is dissatisfied with the manner in which the estate is being administered.³ On the basis of foregoing legal principles, I am of the view that the defence by the defendant that he is entitled to reside on the premises on account that he is an heir of the estate, is bad in law and does not constitute a *bona fide* defence.

[16] The defendant further asserts that the Letters of Authority granted to the plaintiff were erroneously granted on account that the plaintiff was not nominated by the heirs of the deceased estate. The defendant therefore states that such appointment is null and void.

[17] The defendant's challenge to the legality of the plaintiff's appointment as Estate Representative is difficult to comprehend. The plaintiff was appointed in that capacity on 20 December 2001. Up to this point the defendant has not challenged the appointment. In any event the challenge to plaintiff's appointment as Estate Representative does not bestow upon the defendant a right to occupy the premises. The cardinal issue is that the plaintiff is the appointed Estate Representative and is entitled to bring the present action and a defendant challenging his appointment now is bad in law and does not constitute a *bona fide* defence.

Conclusion

[18] I am of the view that an Estate Representative appointed in terms of s 18(3) of the Act and an 'executor' fulfil the same role, the only difference being that the Estate Representative is

² *Greenberg v Estate Greenberg* 1955(3) SA 361.

³ *Cumes v Estate Cumes* 1950(2) SA 15.

appointed in respect of small estates.

[19] In as much as the plaintiff brings the present action in his capacity as the Estate Representative in the deceased estate, he is entitled to take possession of the assets of the state including the premises presently occupied by the defendant.

[20] In my opinion, the defendant has not proffered any *bona fide* defence to the claim and summary judgment should accordingly be granted.

[21] In regard to the issue of costs, the general rule is that the successful party is entitled to costs. There is no reason to deprive the plaintiff, who has been successful in this application, of his costs.

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

1. The defendant and all those holding occupation through him are evicted from the premises known as Erf No 2269, Katutura (Extension No 5), situated in the Municipality of Windhoek.
2. The defendant and all those holding occupation through him are ordered to vacate the said premises not later than 12 April 2024, failing which the deputy sheriff for the district of Windhoek is hereby authorized and required to carry out this eviction order.
3. The defendant is ordered to pay the costs of the plaintiff.
4. The matter is removed from the roll and is regarded finalised.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
K McKnight Of Uanivi Gaes Inc., Windhoek	RCS Silungwe Of Silungwe Legal Practitioners, Windhoek