

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

RULING

<b>Case Title:</b> Elifas Kaukomenwa Kalunga v Hambeleleni Nghuulipondje-Tuyenikelao Haimbodi & 3 Others	<b>Case No.:</b> HC-NLD-CIV-ACT-DEL-2022/00096  <b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr. Justice Munsu, AJ	<b>Delivered on:</b> 10 November 2022.
<b>Neutral citation:</b> <i>Kalunga v Haimbodi</i> (HC-NLD-CIV-ACT-DEL-2022/00096) [2022] NAHCNLD 121 (10 November 2022)	
<b>The order:</b>  <ol style="list-style-type: none"><li>1. The application for summary judgment is refused.</li><li>2. There is no order as to costs.</li><li>3. The matter is postponed to 16 January 2023 for a case planning conference.</li><li>4. The parties are to file a joint case plan report on or before 11 January 2023.</li></ol>	
<b>Reasons for the order:</b>	
<b>MUNSU AJ:</b>	

## Introduction

[1] This is an opposed application for summary judgment. The plaintiff instituted action to evict the first defendant from a portion of land allocated to him. The plaintiff and the first defendant were married to each other, however, they got divorced during the year 2021.

## The application

[2] The plaintiff states in his founding affidavit that during 1992, the Chief of Oukwanyama Traditional Authority allocated to him customary land rights over a parcel of land measuring 5.7 hectares situated at Iilagati Village, Omulonga Constituency, Ohangwena Region. On 26 November 2020 the plaintiff was issued with a Certificate of Registration of Customary Land Rights (Number OHCLB-019304) over the said parcel of land by the Ohangwena Communal Land Board. The certificate was issued in terms of the Communal Land Reform Act, 2002 and is in respect of a farming and residential unit.

[3] The plaintiff avers that the first defendant is in unlawful occupation of the aforementioned land and the traditional homestead constructed by the plaintiff on the land. Despite numerous demands to vacate the land, first defendant refused, ignored and failed to vacate the land and the homestead. The plaintiff avers that as a result of the first defendant's unlawful occupation of the land and the homestead, the plaintiff is denied the right to access, use and enjoyment of his homestead and the land.

[4] The plaintiff further states that the first defendant has no *bona fide* defence to the action, and in his opinion, the first defendant filed notice to defend the action solely for the purpose of delaying the action.

## First defendants' opposition

[5] In her affidavit opposing summary judgment, the first defendant states that she has a *bona fide* defence to the plaintiff's action. She discloses her defence, which amounts to the following:

- (a) That she is also the rightful holder of customary land rights over the land in question, alternatively, and in the event that it is proven that she has no such rights, that she has a legitimate expectation to be the holder of such rights.
- (b) That she acquired and developed the land with the plaintiff for the benefit of the family.
- (c) That she has a strong case on review for the Certificate of Registration of customary land rights to be nullified and cancelled as it was obtained by the plaintiff with the sole purpose to evict her and their dependents.

[6] The first defendant avers that, together with the plaintiff she acquired the piece of land in question some 29 years ago. Pursuant to their divorce, the plaintiff was awarded custody over the children born between the parties excluding the youngest, an infant. She states that she never opposed the divorce proceedings instituted by the plaintiff because the latter had threatened her not to attempt to go to court. She asserts that the plaintiff deserted the children economically and that she is the one taking care of them with the aid of government grants.

[7] The first defendant avers that she has no place to call home. She is a single orphan who was not raised by her biological parents. The homestead where her mother resides belongs to her younger brother. The only home she has known is the land in dispute. She states that she never thought that one day she would become homeless due to the plaintiff's conduct. According to her, it is unfortunate that the laws of the land seem to put women at a disadvantage once their husbands no longer want to continue with the marital relationship. This is because all customary land rights are by virtue of the fact that the man is the 'head of the home' registered in the husband's name.

[8] The first defendant avers that the plaintiff does not have a better claim to the land than she has. She states that the plaintiff left the marital home in April 2021, leaving her alone with the children and only to come back in the year 2022 to evict her after the divorce was finalised. The first defendant further states that she has the right to be in the homestead in question as she has always had the expectation that it will be her home until the day she would die.

[9] According to the first defendant, she was not really bothered that the land was registered in the plaintiff's name because at the time they were married. She asserts that she

has expectations that ought to be protected. Had she been aware that this was the plaintiff's plan all along, she would have opted to register the land in her name.

[10] Furthermore, the first defendant avers that because communal land vest in the state, the plaintiff's 'right' to the land is not an exclusive right. She states that the plaintiff was a difficult man to live with, as he had separated the homestead in two parts, one side was developed and the other side was underdeveloped. The plaintiff lived on the developed side while the first defendant lived on the underdeveloped side. The first defendant then took it upon herself to develop her side by erecting four building structures constructed with bricks.

[11] Moreover, the first defendant avers that the parties' joint estate is yet to be divided and as such, the plaintiff has no right to remove her from the homestead. Taking into consideration the Married Persons Equality Act 1 of 1996, the first defendant states that she intends to challenge the current position whereby communal land only gets registered in a woman's name upon the death of her spouse. She also seeks to challenge the idea that communal land does not form part of the joint estate. She states that granting the application will greatly prejudice her by not affording her the opportunity to be heard and to defend the claim. Due to the nature of her defence and claim, she intends to bring an application to join the Attorney General as well as the Minister of Justice to these proceedings.

#### Submissions by the plaintiff

[12] Mr. Matheus for the plaintiff submitted that the facts disclosed by the first defendant do not accord her a defence which is *bona fide*; alternatively, her defence is not good in law and is unenforceable. Counsel submitted that the first defendant does not dispute that the plaintiff holds a certificate in respect of the land in question nor does she allege that same has been cancelled. Relying on the matter of *Angula v Mavulu*<sup>1</sup> Mr. Matheus submitted that the plaintiff need only allege ownership of the property and occupation thereof by the defendant. That, the onus is on the defendant to prove lawful occupation.

[13] Furthermore, Mr. Matheus made reference to the matter of *Mutrifa v Tjombe*<sup>2</sup> wherein

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<sup>1</sup> *Angula v Mavulu* (I 2690/2010) [2014] NAHCMD 250 (22 August 2014).

<sup>2</sup> *Mutrifa v Tjombe* (I 1384/2016) [2017] NAHCMD 162 (14 June 2017).

the court held that a customary land right is a personal right inseparable from its holder and does not form part of the assets of the joint estate.

[14] Moreover, Mr. Matheus submitted that the first defendant does not predicate her claim of ownership over the land in question on any certificate issued to her. Therefore, it was submitted that the first defendant has neither title nor better title to the plaintiff over the land and has no right to claim the land even at common law.

[15] Mr. Matheus contended that the argument of legitimate expectation is bogus in law. This is so because communal land rights can only be allocated by a Chief or Traditional Authority. Counsel submitted that neither the Communal Land Reform Act, 2002 nor the common law recognise the allocation of customary land rights by expectation.

#### The law on summary judgment

[16] In *Di Savino v Nedbank Namibia Ltd*<sup>3</sup> the Supreme Court succinctly sets out the principles governing summary judgment. The following is said at paragraph 23:

‘One of the ways in which the defendant may successfully avoid summary judgment is by satisfying the court by affidavit that he or she has a *bona fide* defence to the action. The defendant would normally do this by deposing to facts which, if true, would establish such a defence. Under Rule 32(3)(b)<sup>4</sup> the affidavit must “disclose fully the nature and grounds of the defence and the material facts relied upon therefor”. Where the defence is based upon facts and the material facts alleged by the plaintiff are disputed or where the defendant alleges new facts, the duty of the court is not to attempt to resolve these issues or to determine where the probabilities lie.’

[17] In *Standard Bank of Namibia Limited v Veldsman*<sup>5</sup> the court opined as follows:

‘Summary judgment should only be granted if it is clear that the plaintiff has an unanswerable case’<sup>6</sup>

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<sup>3</sup> *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 07 (SC).

<sup>4</sup> The forerunner of the current rule 60.

<sup>5</sup> *Standard Bank of Namibia Limited v Veldsman* 1993 NR 391 at 392 D-E.

[18] In *Government of the Republic of Namibia v Gertze*<sup>7</sup> the court had the following to say:

‘The quest for summary judgment is based on a trite argument that there are no triable issues of fact and the motion is initiated by a plaintiff that contends that all the necessary factual issues are settled and, therefore, need not be tried. If there are triable issues of fact in any cause of action or if it is unclear whether there are such triable issues, summary judgment must be refused as to that cause of action...’

[19] Similarly, it was held in *Kramp v Rostami*<sup>8</sup> that:

‘The test in an application of this nature is for the respondent (defendant) to set out a *bona fide* defence in his answering affidavit. There is no onus on him apart from setting out the facts which in the absence of a trial would satisfy the court that he has a *bona fide* defence in order to entitle the court to decline applicant’s application for summary judgment.’

### Disposal

[20] In response to the plaintiff’s action, the first defendant alleges facts which according to her entitle her to both the land in dispute and the homestead. The first defendant states that she acquired and developed the land in question together with the plaintiff for the benefit of their family. She maintained that she too is a rightful holder of a customary land right in respect of the land in dispute. Furthermore, the first defendant claims that the plaintiff does not have a better claim in respect of the land than her. It is common cause that when a customary land right is allocated; it is in the name of one person.

[21] The first defendant asserts that she developed or made improvements to the land in question by erecting four brick structures on the land. She states that she will be prejudiced if summary judgment is granted because she will be denied an opportunity to be heard.

[22] In my view, the first defendant sets out triable issues of fact, as such the parties should

<sup>6</sup> See *Fair Play Nam Investments (Pty) Ltd v Standard Bank Namibia Limited* (I 3664-2012) [2013] NAHCMD 227 (30 July 2013).

<sup>7</sup> *Government of the Republic of Namibia v Gertze* (HC-MD-CIV-ACT-OTH-2019/00978) [2019] NAHCMD 497 (30 October 2019).

<sup>8</sup> *Kramp v Rostami* 1998 NR 79 (HC) at 82 C-I.

be afforded an opportunity to present their respective cases. The first defendant is not an outsider of the homestead and the land in question, in which case it would probably have been a different matter altogether. The first defendant is an ex-wife to the plaintiff and until to date she is still resident within the parties' matrimonial homestead. In my view, the allegations and claims made by the first defendant should not be brushed aside easily. To do so would the court's door on the first defendant.

### Costs

[23] The first defendant is legally aided. Ordinarily, courts do not easily grant costs orders against legally aided parties. I am mindful that we are just at the inception of this matter. I can do no more than what was suggested by Mr. Matheus i.e. irrespective of which party is successful; the court should not make an order as to costs.

### Order

1. The application for summary judgment is refused.
2. There is no order as to costs.
3. The matter is postponed to 16 January 2023 for a case planning conference.
4. The parties are to file a joint case plan report on or before 11 January 2023.

<b>Judge</b>	<b>Comments:</b>
MUNSU, AJ	NONE
<b>Plaintiff:</b> Mr. J. L. Matheus Of Slogan Matheus & Associates. Ongwediva.	<b>1<sup>st</sup> Defendant:</b> Ms. L. Nghipandulua Of the Directorate of Legal Aid. Ondangwa