



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A 112/2013

In the matter between:

**ISSASKAR KAUNE**

**APPLICANT**

and

**MURAERE KAUNE**

**1<sup>ST</sup> RESPONDENT**

**HIJEE KAUNE**

**2<sup>ND</sup> RESPONDENT**

**RIUNDJUA KAUNE**

**3<sup>RD</sup> RESPONDENT**

**MUKANDI KAUNE**

**4<sup>TH</sup> RESPONDENT**

**KAUNAHANGE KAUNE**

**5<sup>TH</sup> RESPONDENT**

**THE INSPECTOR-GENERAL OF THE NAMIBIA POLICE**

**6<sup>TH</sup> RESPONDENT**

**Neutral citation:** *Kaune v Kaune* (A 112/2013) [2013] NAHCMD 117 (30 April 2013)

**Coram:** SHIVUTE, J

**Heard:** 29 April 2013

**Reasons released:** 30 April 2013

**Flynote:** Applications and motions – such moved by urgent application – Court finding that a case has been made out for the relief sought – in terms of Rule 6 (12) (b) – matter heard on urgent basis.

**Summary:** Applications and motions – Urgent Application – *Mandament van spolie* – Court finding that a case has been made out for the relief sought – Matter heard on urgent basis and granted an order of the restoration of the quiet and undisturbed possession to the immovable property to the applicant - Pending the final determination of case number I 3124/2012.

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### ORDER

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1. That the non-compliance with the forms and service provided for by the Rules of the above Honourable Court is condoned and the application is heard on an urgent basis as envisaged by Rule 6(12) of the Rules of the Honourable Court.
  
2. That a Rule Nisi is hereby issued calling upon the Respondents and any interested party, if any, to show cause on the 18<sup>th</sup> June 2013 why an order in the following terms should not be made final:-
  - 2.1 Ordering and directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to forthwith restore to the Applicant the undisturbed and peaceful possession, *ante omnia*, of Farm Uithou No. 366, situated in the District of Gobabis, Republic of Namibia, pending the final determination of Case Number I 3124/2012 by the Honourable Court.
  
  - 2.2 Ordering and directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to forthwith vacate, together with their livestock and any possession they have brought to Farm Uithou No. 366 situated in the District of Gobabis pending the final determination of Case Number I 3124/2012;
  
  - 2.3 Ordering the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to refrain in any manner whatsoever from interfering with the Applicant's peaceful and

undisturbed possession of Farm Uithou No. 366 situated in the District of Gobabis;

- 2.4 That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents pay the Applicant's costs of the application on a scale as between attorney and client.
3. That prayers 2.1, 2.2, 2.3 and 2.4 shall operate as an interim interdict with immediate effect, pending the return date on 18 June 2013 at 10h00.

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## JUDGMENT

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### SHIVUTE J:

[1] This application is brought before court by notice of motion whereby the applicant prayed that it should be heard as a matter of urgency. The Applicant sought the relief set out in the notice of motion. The Respondents did not oppose the application. Having read the notice of motion and other process and documents filed of record and having heard Mr Phatela counsel for the Applicant and Mrs Yssel counsel for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, I made the following order and I indicated that reasons would follow in due course.

Here follows the order:

1. That the non-compliance with the forms and service provided for by the Rules of the above Honourable Court is condoned and the application is heard on an urgent basis as envisaged by Rule 6(12) of the Rules of the Honourable Court.
2. That a Rule Nisi is hereby issued calling upon the Respondents and any interested party, if any, to show cause on the 18<sup>th</sup> June 2013 why an order in the following terms should not be made final:-

- 2.5 Ordering and directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to forthwith restore to the Applicant the undisturbed and peaceful possession, *ante omnia*, of Farm Uithou No. 366, situated in the District of Gobabis, Republic of Namibia, pending the final determination of Case Number I 3124/2012 by the Honourable Court.
- 2.6 Ordering and directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to forthwith vacate, together with their livestock and any possession they have brought to Farm Uithou No. 366 situated in the District of Gobabis pending the final determination of Case Number I 3124/2012;
- 2.7 Ordering the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to refrain in any manner whatsoever from interfering with the Applicant's peaceful and undisturbed possession of Farm Uithou No. 366 situated in the District of Gobabis;
- 2.8 That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents pay the Applicant's costs of the application on a scale as between attorney and client.
3. That prayers 2.1, 2.2, 2.3 and 2.4 shall operate as an interim interdict with immediate effect, pending the return date on 18 June 2013 at 10h00.

[2] The Applicant is a sibling to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents. He had applied for a *mandament van spolie* in respect of the restoration of the quiet and undisturbed possession to him of the immovable property referred to in the notice of motion. He considered himself to be the owner of farm Uithou No. 366 situated in Gobabis district and he had enjoyed undisturbed possession in respect of the farm since 1988. He owns a considerable heads of stock which are kept at the farm in issue.

[3] He had inherited the farm from his father who died intestate. However, prior to his death he had called the applicant and his other siblings who are not parties to this application and decided *inter alia* that the applicant would inherit the farm.

[4] However, last year the applicant had instituted legal proceedings which are pending before this court seeking a declarative relief that he is the lawful heir to the farm in issue in terms of Otjiherero customary law. Whilst the matter is still pending the Respondents unlawfully dispossessed him of certain portions of the farm. On 26 April 2013 the third respondent whilst he was herding the cattle allegedly belonging to the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents invaded the said farm and threatened him with violence. The 3<sup>rd</sup> respondent was joined by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent who came with seventy five cattle and entered the farm forcefully and also threatened the applicant with threats of violence.

[5] Due to the Respondent's head of cattle the farm has more cattle than its capacity and this may put the sustainability of the farm in jeopardy.

[6] The farm is currently overstocked; overgrazed and water resources are being over utilized. The Applicant and his family are living in fear due to threats of violence from the respondents. The applicant sought assistance from the police but it was not forth coming. He had no other remedy which could afford him redress at a hearing in due course, hence he lodged an urgent application seeking for the relief prayed for in the Notice of motion.

[7] In deciding the question of urgency I would like to consider the provisions of Rule 6 (12) (b) set out below:

*"In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."*

[8] Having considered the applicant's founding affidavit I am of the opinion that the applicant had set out in his affidavit the circumstances which rendered the matter urgent when he pointed out the background and facts of the matter. The same background and facts further contains the reasons why the applicant claimed that it

could not be afforded substantial redress at a hearing in due course. I am therefore satisfied that the complainant had succeeded to satisfy the requirements of Rule 6 (12) (b) of the rules of court.

[9] The Applicant was in peaceful and undisturbed possession of the property and the respondents wrongfully deprived the applicant of his peaceful and undisturbed possession of the property and the rights of the applicant as to his possession has been infringed by the unlawful conduct of the respondents by taking the law into their own hands.

[10] It is my considered opinion that since the Applicant had met the requirements of Rule 6 (12) this is a deserving case where I should consider the application as a matter of urgency and grant the relief prayed for in the notice of motion.

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N N Shivute  
Judge

## APPEARANCES

APPLICANT : Mr Phatela  
Instructed by Dr Weder, Kauta and Hoveka  
Inc.  
Windhoek

RESPONDENTS 1<sup>ST</sup> TO 5<sup>TH</sup> : MRS YSSEL  
Engling Stritter & Partners  
Windhoek