

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 2266/2009

In the matter between:

**RICHARD KATJAIMO**

**PLAINTIFF**

and

**CLAUDIUS KATJAIMO**

**FIRST DEFENDANT**

**MONICA KATJAIMO**

**SECOND DEFENDANT**

**ANTONIA KATJAIMO**

**THIRD DEFENDANT**

**GERHARD KATJAIMO**

**FOURTH DEFENDANT**

**EWALD KATJAIMO**

**FIFTH DEFENDANT**

**Neutral citation:** *Katjaimo v Katjaimo* (I 2266-2009) [2013] NAHCMD 98 [15 April 2013]

**Coram:** UNENGU, AJ

**Heard:** 2-5 April 2012; 3-6 September 2012; 10-12 September 2012 and  
3 December 2012

**Delivered:** 15 April 2013

**Flynote:** The plaintiff – Registered owner of portion 7 (a portion 6) of Farm Tugab No 21 – in possession of the defendants – claiming delivery of same – the defendants alleging acquisition of usufruct - The Court, refuses the plaintiff's action and finds in favour of the defendants.

**Summary:** Registered owner of Farm Tugab West No 21 has sued the defendants for delivery of the farm which is in their possession. The defendants counterclaimed and alleged that they have been allowed by the plaintiff to stay on the farm as if they were co-owners of the farm; in the alternative that they have acquired a lifelong usufruct to stay on the farm: Court refuses the plaintiff's claim and finds in favour of the defendants on the alternative claim.

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**ORDER**

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In the result, I make the following order:

- (i) The plaintiff's claim is refused.
- (ii) The defendant's counterclaim (alternative claim) succeeds.
- (iii) Each party to pay own costs.

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**JUDGMENT**

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UNENGU, AJ: [1] In this matter, the plaintiff instituted the action against the defendants, initially claiming for an order confirming the cancellation of an alleged oral agreement between him and the defendants and to eject the defendants and their cattle from the farm Tugab No 21 where the plaintiff and the defendants were living and farming together as a family for a long time.

[2] The plaintiff claims that he is the registered owner of Farm Tugab No 21 according to the Deed of Transfer No T3613/1990. He further alleges that during 1982 the defendants and him entered into an oral agreement in terms of which he had leased to the defendants as lessees a portion of Farm Tugab No 21.

[3] The defendants occupied the farm in 1982 as a sequence of the alleged oral agreement. It was also a term of the oral agreement that the defendants will allow their cattle to graze on the farm.

[4] However, the plaintiff, during 2008 decided to cancel the agreement because the defendants obtained cattle brand marks from the Meatco Board of Namibia. Despite the termination of the defendants' right to occupy the farm, they failed to vacate the farm.

[5] The defendants requested further particulars from the plaintiff which further particulars were duly provided. According to the further particulars provided, the alleged oral agreement between him and the defendants was concluded in October 1982 at Farm Tugab West No 21.

[6] Further, the plaintiff informed the defendants that he represented himself during the conclusion of the oral agreement while first and third defendants acted on their own behalf and on behalf of the second, fourth and fifth defendants and it happened in the presence of the late Stephanus Katjaimo. This information and other more particulars requested were provided. The plaintiff stated that he had terminated the oral agreement because the defendants obtained cattle brand marks from Meatco Board of Namibia without his consent. The defendant ought to have obtained written consent from the plaintiff before applying for the brand marks which they have not done.

[7] Thereafter, the defendants tendered their plea and alleged amongst others that the registration of portion 7 of Farm Tugab No 21 in the name of the plaintiff was intended to be temporary because, the plaintiff was merely a nominal representative of all the defendants and the late Stephanus Katjaimo who was the old person of the Katjaimo family, until the establishment of a Katjaimo family company.

[8] The defendants further pleaded that they did not enter into any lease agreement, be it oral or in writing to hire a portion of the farm as the plaintiff was alleging – but have access to the whole farm in their capacity as co-owners of portion 7 (a portion of portion 6) of Farm Tugab No 21.

[9] In the alternative the defendants pleaded that they are on the farm in their respective capacities as shareholders and/or directors of the company known as Katjaimo (Pty) Ltd, the true owner of the farm or in accordance with the law, custom and usage of the Herero people of Namibia, which they alleged to be binding on the plaintiff.

[10] In addition to the plea, the defendants also filed a counter-claim against the plaintiff wherein they restated what they said in their plea that portion 7 (a portion of

portion 6) of Farm Tugab No 21, was acquired by the late Stephanus Katjaimo and that the plaintiff merely conducted the affairs of the late Stephanus Katjaimo because Stephanus Katjaimo was uneducated. Further, that the farm was registered in the plaintiff's name on a temporary basis until the establishment of the Katjaimo family company.

[11] Further to the above, the defendants counterclaimed that during or about 1994 the plaintiff, the defendants and the late Stephanus Katjaimo agreed that the plaintiff should transfer the farm to Katjaimo (Proprietary) Limited which is the family company, that the defendants acquired a lifelong usufruct in respect of portion 7 of portion 6 of farm Tugab No 21.

[12] According to the defendants, the farm was purchased with the view to provide the defendants and their children with the right to reside thereat, to farm it and to enjoy the fruits thereof.

[13] The plaintiff tendered a plea to the counterclaim of the defendants in which plea he denied some of the allegations in the counterclaim and explained why he denied these allegations. He emphasised the point that at all material times, he was and still is the lawful and registered owner of the farm.

[14] At this stage, the plaintiff was represented by Elmarie Thompson of Elmarie Thompson Inc.

[15] However, it would appear that Mr Stolze of Chris Brandt Attorneys also acted as a legal representative for the plaintiff at one stage if regard is had to a letter dated Wednesday, November 5, 2008 addressed to Conradie & Damaseb Legal Practitioners which dealt with issues of a certificate of registration of brands for the brandmark TJW in the name of the plaintiff wherein notice was given to the defendants together with their families and belongings, including cattle, to vacate the farm.

[16] How this happened, is not clear from the record because Ms Elmarie Thompson of Elmarie Thompson Inc was still the legal practitioner of record for the

plaintiff. But soon thereafter, Miss Thompson was replaced by Messrs Hengari, Kanguuehi & Kavendjii Incorporated as legal practitioners for the plaintiff.

[17] After the pleadings have closed, and the parties have applied for a trial date to be allocated, the plaintiff filed a notice to amend his particulars of claim. In his amended particulars of claim, in paragraphs 7 and 8 thereof, the plaintiff claimed that he was the owner of portion 7 (a portion of portion 6) of farm Tugab No 21, and that the defendants were in possession of the farm. He then prayed for the delivery of the farm to him by the defendants with a costs order in his favour.

[18] With this amendment, the plaintiff seems to have abandoned all claims previously pleaded, and has now changed the battleground between him and the defendants.

[19] It is not wrong for a litigant to apply on notice given to all other parties to the proceedings, to amend his or her particulars of claim<sup>1</sup>. However, I am in full agreement with what was stated by Innes CJ in *Robinson v Randfontein Estates City Co Ltd*<sup>2</sup> that “the object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry”.

[20] In the present matter, the plaintiff in his Notice in terms of Rule 28(4) stated that he intended to amend his particulars of claim by substituting paragraphs 7 to 17 thereof with the following:

‘7. The plaintiff is the owner of portion 7 (a portion of portion 6) of the Farm Tugab No 21 (hereinafter referred to as ‘the farm’), as appear from Annexure A attached hereto.

8. The defendants are in possession of the farm, plus prayers for the delivery of the said portion 7 and the costs of suit’.

This was done after the exchange of various documents between the plaintiff and the defendants and the pleas from both the parties. The defendants are again, due to the amendment required to plead to the plaintiff’s new cause of action and to put up

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<sup>1</sup> Rule 28(1) of the High Court Rules

<sup>2</sup> 1925 AD 173 at 198

another defence. Even though there is no change in their defence of co-ownership alternatively a lifelong usufruct, prejudice was caused to the defendants.

[21] The plaintiff changed his cause of action after more than a year from the day the action was instituted without an explanation as why he has waited so long to amend the pleadings.

[22] In my view, the defendants suffered prejudice by incurring additional expenses as a result of drafting the amended plea and other ancillary costs. The question now is what happens to the initial cause of the claim? Has it been abandoned or to be regarded as if it did not exist? I think the plaintiff amended the particulars of claim because he knew that it will not be easy for him to prove his alleged oral lease agreement with the defendants.

[23] Be it as it may. The following issues are either common cause or not in dispute between the parties.

(i) That the plaintiff and the first, second and third defendants are brothers and sisters from one father, the late Stephanus Katjaimo and from the same mother except for the first defendant, Mr Claudius Katjaimo, who is from the same father but from a different mother;

(ii) That the farm Tugab No 21 (the subject matter) is registered in the name of the plaintiff in the Deeds Office per Government Grant No T3613/1990.

(iii) That, before moving to the disputed farm, the plaintiff and the defendants lived and farmed as communal farmers together in unison as a family under the leadership of their father and grandfather, the late Stephanus Katjaimo.

(iv) It is also not in dispute that the defendants are living and farming on the farm, some since 1982 and some from 1985 to date.

[24] When delivering their plea to the amended particulars of claim, the defendants pleaded that the plaintiff was the nominal owner of the Farm Tugab and that they

were co-owners of the farm alternatively that they were holders of a life-long usufruct in respect of the farm. This defence, was repeated in their counter-claim.

[25] At the trial of the matter, Mr Denk represented the plaintiff and called the plaintiff as the only witness to testify. Meanwhile, the defendants were represented by Mr Narib who called the first, third, fourth and fifth defendants to testify for the defendants.

[26] It is clear from the evidence of the defendants and the plaintiff that they are related to each other as indicated in paragraph 23 above and as such lived and farmed together as a family. Being offsprings of the late Stephanus Katjaimo who was regarded and respected by all as the patriarch of the Katjaimo family; they lived together, did things together and assisted one another when one of them was in trouble.

[27] It would also appear from the evidence that as children and grandchildren of the late Stephanus, the plaintiff and the defendants were not allowed to do things like buying and selling of own animals without the blessings from the late Stephanus. The late Stephanus had to be informed first about what they were planning and intending to do that he could give them the green light to proceed with their intended plans.

[28] Further, it would appear again from the evidence that a meeting has always to be called which was attended mainly by older people – young people excluded, where the patriarch acted as the chairperson. Whatever was resolved in the meeting, was conveyed to everybody, including young people for implementation.

[29] It is the evidence of the defendants that a meeting was called by the late Stephanus wherein it was decided to look for a place somewhere – where the family could be relocated, because, according to the witnesses, Oruua at Ovitoto became too small for them as a family. Cattle of different family members were sold and a search for a new place began. Eventually, Farm Tugab No 21 was acquired and the family relocated from Oruua to Tugab No 21 (portion 7 of portion 6). The relocation did not start full blown – but went in turn. One or two people went earlier to the farm

to take care of the farm and the equipment thereof against theft while others and animals followed at a later stage.

[30] While on the farm, some of the defendants occupied the farm house together with the plaintiff and the late Stephanus – and the others constructed and built own permanent structures where they are living to date. The plaintiff was aware of all these, but did nothing, not even to remind them that they should not forget that the farm was his own property and that they were there subject to his approval, but one day in the future, they will be requested to leave the farm.

[31] Similarly, it would appear from the evidence that the defendants and their children were free to keep many animals, be it small or big livestock, as they could afford, on the farm, the plaintiff did not mind. He was happy with that and allowed the defendants to maintain the farm as if they were co-owners. They repaired the fences, kept the water points and boreholes on the farm in good condition. All these were going on since 1982 until the death of Stephanus Katjaimo in 2008 or thereafter. The sin the defendants did which caused the eviction claim from the farm they called and regarded, and still do so as their permanent abode and shelter, is because they have acquired for themselves a landmark which they use to landmark their cattle.

[32] In my view, the above facts and the surrounding circumstances in which the plaintiff and defendants lived, coupled with the fact that the plaintiff has acted as the representative for the Katjaimo family due to the fact that he was literate in the family, is more probable and plausible that the Katjaimo family bought the farm than the evidence of the plaintiff that he bought the farm alone from his own resources.

[33] If his version is correct – why did he allow the defendants and the late Stephanus to go ahead with the idea of transferring his farm into a family company called Katjaimo (Proprietary) Ltd by signing a declaration which would facilitate the transfer of the farm? According to Monica, there was a second try to have the farm transferred to the family – one would like to know the reason for that if the defendants and the late Stephanus did not assist in the acquisition of the said farm.



[34] Further, the plaintiff initially pleaded that he entered into an oral lease agreement with the defendants which he wanted to cancel. However, realizing that the fabricated oral lease agreement with the defendants will not assist him in his claim, he suddenly changed the tune and crafter another cause of action namely being the registered owner of the farm and pleaded for the delivery thereof because the defendants were on the farm. The oral lease agreement was a subterfuge. He just waited for his father to die to kick the defendants out of the farm, which he could not do while his father was still alive. The defendants admits that the farm is registered in his name, therefore the onus is on the defendants to prove their right of possession of the farm as submitted by Mr Narib, counsel for the defendants.

[35] It is further the submission of Mr Narib that now that the plaintiff is conceding that the defendants have a right to possess the farm, the onus will be on the plaintiff to prove valid termination thereof. In support of his submission, counsel referred to *Chetty v Naido; Matador Buildings (Pty) Ltd v Harman and Schnehage v Bezuidenhout*<sup>3</sup>. Counsel further contended that the onus to proof the term of the agreement that gave the right of cancellation, was on the plaintiff. According to Mr Narib, the defendants have conceded that the plaintiff is the registered owner of the farm in terms of the title deed, whereas the defendants are not registered as co-owners of the farm, but based their claim to remain on the farm as if they were co-owners on the strength of an understanding which existed between the plaintiff and defendants.

[36] Furthermore, Mr Narib submitted that from the facts of the matter, it is clear that the plaintiff acknowledged that the defendants were not unlawful on the farm – but were there on account of the fact that the late Stephanus, their patriarch relocated his homestead from Oruua to the farm. He said the intention was to relocate and to settle permanently on the farm as if they were owners.

[37] As regards the alternative claim to the counterclaim, counsel pointed out that the fact that the usufruct is unregistered does not avail the plaintiff, for, an unregistered usufruct is enforceable *inter partes*. Mr Narib referred to the matter of

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<sup>3</sup> 1974 (3) SA 13(A); 1971 (2) SA 21 (c); 1977 (1) SA 362 (O)

*Dhayanundh v Narain*<sup>4</sup> as authority. Dhayanundh case above, dealt with an unregistered servitude of *habitation*.

[38] I agree with the principles laid down in *Dhayanundh v Narain* case, in particular the quotation from *Grant and Another v Stonestreet* and 6 others above at 573 G-H where the following was said by Ogilvie Thompson, JA at 20 A-G.

‘Having regard to our system of registration, the purchaser of immovable property who acquires clean title is not lightly to be held bound by an unregistered praedial servitude claimed in relation to that property. If, however such purchaser has knowledge at the time he acquired the property, of the existence of the servitude, he will – subject to a possible qualification discussed below relating to cases where there has been an intervention of a prior innocent purchaser – be bound by it notwithstanding the absence of registration’.

[39] In the present matter, no third party is involved – the plaintiff and the defendants are related to each other and stayed on the farm together for a period of over twenty years as if they were co-owners of the farm. The plaintiff did not require the defendants to register their right to remain and stay on the farm. They were allowed to stay and live with their belongings, be it livestock or otherwise, without any conditions attached. That being so, I am also in agreement with what the authors of the book: *Introduction to South African Law and Legal Theory*<sup>5</sup> when they state the following ‘Although the right of ownership offers in principle limitless control, in practice this is of course not necessary the case. An owner may through agreement or otherwise allow another to exercise one or more powers inherent in his right even to the extent where only bare ownership stripped of all powers, *nuda proprietas* is left to him.’ (Emphasis added). The authors continue on the same page and state as follows:

‘In modern society, the idea that the right of ownership is absolute in that the owner’s power to use, to destroy, etc. is unlimited, has become untenable’.

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<sup>4</sup> 1982 (1) 565 (NPD)

<sup>5</sup> At page 337

[40] This is true because an owner may be prevented from vindicating his thing in circumstances where the doctrine of estoppel by representation comes into operation. Further, where the owner through his negligence or intentional conduct has created the appearance that another person is the owner or is entitled to alienate the thing and a *bona fide* third party. A limited real right over the thing belonging to the owner like a right of usufruct may limit the owner's right – which is the position in the present matter.

[41] Briefly, the evidence of the plaintiff went as follows. He said that he is a son of the late Stephanus Katjaimo, therefore the first, second and third defendants are his brother and sisters. The fourth and fifth defendants are children of the third defendant. He started his truck business in 1977 while still working in Windhoek. His brother, Claudius (first defendant) and sister Monica (second defendant) also worked in Windhoek while Antonia (third defendant) stayed with and cared for their late father at Ovitoto permanently. He said that as children, they all stayed with their father at Ovitoto. According to him he bought the farm alone from the then Administration of the Hereros and in 1981 he went to the farm for the first time. He admits signing a declaration together with the first defendant on behalf of the family to transfer the farm into Katjaimo (Pty) Limited – a company still to be registered, on 3 August 1994. This was done, he said, because the communication between them as a family was good, secondly the defendants agreed to pay him N\$120 000.00 for the farm and thirdly because he realized that the defendants will not have a place to stay. But cancelled the transfer because the defendants did not pay the money. However, he concedes that according to Herero customs and traditions, he as the elder brother of the Katjaimo family, represents the family as the head of the family – therefore gave them permission to have their own houses on the farm because he could not cater for all of them in his own house.

[42] This testimony corroborates the testimony of the second defendant when she testified that the whole family moved from Ovitoto to farm Tugab during 1990 permanently. That the plaintiff was aware of the presence of the defendants' animals on the farm and as children from one father and one mother they always stayed together all along and were never divided. She further stated that the plaintiff allowed them (the defendants) to build houses on the farm.

[43] Mr Denk, counsel for the plaintiff argued amongst others that the plaintiff is the owner of the farm by virtue of Government Grant No T3613/1990 which refers to the Title Deed in terms of which ownership was transferred from the Government of the Republic of Namibia to the plaintiff.

[44] This issue is not disputed. Defendants have admitted that the plaintiff is the registered owner of the Farm Tugab West. However, in their amended counterclaim the defendants are pleading that the plaintiff allowed them to stay on the farm as if they were co-owners of the farm, alternatively that they had acquired a lifelong right of usufruct to stay, enjoy the fruits of the farm and farm thereon. Therefore, ownership of the farm is no longer an issue between the parties.

[45] If one looks at the evidence as a whole, it is clear that plaintiff and the defendants relocated from Oruua village at Ovitoto to the farm Tugab West as a family to live and farm together on the newly found piece of land, *albeit* registered in the name of the plaintiff. They support one another on this aspect that as children of one father and one mother, except for the first defendant who is from a different mother, they always lived together in the past as a family under the leadership of their late father Stephanus Katjaimo. This practice is supported by the fact that since 1982, when the farm was acquired, the plaintiff and the defendants stayed and farmed together as a family on the farm until 2008 when their father passed away. The misunderstanding or miscommunication occurred as a result of a quarrel over an iron brand mark. This happened after a period of more than twenty six years of staying together in harmony on the farm following the old tradition as pointed out by the second defendant in her evidence that as children from one father and mother, they always stayed together and were never divided. The plaintiff also never informed the defendants, severally or individually that their stay on the farm was temporary and that one day they will be required to vacate the farm.

[46] The plaintiff intentionally allowed the defendants to erect permanent structures or to make extensions to the existing structures on the farm. The defendants also testified that they maintain the farm from the time they relocated from Ovitoto. They take care of the fences and other farm equipment and

implements as they regard the farm to be their permanent home. All the defendants, except for the fourth and fifth are now old. They will have no place to stay if evicted from the farm they have helped to develop during the time when they were still young, strong and capable to do so. Ovitoto where they stayed before going to the farm has become overcrowded and their village has disappeared.

[47] Taking into account all the facts of the matter and the evidence as a whole, I am satisfied that the defendants have managed, on a balance of probabilities, to prove that they have acquired a usufruct from the plaintiff, *albeit* unregistered to settle and remain with their belongings on the farm permanently. It will be inequitable and unfair to them if ordered to vacate the farm as requested by the plaintiff.

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

- (i) The plaintiff's claim is refused.
- (ii) The defendant's counterclaim (alternative claim) succeeds.
- (iii) Each party to pay own costs.

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E P Unengu  
Acting Judge

#### APPEARANCES

PLAINTIFF: A Denk

Instructed by Hengari, Kangueehi & Kavendjii  
Inc, Windhoek.

DEFENDANTS:

G Narib

Instructed by Conradie & Damaseb, Windhoek.