

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON POINTS IN LIMINE

Case No: A 347/2015

In the matter between:

ALEX KAMWI 'MABUKU' KAMWI

APPLICANT

And

SIMASIKU RAYMOND SILUZUNGILA AND FAMILY

1ST RESPONDENT

ZACHARIA CHIKA SIMASIKU AND FAMILY

2ND RESPONDENT

Neutral citation: *Alex Kamwi 'Mabuku' Kamwi v Simasiku Raymond Siluzungila and Family and Another* (A 347/2015) [2016] NAHCMD 273 (19 September 2016)

Coram: ANGULA, DJP

Heard: 19 July 2016

Delivered: 19 September 2016

Flynote: Applications and motions – Applications – Points raised *in limine* - Non-Joinder – Misjoinder – Application struck from the roll with costs.

Summary: Applications and motions – Applications – Applicant filed an application seeking for an eviction order against the respondents and their family members. The land concerned is a communal land. Two points *in limine* raised on behalf of the respondents, namely that of non-joinder and misjoinder.

Held that - a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court, has a direct and substantial interest in the matter and should be joined as a party.

Held that – a deceased person cannot be joined as a party to proceedings. The right person to be cited as a party to the proceedings is the executor of the deceased estate.

Held that – the applicant should and was obliged to join the State in whom ownership of communal land vest. In addition the applicant should also have joined the Communal Land Board and the Chief or the Traditional Authority in whose area of jurisdiction the Communal Land concerned is situated.

ORDER

1. The points raised *in limine* are upheld.
2. Application is struck from the roll with costs.

RULING

ANGULA, DJP:

Background

[1] The applicant is an adult male, who acting in person, brought this application. The first respondent is Simasiku Raymond Siluzungila, an adult male and his family members and the second respondent being Zacharia Chika Simasiku, a deceased, and his family members. The respondents are represented by Mr Tjombe. Both Mr Tjombe and the applicant filed comprehensive heads of arguments for which the court is thankful. The applicant seeks following orders.

'1. Authorizing the Deputy Sherrif to evict the respondents and their families and all persons claiming through them, the goods and possessions from and out of all occupation and possession whatsoever of my ploughing area, located and in Ngala, Mahundu District, in the Zambezi to the end that I may peacefully enter into and possess his ploughing area without and form of harassment or attacks from the respondents and their families or any person claiming through them or from any other person.

2. Authorizing the Deputy Sherriff to relocate the respondents' and their families and all their possession and any person claiming through them or any persona and all their possessions back to Shanshuma the area they were allocated by the late Chief Maiba Moraliswana as stated in the Magistrates Court judgment dated 3 March 1995 hereto annexed.

3. To interdict the respondents and their families and all persons claiming through them or any person from crossing the Shanshuma River or point at any direction which serves as the boundary between my ploughing area at and in Gala and the respondents' ploughing area Shanshuma, and to authorize the Namibian Police to arrest and of the respondents and their families or any person claiming through them or individually from somewhere if any who shall cross the said boundary or point which serves as our boundary into my ploughing area.

4. To interdict the respondents and their families from referring themselves as bena Ngala because they are not from Ngala, but rather from Shanshuma and should accordingly refer to themselves as ben Shanshuma.

5. Ordering the respondents to pay the costs of this application, if they oppose the application.

6. Further and/or alternative relief.'

[2] The application is opposed by respondents. The respondents in opposing the application, raise two points *in limine*, in addition to opposing the application on the merits. The first point *in limine* is that of non-joinder and the second being of misjoinder.

First point *in limine*: Non-joinder

[3] On the law relating to joinders, Damaseb JP in *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*¹ at 447, para 32 said the following:

'The leading case on joinder in our jurisprudence is Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A). It establishes that it is necessary to join as a party to litigation any person who has a direct and substantial interest in any order which the court might make in the litigation with which it is seized. If the order which might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary party and should be joined except where it consents to its exclusion from the litigation. Clearly, the ratio in Amalgamated Engineering Union is that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court, has a direct and substantial interest in the matter and should be joined as a party.'

[4] Mr Tjombe submitted that the applicant failed to join all the necessary parties such as the Government of the Republic of Namibia, the Council of Traditional Leaders and the Communal Land Board and the Traditional Authorities in whose areas of jurisdiction the communal land in question is situated.

[5] In terms of Article 100 of the Namibian Constitution read with Article 124, the State, represented the Government of the Republic of Namibia, is the owner of land not

¹ 2011 (2) NR 437.

otherwise lawfully owned. Section 17 of the Communal Land Reform Act 5 of 2002 provides:

“(1) Subject to the provisions of this Act, all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.

“(2) No right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land.”

[6] In light of the above, the State as the lawful owner of the communal land concerned and has a direct and substantial interest in the outcome of the application and should have been joined to these proceedings.

[7] Another party that should have been joined to the proceedings is the Council of Traditional Leaders. Article 102 (5) of the Constitution reads as follows:

“There shall be a Council of Traditional Leaders to be established in terms of an Act of Parliament in order to advise the President on the control and utilization of communal land and on all such other matters as may be referred to it by the President for advice.”

[8] Section 2 (a) of the Council of Traditional Leaders Act 13 of 1997 reads:

“Pursuant to Article 102(5) of the Namibian Constitution, there is hereby established a Council of Traditional Leaders in order to advise the President on-

(a) the control and utilization of communal land; ...”

[9] It is rightly submitted by Mr Tjombe that the application sought by the applicant directly involves the control and utilisation of a certain portion of communal land and for this reason, the Council of Traditional Leaders have a direct and substantial interest in the application and its outcome and should have been joined to the proceedings.

[10] Furthermore the Communal Land Boards in whose areas of jurisdiction the land in question is situated have direct and substantial interest in the application and its outcome and therefore should have been joined. Section 2 of the Communal Land

Reform Act 5 of 2002 establishes Communal Land Boards to have statutory authority over communal land. Section 43 of the same Act reads:

“(1) No person may occupy or use for any purpose any communal land other than under a right acquired in accordance with the provisions of this Act, including a right referred to in section 28(1) or 35(1).

“(2) A Chief or a Traditional Authority or the board concerned may institute legal action for the eviction of any person who occupies any communal land in contravention of subsection (1).”

[11] In terms of section 43 (2), only the Communal Land Board, a Chief or a Traditional Authority can institute legal proceedings to evict persons who are in unlawful occupation of communal land. It is common cause that the applicant is seeking for an eviction order against persons in occupation of communal land which falls in the area of the Zambezi region, formerly known as Caprivi and as such reference is made to it in Schedule 1 to the Communal Land Reform Act. It is for this reason that the Communal Land Board of the Zambezi region and the Chief or Traditional Authority responsible for that area should have been joined to the proceedings.

[12] Furthermore, the applicant seeks an order against the respondent's family members without identifying who these family members are. The family members clearly have substantial interest in the application and its outcome. The applicant is under a duty to establish the identities of those family members and join them to the proceedings. Where the applicant is unable to set out their identities, then the applicant should set out the grounds for not being able to do so in his founding affidavit.

Second point *in limine*: Mis-joinder

[13] In so far as the second point *in limine* is concerned, the respondents point out in paragraph 4 of their answering affidavit that the second respondent, Zacharia Chika Simasiku, is long deceased. The applicant, in his replying affidavit, did not deal with this allegation. In fact, in addressing paragraph 4 of the respondents' answering affidavit, the applicant simply addressed the issue of one Charles Luka Lisulo, who according to the

respondents should have been joined as he also occupies a portion the communal land in question. The mis-joinder point raised of the second respondent was not dealt with by the applicant.

[14] The applicant in his heads still did not address this point *in limine*. It was only when the matter was argued that the applicant for the first time addressed the point. He argued that there was no proof showing that the second respondent is deceased. Mr Kamwi orally informed the Court that he now accepts the second respondent to be deceased. In this regard, Mr Tjombe argued that the application should be dismissed in respect of the second respondent and costs awarded should be that of punitive costs against the applicant as citing dead parties unnecessarily leads to higher legal fees. The applicant, however, argued that punitive costs should not be awarded against him as the respondents never produced any death certificate as proof of the death of the second respondent. I think it is fair to say under the conditions prevailing in the communal areas, unlike in the urban areas, the death of a person is not always recorded by way of a death certificate. The deceased is simply buried by family members. The death of the deceased does not come to the knowledge of the general public. Mr Kamwi has obliged by accepting that in fact the deceased has died. For this reason I am not inclined to impose a punitive order of costs on the applicant.

[15] In respect of the second point *in limine*, it is trite law that legal personality begins at the birth of a natural person and ends at the death of such a person. The second respondent in this case is one that is deceased and surely no longer has the legal capacity to sue or be sued. In order to institute legal proceedings in a court of law, both parties should have an actual legal existence, that is the legal capacity of either a natural or juristic person, and no suit can be lawfully prosecuted in the name of a person that has ceased to exist. An applicant wishing to institute legal proceedings against a deceased can only do so by instituting legal proceedings against the executor of the deceased estate. In view of this, and as rightly stated by counsel for the respondents, a better point for mis-joinder cannot be found than joining a deceased person.

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

1. The points raised *in limine* are upheld.
2. The application is struck from the roll with costs.

H Angula
Deputy Judge President

APPEARANCES

APPLICANT:

Mr Kamwi

In Person

RESPONDENTS:

Mr Tjombe

Tjombe-Elago Law Firm Inc.