



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

In the matter between:

Case no: I 1581/2015

AMBROSIUS SHETUNYENGA

PLAINTIFF

and

**TAITOS KWANISAI
EDWARD SHETUNYENGA
SIPRIANO SHETUNYENGA
JOSHUA JOZE SHETUNYENGA
JOHANNES SHETUNYENGA
JOHANNES KENEDY SHILONGO
PIUS M PANGELIUS**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT
5TH DEFENDANT
6TH DEFENDANT
7TH DEFENDANT**

Neutral citation: *Shetunyenga v Kwanisai* (I 1581/2015] [2017] NAHCMD 233
(17 August 2017)

Coram: MILLER AJ
Heard: 26 February 2016
Delivered: 04 March 2017 (*Ex tempore*)

ORDER

It is ordered that summary judgment is granted in favour of the plaintiff as follows:

1. Evicting all the defendants and all other unlawful occupants of Erf 7214 Ongwediva Oshakati Main Road Ongwediva Ext 17.
2. Cost of suit.

JUDGMENT

MILLER AJ:

[1] The plaintiff is the owner of a certain piece of land situated within the Municipal Boundaries of the town of Ongwediva. That the property is described as Erf 7214 Ongwediva Extension no. 17. It is common cause that the 7th defendant is in occupation of the property. The 7th defendant refuses to vacate the property whereupon the plaintiff issued summons, seeking the ejectment of the 7th defendant from the property together with an order for costs.

[2] When the 7th defendant filed a notice of intention to defend, the plaintiff then filed an application for summary judgment which is the issue I am currently concerned with. It is the 7th defendant's case that his right to occupy the property in question stems from certain rights granted to him in terms of customary law. Mr lipumbu who appeared for the 7th defendant impressed upon me that I should recognise that customary law is of application in Namibia. With that as a general proposition I have no quarrel.

[3] I must however bear in mind that customary law like any other law is sometimes amended in terms of subsequently entered legislation. It is apparent that at one stage before the proclamation of the town Ongwediva, the land that now falls within its Municipal boundaries was communal land. The identifying characteristic of what was then communal land was that the land belonged to the State, who administered the land on behalf and for the benefit of the occupants of that period. Since the promulgation of regulation 47 of Regulation 188 of 1969, a right to occupy land in the communal area was dependant on the issue of a document entitled permission to occupy or PTO in its abbreviated form.

[4] In conjunction with the Local Authorities Act, the scheme is that once a town or a village is proclaimed in a communal area, the ownership of the land is transferred from the State to the particular local authority established. Once erven are demarcated and surveyed, the local authority has the power to sell, those erven subject to (in the case of towns) the permission of the Permanent Secretary of the relevant Ministry. Previous holders of PTO's are protected in the sense that they retained a right of pre-emption in respect of a property they had occupied prior to the proclamation of the township. It appears on the papers that this is exactly what happened with the town of Ongwediva.

[5] In coming to this decision, I had regard to the decision of the Supreme Court in the matter of *Martha Namundjebo and Another vs Northgate Properties (PTY) Ltd and Others*, case number SA 33/2011. The history is set out by Strydom AJA in paragraph 7 of that particular judgment.

[6] The 7th defendant did not contend that he at any stage had a so called PTO to occupy the land. Hence upon proclamation of the town Ongwediva, he could not have acquired any right of pre-emption. If best, the defendant has a claim sounding in money against the Ongwediva Town Council. However such a defence even if it were to succeed, would not in any way have any bearing on the right of the plaintiff as owner to the land.

[7] I am satisfied on the papers before me that the defendant does not raise a Bona fide defence. In fact the defence he raised constitutes not a defence to the vindicatory claim of the plaintiff. I will accordingly grant summary judgment in favour of the plaintiff in terms of prayer 1 and 2 of the particulars of claim.

[8] Order:

1. Evicting all the defendants and all other unlawful occupants of Erf 7214 Ongwediva Oshakati Main Road Ongwediva Ext 17.
2. Cost of suit.

Miller, AJ
Acting

Appearance:

Applicant
Of

KN Amoomo
Sisa Namandje & Co, Windhoek

Respondent

Mr Ipumbu

Instructed by

Mugarivi Attorneys, Oshakati