



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

**JUDGMENT**

Case no: HC-MD-CIV-MOT-GEN-2016/00333

In the matter between:

**ALEX MABUKU KAMWI KAMWI**

**APPLICANT**

and

**MINISTER OF LANDS AND RESETTLEMENT**

**FIRST RESPONDENT**

**COMMUNAL LAND BOARD OF ZAMBEZI:  
REPRESENTED BYCHAIRPERSON**

**SECOND RESPONDENT**

**CHIEF KISKO MAIBA LISWANI III**

**THIRD RESPONDENT**

**LUCKSON MAHOSHI CHIKA**

**FOURTH RESPONDENT**

**PHILLEMUN MUNICHEZE NASILELE**

**FIFTH RESPONDENT**

**SIMASIKU RAYMOND SILUZUNGILA NTOMWA**

**SIXTH RESPONDENT**

**CHARLES LISULO**

**SEVENTH RESPONDENT**

**BENSON NTOMWA**

**EIGHTH RESPONDENT**

**ALBERT SHAMUKUNI**

**NINTH RESPONDENT**

**NCHINDO SIMASIKU**

**TENTH RESPONDENT**

**SAMUEL BUCHANE MUKANGARA SIMATAA**

**ELEVENTH RESPONDENT**

**Neutral citation:** *Kamwi v Minister of Lands and Resettlement* (HC-MD-CIV-MOT-GEN-2016/00333) [2019] NAHCMD 138 (8 May 2019)

**Coram:** ANGULA DJP

**Heard:** 12 December 2018

**Delivered: 8 May 2019**

**Flynote:** Civil Practice – Rules of Court – Service of process initiating application proceedings – Rule 8(1), 8(8) and 9(1)(c) of the High Court Rules – Second respondent served by the applicant himself and not by the Deputy-Sheriff – Non-compliance with the Rules of Court – Service a nullity.

**Summary:** This is an application in which the applicant seeks eviction orders against the fourth to eleventh respondents and their families and all persons claiming occupation through the respondents, of the area situated in Ngala, Mahundu District in the Zambezi Region. He further seeks an order interdicting the respondents from ploughing, grazing and crossing certain points and areas which he claims belongs to him.

The application is opposed by the fourth to eleventh respondents. They chose not to file answering affidavits as they contend that the applicant's case is bad in law and opted to simply raise points *in limine* in law. They alleged that service of the application was defective and that (the area of) the communal land over which the applicant claims a right of occupation has not been properly described.

*Held* that the service of the application was a nullity. Matter struck from the roll with costs.

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### ORDER

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1. The application is struck from the roll.
2. The applicant to pay the respondents' costs.

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### JUDGMENT

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ANGULA DJP:

### Introduction

[1] I have before me an application in which the applicant seeks an order to evict the respondents, the fourth to the eleventh respondents ('the respondents') and their families and all persons claiming occupation of the area through the respondents. The area from which the eviction is sought is simply described as Ngala, Mahundu District, situated in the Zambezi Region ('the area'). The applicant further seeks an order interdicting the respondents from ploughing, residing and grazing their cattle in that area.

[2] The respondents did not file an answering affidavit but simply raised points of law as contemplated by rule 66(1)(b). They further raised procedural legal points *in limine* in their heads of argument. The first point raised is that there had been defective service of the application on the second respondent, the Communal Land Board of Zambezi Region. Furthermore, that the service on the fourth, seventh and ninth respondents was effected on Mr Phillemon Municheze Nasilele (the fifth respondent) the headman of the area, purportedly in terms of rule 8(2)(b) of the Rules of Court.

[3] The respondents also raised a point *in limine* with regard to the facts; that there are no facts before court to ascertain the extent of the area from which the respondents are sought to be evicted.

[4] The heads of argument of the respondents in which the issue of defective service was raised, were filed on 29 October 2018, whereas the hearing was set down for 12 December 2018. The applicant was given sufficient notice before the hearing to rectify the procedural non-compliance. Notwithstanding the timeous notice given to rectify the defects, the applicant did nothing.

### Service

[5] Rule 8(1) provides the following:

'Service of any process of the court directed to the deputy-sheriff and any documents initiating application or action proceedings must be effected by the sheriff in one or other of the ways set out in this rule.'

[6] It is common cause that the process served in respect of the second respondent, the Communal Land Board for Zambezi Region was not served by the Deputy-Sheriff. It was served by the applicant himself, who filed an affidavit on the e-Justice system titled 'Affidavit for Alex Mabuku Kamwi Kamwi: Proof of Service Rule 9(1)(c) of the High Court Rules'.

[7] Rule 8(1) of the rules of court require that service of any process of the court directed to the Deputy-Sheriff and any document initiating application or action proceedings must be effected by the Deputy-Sheriff in one or other of the ways set out in that rule. It is also common cause that the notice of motion together with the founding affidavit constitute 'documents initiating proceedings within the meaning of rule 8(1)'.

[8] The applicant sought to rely on rule 9(1)(c) and argued that it was in terms of the provisions of the said rule that he effected service. Rule 9(1)(c) on which the applicant relies stipulates that:

**'Proof of service**

**9. (1)** Service of any process of the court in Namibia is proved -

...

(c) where service has not been effected by the deputy-sheriff or in terms of paragraph (b), by an affidavit of the person who effected service or in the case of service on a legal practitioner or a member of his or her staff, the State or any minister, deputy minister or any other official of the State, in his or her capacity as such, by the production of a signed receipt from the person on whom the process was served.'

[9] Rule 9 deals with the manner in which service must be proved. Rule 9(1)(c) refers to instances where service was not effected by the Deputy-Sheriff – that the person who effected service must make an affidavit as proof of service. In this

regard, one must look at rule 8(9) of the Rules of Court which deals with instances in which service by the Deputy-Sheriff is not possible. It reads as follows:

'(9) Where it is not possible to effect service in any manner described in this rule, the court may, on application of the person wishing to cause service to be effected, give directions in regard thereto and where such directions are sought in regard to service on a person known or believed to be within Namibia, but whose whereabouts therein cannot be ascertained, rule 13(2) applies with necessary modifications required by the context.'

[10] Accordingly, it is only when it is impossible to effect service in terms of rule 8 that with leave of the court, on application that a person other than the Deputy-Sheriff is permitted to effect service of court process initiating proceedings.

[11] The rule in my view serves, public policy purposes: It would be against public policy and against proper administration of justice that a plaintiff or an applicant should be allowed to serve court documents personally on the opposing party. The reasons are, I think, self-evident: firstly, the applicant is conflicted; secondly, the court needs assurance that the process has indeed been served on the opposing side. It is for these reasons, there could be many more, that the office of the Deputy-Sheriff as an official messenger of the court was established.

[12] In the present matter, it is common cause that the applicant did not seek leave of the court for him to effect service on the second respondent. In the absence of leave granted by the court, it renders the service of the application on the second respondent defective and the non-compliance with rule 8, accordingly fatal. For those reasons, the court is of the considered view that there is merit in the point *in limine* raised by the respondents and stands to be upheld.

[13] There is a further reason why the point should be upheld. Service of the process by anybody else than the Deputy-Sheriff can only be authorised if it is impossible for the Deputy-Sheriff to serve the process. In this connection, it is submitted on behalf of the respondents that the purported service of the application by the applicant himself was improper and invalid and for that reason, there had

been no service at all on the second respondent, the Communal Land Board of Zambezi Region.

[14] The applicant caused the process to be served by the Deputy-Sheriff for Katima Mulilo on the other respondents residing in Katima Mulilo and some in Windhoek but decided to serve the process himself on the second respondent. There is no explanation for this rather erratic or inconsistent conduct.

[15] The applicant argues in his heads of argument that the service on the ninth respondent has been 'cured' because it was served on the headman of the village in which the homestead of the ninth respondent is situated. Further that after service, the ninth respondent filed a notice to oppose. I should mention the applicant subsequently withdrew his application against the ninth respondent for the reason that he has in the meantime discovered that they are related.

[16] Mr Kamwi, relying on the *Witvlei Meat*<sup>1</sup> matter, submits that the purpose of service is to bring the application or action to the attention of the respondent or defendant in so far as he received it and acted upon it, there is a complete service. In my view the case law cited is distinguishable from the facts of this case. In this case there was no reaction from those who were served with the application papers. There is no evidence that the application ever came to the attention of the Communal Land Board. The Communal Land Board did not act. It did not file a notice to oppose or file any affidavit. In any event, in so far as might be necessary to state, I prefer the approach adopted by the court in the *Knouwds NO v Josea and Another*<sup>2</sup> matter, namely that the proceedings which have taken place without service are a nullity and it is not competent for a court to condone same. The approach does not leave room for the court to embark on value judgment based on a set of facts in each case.

[17] I take judicial notice of the fact that Mr Kamwi has litigated in numerous cases before this court and is well conversant with the rules of this court and the practice directions. He has initiated so many cases before this court and is aware of how the service process works and the fact that it is effected by the Deputy-Sheriff. His failure

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<sup>1</sup> *Witvlei Meat (Pty) Ltd & Others v Disciplinary Committee for the Legal Practitioners & Others*, Case No A 212/2011 (HC)

<sup>2</sup> 2007 (2) NR 792.

to comply with the rules is irrational in the circumstances. I say this for reason that the applicant caused the application to be served on other respondents including the Minister of Land Reform and Resettlement through the Deputy-Sheriff. He made use of both the Deputy-Sheriff of Katima Mulilo and Windhoek to serve the application papers. Why he chose to attempt to serve the application on the Communal Land Board himself, is not explained. As mentioned earlier he was alerted by Mr Tjombe long in advance before the hearing of the matter that service of the Communal Land Board was defective. He did not take steps to rectify the service.

[18] I have therefore arrived at the conclusion that the purported service on the Communal Land Board is a nullity. The Communal Land Board has a direct and substantial interest in the issues raised in this application and must be served properly and in terms of the rules. For these reasons that the matter is struck from the roll.

#### Costs

[19] I do not see the reason why the normal rule, that costs follows the result should not apply. The applicant was forewarned long in advance and had an opportunity to rectify the non-service. He ignored the warning and instead persisted with the application. He must indemnify the respondents for their costs.

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

1. The application is struck from the roll.
2. The applicant to pay the respondents' costs.

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H Angula  
Deputy-Judge President

APPEARANCES:

APPLICANT: A M KAMWI  
In person

FOURTH TO ELEVENTH  
RESPONDENTS: N TJOMBE  
Of Tjombe-Elago Inc., Windhoek