

REPUBLIC OF NAMIBIA

NOT REPORTABLE



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

Case No: HC-MD-CIV-ACT-CON-2017/04580

In the matter between:

ALINA SHILOMBOLENI

PLAINTIFF

and

ARMAS HANGO MUETUDHANA

DEFENDANT

Neutral citation: *Shilomboleni v Muetudhana* (HC-MD-CIV-ACT-CON-2017/04580)
[2019] NAHCMD 266 (25 July 2019)

Coram: USIKU, J

Heard on: 22-23 July 2019 and 25 July 2019

Delivered: 25 July 2019

Reasons: 2 August 2019

Flynote: Land – Eviction – Action for eviction based on ownership –
Plaintiff needs only allege and prove ownership of the property and occupation thereof
by the defendant – Onus then shifts on the defendant to prove that he has a valid right

to occupation against the owner – Court held that the plaintiff succeeded in discharging her onus of proof in respect of ownership by producing title deed in her name – The defendant failed to discharge the onus of proving valid right to stay in occupation of the property.

Summary: The plaintiff alleges that she is the owner of an immovable property and that the defendant is in possession of such property. The plaintiff had orally agreed to allow the defendant to stay with her on the property till the end of 2015. The plaintiff had demanded, after the expiry of 2015, that the defendant vacates the property but despite demand the defendant continued to remain in unlawful occupation and possession of the property. The plaintiff asks for an order confirming cancellation of the oral agreement and eviction of the defendant from the property. The court grants eviction order in favour of the plaintiff

ORDER

1. Judgment is hereby granted in favour of the plaintiff against the defendant, in the following terms:
 - (a) cancellation by the plaintiff of the the oral agreement regarding occupation of undermentioned property is hereby confirmed;
 - (b) the defendant and all occupants holding under him, be evicted from the undermentioned property, namely:

Certain: Erf No: 2546, Katutura, (Extension No.13);
Situate: In the Municipality of Windhoek, Registration Division "K", Khomas Region;
Measuring: 262 square metres;
Held by the plaintiff under Deed of Transfer No.T1667/1995;

(c) the defendant must vacate the above property on or before 25/08/2019, failing which the Deputy Sheriff for the District of Windhoek is hereby directed and authorized to evict the defendant and all persons holding under him;

(d) the defendant is ordered to pay the plaintiff's costs of suit.

2. The defendant's special plea of acquisitive prescription is hereby dismissed with costs.
3. The defendant's counterclaim for the transfer of the property into his name is dismissed with costs.
4. The defendant's alternative claim based on enrichment in the amount of N\$920 000 is dismissed with costs.
5. Matter is removed from the roll: Case Finalized.

JUDGMENT

USIKU, J:

Introduction

[1] In this matter the plaintiff claims for the eviction of the defendant from immovable property described as:

Certain: Erf No: 2546, Katutura, (Extension No.13);

Situate: In the Municipality of Windhoek, Registration Division "K", Khomas Region;

Measuring: 262 square metres;

Held by the plaintiff under Deed of Transfer No. T1667/1995.

[2] The plaintiff's claim is based on ownership of the above property. In proof of such ownership the plaintiff has handed-in a copy of the title deed aforesaid, indicating that she is the registered owner of the property.

[3] In addition the plaintiff also claims payment of N\$ 3 500 per month from the defendant as damages arising from the defendant's alleged unauthorised occupation of the property from July 2017 to the date of eviction.

[4] In response to the plaintiff's claims, the defendant raised special plea of acquisitive prescription and further launched a counterclaim in which he claims transfer of the property into his name. Alternatively he claims payment in the amount of N\$ 920 000 from the plaintiff being the amount by which the plaintiff is allegedly enriched and the defendant correspondingly impoverished. In his counterclaim, the defendant claims that he is entitled to retain possession of the property by virtue of a salvage lien which he holds over the property until payment by the plaintiff in the amount of N\$ 920 000.

Plaintiff's version

[5] The plaintiff called two witnesses, namely Alina Shilomboleni ("Ms Shilomboleni") the plaintiff in this matter and Uda Gawachab ("Ms Gawachab").

[6] Ms Shilomboleni testified that she is an elder sister of the defendant. She is the owner of the immovable property ("the property") as described in paragraph 1 hereof. In December 1978 she got married to Mr Shilomboleni who died in October 1992.

[7] During 1981 – 1983 the defendant was as student at Augustinium Secondary School in Windhoek and used to stay with the plaintiff and her late husband during weekends and public holidays at the property.

[8] About 1984, the defendant completed his grade 12, got employment at Orangemund and went to work there. About 1986 the defendant resumed staying at the plaintiff's property. In November 1996, the defendant got married and found his own place with his family. During 2003, the defendant and his wife divorced and the defendant went to Angola and stayed there for about 5 years. The defendant returned in 2009 and after some time came and stay with the plaintiff at the property. About

2016 the plaintiff requested the defendant to vacate the premises as her children are now grown-ups and need a place to stay. The defendant refused to vacate the property. According to the plaintiff, it was only after the defendant was asked to leave the property that he claimed that the plaintiff's late husband owed the defendant money.

[9] The plaintiff further testified that she suffered damages due to the unlawful occupation of the the property by the defendant. She stated that a reasonable market rental value for a house in Katutura is between N\$ 3 500 and N\$ 7 000. She now claims payment from the defendant in the amount of N\$ 3 500 per month, calculated from July 2017 (being the date of demand) until the date of eviction.

[10] The second witness to testify for the plaintiff is Ms Gawachab. She testified that she is a daughter of the plaintiff. She recalls that the plaintiff renovated the property in 1994 by adding a garage, two additional rooms, a dining room and also renovated the kitchen.

[11] According to Ms Gawachab, in 1996 the defendant was living with aunt Cornelia. That same year, the defendant got married and thereafter found a different property where he lived with his wife.

[12] In 2002-2003, Ms Gawachab testified, the defendant and his wife divorced and the defendant left for Angola where he stayed up to 2009. On his return to Windhoek, the defendant went to live with aunt Cornelia in Cimbembasia.

[13] In 2012, the defendant was living at the plaintiff's property, together with the plaintiff and other relatives. In 2016, the plaintiff asked the defendant to vacate the premises. The defendant refused to vacate. In 2017 the plaintiff instituted legal action for the eviction of the defendant from the premises.

The defendant's version

[14] The defendant called three witnesses, namely: Berens Ganeb, (“Mr Ganeb”), Eva Kasetura (“Ms Kasetura”) and Marius Muetudhana (“Mr Muetudhana”). The defendant was initially legally represented, however his legal practitioner withdrew representation during case management stage. The defendant did not testify at trial.

[15] Mr Ganeb testified that in 1990 he was a police officer in the Diamond Department, with a rank of constable. The late Shilomboleni was a senior colleague to Mr Ganeb, in the same division with a rank of inspector.

[16] The defendant was known to Mr Ganeb as a brother-in law to the late Shilomboleni. Mr Ganeb testified that he recalls a day in 1990 when the late Shilomboleni asked him to accompany him to the office of the defendant, at Old Mutual, where the defendant was employed. According to Mr Ganeb the purpose of that visit was for Mr Ganeb to commission a sworn declaration by the late Shilomboleni to the effect that the late Shilomboleni had sold the property to the defendant and that the defendant was therefore the owner of the property.

[17] Mr Muetudhana testified that he is a young brother to the defendant and the plaintiff. He further related he recalls that during the period between 1985 – 1986 when the defendant was imprisoned, the late Shilomboleni and the plaintiff used to withdraw money from the defendant’s bank account on the instructions of the defendant. Mr Muetudhana did not know at that time the reason for those withdrawals. After the defendant was released from prison in August 1986, he moved into the property. It was after that, that Mr Muetudhana later learnt that the defendant had purchased the property from the late Shilomboleni.

[18] Ms Kasetura gave testimony to the effect that she was employed as a supervisor at Rentmeester Building in Ausspanplatz, in Windhoek, between 1985 and 1986. She deposed that the defendant as an inmate, used to perform cleaning services, as part of his prison- sentence, at the Rentmeester Building. While there, recounts Ms Kasetura, she witnessed the defendant writing out withdrawal receipts on many occasions and

handed them over to the late Shilomboleni for the latter to go and cash them at the then Barclays Bank, in Ausspanplatz, Windhoek. According to her, the total amount of the withdrawal receipts written-out by the defendant to the late Shilomboleni, that she witnessed, amounts to R 14 000. Ms Kasetura further testified that she later learned that the monetary transactions between the defendant and the late Shilomboleni was in relation to the sale of the property by the late Shilomboleni to the defendant.

Legal principles

[19] Where the action for eviction is based on owner's ownership of the property, the owner is required to allege and prove his/her ownership and the fact that the property is held by another. Generally, the owner proves his/her ownership of the property by producing his/her title deed indicating that the property is registered in his/her name. The onus is then on the defendant to allege and prove a right to stay in possession of the property.¹

[20] In terms of the *Formalities in Respect of Contracts of Sale of Land Act (No 71 of 1969)*, no contract of sale of land shall be of any force or effect, unless it is reduced to writing and signed by the parties thereto. In other words, an oral contract of sale of land is unenforceable.

[21] *Section 1 of the Prescription Act 68 of 1969* reads as follows:

“Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years”.

[22] Put differently, to acquire ownership of “a thing” by prescription, one must either:

- (a) personally, or,
- (b) both personally and through predecessors in title;

¹ Chetty v Naidoo 1974 (3) SA 13 (A) at 20A.

have “possessed” both “openly” and “as if s/he were the owner” for an uninterrupted period of 30 years.

[23] Insofar as the enrichment lien is concerned, a lien has been described as a right of retention enjoyed by the holder of the lien (the retentor) over the property of another.² “It arises by operation of law from the fact that one person has put money or money’s worth into the property of another and has as its object the security of payment for the holder’s expenses. The obligation to compensate the retentor may arise from various sources including unjust enrichment”.³

Analysis

[24] As was already previously alluded to, the plaintiff has produced in court *Deed of Transfer No T.1667/1995*, which indicates her as the registered owner of the property. In terms of that *Deed of Transfer*, the property was sold to the plaintiff on 28 December 1993 by the Municipal Council of Windhoek. The registration of the transfer in the name of the plaintiff was effected on 27 March 1995.

[25] The defendant’s case appears to be that he has verbally purchased the property from the late Shilomboleni in 1986. He therefore contends that his occupation of the property is accordingly lawful.

[26] In terms of the law,⁴ a verbal agreement for the purchase of land is not valid and is therefore unenforceable. The defendant’s argument relating to rights obtained on account of the verbal agreement stands to be rejected.

[27] The defendant further argues that he has been in continuous possession and occupation of the property since 1986, as if he were the owner and by virtue of that fact had become the owner of the property. This argument by the defendant has no merit.

² Hing v Mkhabela (2013/ 37921) [2017] ZAGPJHC 107 (22 March 2017) para 74.

³ Ibid

⁴ S1 of the Formalities In Respect of Contracts of Sale of Land Act No. 71 of 1969.

By his own version he moved into the property in 1986 and stayed there up to 1992. In 1992 he moved out and the plaintiff and her children moved in.⁵ Then the defendant returned to the property only in 2010.⁶ In 2017 the plaintiff instituted eviction proceedings against the defendant. Even by the defendant's own version, the period he has allegedly possessed the property does not constitute an uninterrupted period of thirty years. Furthermore, there is evidence led by the plaintiff that when the defendant got married in 1996 he and his new family had their own place in Windhoek-North where they lived up to 2003. In 2003-2009 he lived in Angola.

[28] In the circumstances, I am satisfied that the evidence shows that the defendant did not acquire the property by prescription. His claim of ownership based on acquisitive prescription, therefore, stands to fail.

[29] In the alternative to the claim of ownership, the defendant claims payment from the plaintiff in the amount of N\$ 920 000.00 based on the allegation that the defendant has incurred expenses to that value on the property. The defendant further alleges that the plaintiff is enriched to that amount.⁷

[30] None of the defendant's witness testified on the claim for the improvements or expenses incurred by the defendant on the property. I therefore hold that the defendant's claim for N\$ 920 000 has not been proved and stands to be dismissed.

[31] In regard to the plaintiff's claim for damages until the date of eviction, this claim appears to be delictual and the plaintiff claims the amount she would have received, had she let the premises.

[32] According to the evidence, other members of the plaintiff's extended family stay on the property on a permanent or semi-permanent basis. It is not clear whether the

⁵ Para 6.3 and 6.4 of the defendant's plea.

⁶ Para 6.6.

⁷ Para 23 and 25 of the defendant's counterclaim.

amount claimed is in respect of the 'market rental value' of the whole premises or in respect of the portion(s) occupied by the defendant.

[33] In addition, the plaintiff did not lead evidence as to how she acquired knowledge of the reasonable '*market rental value*' of the properties in Katutura. In the circumstances, I cannot place any reliance upon the evidence of the plaintiff on the *reasonable market rental value* she attaches to the premises. For that reason, I would decline to grant her the damages she claims in respect of the defendant's continued occupation of the property from July 2017 to the date of eviction.

Conclusions

[34] For the reasons foregoing, I find that the plaintiff has discharged her onus of proof in respect of ownership of the property. By virtue of her ownership she is entitled to the relief she claims herein. On the other hand, the defendant has failed to discharge the onus on him of proving a valid right to stay in occupation of the property. It therefore follows that his occupation is unlawful and is liable to be evicted from the property.

[35] In the premises, I make the following order:

1. Judgment is hereby granted in favour of the plaintiff against the defendant, in the following terms:

(a) cancellation by the plaintiff of the the oral agreement regarding occupation of undermentioned property is hereby confirmed;

(b) the defendant and all occupants holding under him, be evicted from the undermentioned property, namely:

Certain: Erf No: 2546, Katutura, (Extension No.13);

Situate: In the Municipality of Windhoek, Registration Division "K", Khomas Region;

Measuring: 262 square metres;

Held by the plaintiff under Deed of Transfer No.T1667/1995;

(c) the defendant must vacate the above property on or before 25/08/2019, failing which the Deputy Sheriff for the District of Windhoek is hereby directed and authorized to evict the Defendant and all persons holding under him;

(d) the defendant is ordered to pay the plaintiff's costs of suit.

2. The defendant's special plea of acquisitive prescription is hereby dismissed with costs.
3. The defendant's counterclaim for the transfer of the property into his name is dismissed with costs.
4. The defendant's alternative claim based on enrichment in the amount of N\$920 000 is dismissed with costs.
5. Matter is removed from the roll: Case Finalized.

B Usiku
Judge

APPEARENCES

PLAINTIFF:

F. Kishi

Instructed by Dr Weder, Kauta & Hoveka,
Windhoek

DEFENDANT:

In person