

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

<b>Case Title:</b> SIMON JESIA TJOMBONDE // BARNABAS NGARANGOMBE & 2 OTHERS	<b>Case No:</b> HC-MD-CIV-MOT-GEN-2021/00019
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE MR JUSTICE ANGULA, DEPUTY JUDGE-PRESIDENT	<b>Date of hearing:</b> 17 MARCH 2022
	<b>Delivered on:</b> 19 APRIL 2022
<b>Neutral citation:</b> <i>Tjombonde v Ngarangombe</i> (HC-MD-CIV-MOT-GEN-2021/00019) [2022] NAHCMD 200 (19 April 2022)	

**The order:**

Having heard **Ms Katjaerua**, on behalf of the applicant and **Mr Andima**, on behalf of the respondent and having read the documents filed of record:

**IT IS ORDERED THAT:**

1. The first respondent be and is hereby directed and ordered to immediately restore undisturbed and peaceful possession of the communal land known as Tusu-Tusu Village in Otjituuu to the applicant.
2. The first respondent is to pay the applicant's costs.
3. The matter is finalized and removed from the roll.

**Following below are the reasons for the above order:**

Introduction

[1] This is a spoliation application against the first respondent in terms whereof the

applicant seeks relief in the following terms –

- '1. That the first respondent be and is hereby directed and ordered to immediately restore undisturbed and peaceful possession of the communal land known as Tusu-Tusu Village in Otjituuo to the applicant;
2. That the decision by the second respondent dated 21 October 2020 be and is hereby reviewed and set aside and is declared to be null and void and of no force and effect and is void ab initio.
3. Costs of suit of one instructing and one instructed counsel.
4. Further and/or alternative relief.'

[2] I should mention prayer no. 3 was in the meantime granted by Parker AJ on 23 April 2021. Therefore the present matter only concerns with the question whether spoliation took place or not.

[3] The first respondent opposed the application.

#### Applicant's version of events

[4] The applicant is the brother-in-law of the first respondent. During 2013, the applicant's father-in-law sold to the applicant his rights in the improvements he had constructed on a land situated in the Tusu-Tusu Village. Tusu-Tusu Village is situated in a communal area. Thereafter, the applicant took occupation and peaceful possession of the improvement and the land at Tusu-Tusu Village on which the improvements had been constructed. According to the applicant, his father-in-law was residing at Omarindi Uovirongo Village with his wife. He passed away during 2014.

[5] The applicant's case is further that when the applicant took occupation of the land at Tusu-Tusu Village during 2013, the first respondent was residing at Omarindi Uovirongo Village. However, during 2016, the first respondent started to claim that the land at Tusu-Tusu Village occupied by the applicant, belonged to him.

[6] Subsequent thereto the first respondent lodged a dispute with the third respondent, the Otjozondjupa Communal Land Board ('the Board'), claiming that the land at Tusu-Tusu

Village belonged to him. The board investigated the dispute, heard testimonies from witnesses and resolved on 30 November 2017 that: ‘. . . Mr Barnabas Ngarangombe cannot claim to have land rights at Tusu-Tusu Village if he was only leaving [sic] under the household of the Late Tibelius Ngarangombe unless otherwise proven.’

[7] The board advised the parties that should any of them be aggrieved by its decision, they may appeal within a period of 30 days to the Minister of Land Reform in accordance with the provisions of the Communal Land Reform Act, No. 5 of 2002.

[8] The first respondent did not appeal against the decision of the board, instead during 2020 he referred the dispute to the second respondent, the Kambazembi Traditional Authority for determination. The Kambazembi Traditional Authority found in favour of the first respondent on 21 October 2020.

[9] It is further the applicant’s case that subsequent to the decision of the Traditional Authority, the first respondent forcefully entered the land at Tusu-Tusu Village that was in his peaceful and undisturbed possession. The first respondent then proceeded to erect a kraal and a small corrugated iron building and further erected fences. The applicant asserts that in so doing, the first respondent has disposed him of the portion of the land he was occupying and so fenced off.

[10] Following the dispossession aforesaid, the applicant laid a criminal charge with the police. He thereafter successfully brought an application to this court for an order to review and set aside the decision of the Traditional Authority. That application served before Parker AJ on 23 April 2021, who reviewed and set aside the decision of the Traditional Authority holding *inter alia* that the decision was null and void *ab initio*.

#### First respondent’s version of events

[11] The first respondent maintains that he did not deprive the applicant of his peaceful and undisturbed possession to the land in question. According to the first respondent, the land in question is not private property but is communal land and he too can ‘be on the land’. He asserts that the area the first respondent resides on is nowhere near the portion of land occupied by him. In his answering affidavit, the first respondent in answer to the applicant’s assertion that he was deprived of his peaceful and undisturbed possession by the first respondent states that he (the first respondent) is entitled to be on the said land

and it is big enough to accommodate various households.

[12] It is the first respondent's contention that he is entitled to be on the land as he had long before the improvements to the land were allegedly sold by his late father to applicant, helped in the development of the land. As regards the resolution of the board, the first respondent takes the position that, the board through its resolution, did not give the applicant any right in that, no determination was made as regards ownership or who the lawful land right holder was. He further asserts that he moved to Windhoek in 2013 for employment and when he left, he left behind all fixtures on the land with his late father and that occasionally he would return to Tusu-Tusu Village when on leave or on holiday.

[13] The first respondent further states that he attempted to enforce his rights as a resident of Tusu-Tusu village, but was denied such use and enjoyment and therefore instituted proceedings with the Otjozondjupa Communal Land Board. He also asserts that he had opened a case with the police regarding the land dispute.

#### Issue for determination

[14] Whether applicant was in undisturbed and peaceful possession of the land in question and whether the first respondent wrongfully and unlawfully deprived the applicant of his peaceful and undisturbed possession.

#### Applicable legal principles and analysis

[15] In *Uvhungu-Vhungu Farm Development CC v Minister of Agriculture, Water & Forestry* 2009 (1) NR 89 (HC), Swanepoel, J held that: 'It is trite law that an applicant in an application for a *mandament van spolie* only need to prove:

- '(a) that it was in undisturbed peaceful possession; and
- (b) that it was deprived of this possession.'

[16] The purpose of this remedy is to preserve law and order and to discourage persons from taking the law into their own hands.<sup>1</sup> In determining an application for spoliation, the court is not concerned with the lawfulness of the applicant's possession nor

<sup>1</sup> *Kandombo v The Minister of Land Reform* (A 352/2015) [2016] NAHCMD 3 (18 January 2016) para 38.

is the issue of ownership considered. Therefore, spoliation as a remedy does not concern the protection of rights 'in the wider sense'.<sup>2</sup>

### Discussion

[17] Applying the foregoing principles to the facts in the present matter, I am satisfied that the applicant has proven that he moved to Tusu-Tusu Village in 2013, following the sale transaction of the improvements between him and his late father. He remained in peaceful and undisturbed possession of the land and those improvements since 2013 until on or about 2016 when the first respondent started disturbing the peaceful possession of the applicant by laying claim to the land. It is necessary to point out in this regard that the first respondent does not dispute the applicant's allegations. Instead, the first respondent insists that he is entitled to reside on the land. The first respondent misconstrues the purpose of the spoliation remedy. It is not concerned with ownership. The first respondent was advised by the Land Board to appeal its decision should he be unhappy. He failed to follow the lawful course and instead embarked on taking the law into his own hands. That cannot be countenanced by this court.

[18] The first respondent, though disputing that his father in fact sold the 'improvements' on Tusu-Tusu Village to the applicant, does not deny that the applicant took occupation of the land in 2013. As pointed out above, it is irrelevant for purposes of the determination of this matter, whether the improvements were sold or not. What is relevant is the issue of possession. The first respondent does not deny that the applicant was in possession of Tusu-Tusu Village after 2013.

[19] I am further satisfied that the applicant has also established that during 2020 and subsequent to the decision of the Traditional Authority, the first respondent started erecting structures at Tusu-Tusu Village without the consent of the applicant. The first respondent did not deny this allegation and merely took the point that the land was big enough to accommodate various households. The first respondent also does not dispute that the applicant had peaceful and undisturbed possession of Tusu-Tusu Village before he started erecting the structures subsequent to the decision of the Traditional Authority. It is common cause that the decision of the Traditional Authority has been set aside for the reason that it was null and void *ab initio*.

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<sup>2</sup> Ibid.

## Conclusion

[20] I am satisfied that the applicant has made a case for the grant of the relief sought. I am further satisfied that the applicant has proved that he was in peaceful and undisturbed possession of Tusu-Tusu Village from the year 2013 to the year 2020 (post Traditional Authority decision). I am further of the considered view that the first respondent disturbed the applicant's peaceful possession of the said land. Any issue regarding the lawfulness or otherwise of the applicant's possession of Tusu-Tusu Village is not relevant for purposes of determining whether an act of spoliation took place or not.

## Costs

[21] In his notice of motion the applicant seeks costs for one instructing and one instructed counsel. There is no justification for the prayer for costs of an instructed counsel. Ms Katjaerua appeared alone. There is no reason why costs should not follow the result and as such that is the order I propose to make.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>First Respondent</b>
E M Katjaerua <i>of</i> Katjaerua Legal Practitioners, Windhoek	T Andima <i>of</i> Van der Merwe-Greeff Andima Inc., Windhoek