REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case Title:	**Case No.:**
Petrina Ndahekelekwa Kapofi Plaintiff and Miriam Hauwanga Defendant	HC-MD-CIV-ACT-OTH-2020/04066
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Lady Justice Rakow	**Date of hearing:** 29 March 2022
	Delivered on: 19 April 2022

Neutral citation: *Kapofi v Hauwanga* (HC-MD-CIV-ACT-OTH-2020/04066) [2022] NAHCMD 202 (19 April 2022)

The order:

The court grants the following orders:

(1) An order evicting the Defendant from the Plaintiff's customary land

(2) Cost of suit

Following below are the reasons for the above order:

Rakow, J:

Introduction

[1] The matter before court, for determination is a summary judgement application by the plaintiff who seeks the eviction of the defendant from the customary land of the plaintiff. The defendant is opposing the application. The plaintiff and the defendant are related. The plaintiff is the maternal aunt of the defendant

[2] The defendant further filed a condonation application, seeking condonation for the late filing of her answering affidavit which sets out the reason for the late filing of the answering affidavit as the late receival of the translated documents that were to accompany the answering affidavit.

Background

[3] The plaintiff alleges that she is the rightful holder of customary land rights allocated to her under UPI EMBWKN000038 in the Embawakuni area, Ongenga constituency in the Oukwanyama Traditional Authority area. The defendant however alleges that she ~~is~~ acquired the specific piece of land from her grandmother when she approached her grandmother requesting her to allocate a piece of land to her in order for her to build a homestead for her siblings as well as other family members. The family's land was initially allocated to her grandfather, Gotlieb Haihambo but when he passed away, the land was allocated to her grandmother, Lucia Mutota who was the lawful spouse of Gotlieb Haihambo.

[4] The defendant also attach a letter from a certain David Nakale who was the person assigned by her grandmother to demarcate the portion of the land that was assigned to the defendant. She paid N$ 600 to the headman on 6 September 2001 as that was the fee payable to the traditional authority for land. The defendant then proceeded to develop her piece of land and invited her family members and eventually her grandmother to reside at the house. She furnished the house she built as well as installed electricity. The electricity account is in the name of her younger brother Absolom Hendjambi who was instructed by her to deal with the electrical process. The water account is in the name of her younger sister, Justina Hendjabi.

[5] During 2012, the defendant's grandmother passed away, and at that stage she was staying in the house of the defendant and heading that household. After her death, the plaintiff chased everyone out of the house because she claimed that it was her mother's house and she was entitled to it. In 2018 the plaintiff paid N$600 to the headman to register her claim on the disputed portion of land. A month later this payment was discovered and it was alleged that permission was obtained on a fraudulent basis and the Village Secretary, Saima Fikunawa issued a letter informing the traditional authority that the land application by the plaintiff was not in order and is disputed. The family had a meeting and decided that the plaintiff can built a house on a portion of land that belonged to her parents and that they were willing to allocate it to her, other than the portion of land that forms part of the current dispute. The plaintiff however did not accept that decision.

[6] The defendant was then issued with a letter on the instructions of Senior Councillor Linda Mwaetako reaffirming that she was still the holder of an occupational right over the specific land parcel. Although her grandmother was the one paying the annual land occupation taxes under her card as she was the elder in the household, the actual fees were paid by the defendant. The allegation in the papers is that the plaintiff did not receive such a card, but forged one. The allegations of fraud relates to the manner in which the plaintiff obtained the Certificate of Registration of Customary Land Rights. These allegations were however never raised with the police and as such, stands uninvestigated.

[7] The plaintiff meantime applied to the Ohangwena Communal Land Board for a Certificate of Registration of Customary Land Rights which was issued on 1 July 2019. When the defendant filed her application to the Land Board, she was informed that there was already a certificate issued and after a meeting held on 9 – 10 March 2020 she was informed that the Board is *functus officio* and could not review its own decision. The Defendant then lodged an appeal to the Appeal Tribunal in terms of section 39 of the Communal Land Reform Act, 5 of 2000. Her appeal was heard on 30 August 2021 and was not successful. At that stage there was already proceedings pending before this court but it was stayed pending the outcome of the appeal. There was an indication that the defendant might take the latter decision on review but since the time that the decision was conveyed till the date of hearing of this summary judgement application, no review was filed.

The arguments before court

[8] On behalf of the plaintiff it was argued that she is the lawful holder of the land rights to the disputed piece of land and as such entitled to occupy it. The defendant on two occasions challenged her claim and both those challenges were dismissed. She further claims that in terms of s 26(2)(*b*) of the Communal Land Reform Act, 5 of 2000, a customary land right shall be allocated to the surviving child in the absence of the surviving spouse, and that is what she is, she follows her mother in rights. She further received a certificate of registration of the customary land right from the Traditional Authority and this decision was ratified by the Land Board when they also issued her with a certificate of registration. In terms of the current law, the plaintiff is therefore the legal right holder and this was confirmed by the Appeals Board. In light of the above, it is argued that it is clear that the defendant has no *bone fide* right as her defence is not good in law.

[9] The defendant on the other hand argues that she provided a *bona fide* defence. The land in dispute has been allocated to her by the initial owner, her grandmother. After the said sub-divided her land and allocated a piece of land to her, she paid the required N$600 fee to the headman and proceeded to develop the land, such developments being to the tune of N$1,5 million dollars.

The applicable law and legal arguments

[10] The requirements of rule 60(5)*(b)* which must be satisfied for a successful opposition to a claim for summary judgment was stated as follows in the *locus classicus, Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A by Corbett JA with regard to the previous rule 32, dealing with summary judgment applications:

‘Accordingly, one of the ways in which the defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the

plaintiff/applicant in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

All that the Court enquires into is:

(a) whether the defendant has fully disclosed the nature and the grounds of his defence and the material facts upon which it is founded, and

(b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.

If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word fully, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.'

[11] In general, the approach of the court is as set out by Justice Cheda in *Lofty-Eaton v Ramos*[1] as follows:

'The general approach of these courts in applications of this nature is that cognisance is taken into account that a summary judgment is an independent, distinctive and a speedy debt collecting mechanism utilized by creditors. It is a tool to use by a plaintiff/applicant where a defendant raises some lame excuse or defence in order to defend a clear claim. These courts, have, therefore, been using this method to justly grant an order to a desperate plaintiff/applicant who without doing so, will continue to endure the frustration mounted by an unscrupulous defendant (s) on the basis of some imagined defence. As remedy available to plaintiff/applicant is an extra-ordinary one and is indeed stringent to the defendant, it should only be availed to a party who has a watertight case and that there is absolutely no chance of respondent/defendant answering it, see *Standard Bank of Namibia Ltd v Veldsman*.[2] Rule 32 specifically deals with the said applications. Summary Judgment is therefore a simple, but, effective method of disposing of suitable cases without high costs and long delays of trial actions, see *Caston Ltd v Barrigo*.[3] In that case, Roberts, AJ went further and

[1] *Lofty-Eaton v Ramos* (I 1386/2013) [2013] NAHCMD 322 (08 November 2013).

[2] *Standard Bank of Namibia Ltd v Veldsman*. 1993 NR 391 (HC).

[3] *Caston Ltd v Barrigo* 1960 (4) SA I at 3H.

crystalised the principle as follows: *'it is confined to claims in respect of which it is alleged and appears to the court that the defendant has no bona fide defence, and that appearance has been entered solely for the purpose of delay.'*

[12] Where a summary judgment has been applied for, the respondent is entitled to oppose, if he has a *bona fide* defence and in that opposition he/she must depose to an affidavit where he/she should positively state and show that he/she has a *bona fide* defence to applicant's claim. Respondent must not only show, but, must satisfy the court that he/she has a *bona fide* defence. In furtherance of the satisfaction to the court, respondent must at least disclose his defence and material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence, see *Breitenbach v Fiat SA (Edms) BPK*[4] and *Namibia Breweries Ltd v Marina Nenzo Serrao*.[5] This, however, is not to say that he/she should do so by disclosing all the details and particulars as would be the case of proceedings, see *Maharaj v Barclays National Bank Ltd*[6] and *Breitenbach v Fiat SA*.[7]

[13] The requirement seems to be relaxed to a certain extent as it is not rigorous *per se,* but, is designed to enable a genuine respondent to defend a claim which otherwise would result in applicants' obtaining judgment under circumstances where respondent had a genuine defence. The need for clarity on defendant's part is designed to avoid the entry of intention to defend an action solely to delay an otherwise just claim by plaintiff/applicant.
[9] For that reason, these courts will always seriously consider the granting of a summary judgment and will only do so where a proper case has been made out by applicants. The above principle has been applied in many cases, see also *Crede v Standard Bank of South Africa Ltd* [8] where Kannemeyer, J remarked:

'One must bear in mind that the granting of summary judgment is an extraordinary and drastic remedy based upon the supposition that the plaintiff/applicant's claim is unimpeachable and that the defendant's defence is bogus or bad in law."

[4] *Breitenbach v Fiat SA (Edms) BPK* 1976 (2) SA 226 (T) at 228 B-C.
[5] *Namibia Breweries Ltd v Marina Nenzo Serrao.* (2006) NAHC 37.
[6] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418.
[7] *Breitenbach v Fiat SA 1976* (2) 226.
[8] *Crede v Standard Bank of South Africa Ltd 1988* (4) SA 786 at 789 E.

[14] In *Joseph v Joseph and Joseph v Joseph*[9] the Supreme Court held:

'In the context of the Act, it is clear and just as an important objective that, what was intended was to provide holders of customary land rights security of tenure and by way of registration, a public register of their title is kept so as to avoid any confusion as to their rights. Common law provides a vindicatory action to a possessor, the only way to interpret s 43 of the Act so as to do away with this common law right is to insert the word 'only' in front of s 43(2) to make it read 'only a Chief or a Traditional Authority or the Land Board concerned' may evict a person who occupies land without it being allocated to such person. Whereas the Act vests the relevant Chief, Traditional Authority or the Land Board with *locus standi* as the statutory appointed administrators of communal land to evict persons who occupy land not allocated to them, it does not mean that other persons who have the right to evict such persons are no longer vested with such a right. '

The court further held:

'the plain meaning of s 43 does not give the Chief, Traditional Authority or the Land Board the sole right to evict persons from land not allocated to them. The only change to the common law is that it gives the Chief, Traditional Authorities and the Land Board locus standi to bring eviction proceedings in respect of land they are neither the owners nor the possessors of. As mentioned, there are other persons who may have such rights under common law and there is no indication in the Act that the intention was to abolish their common law rights.

Held that, to grant a person a right which is registered and then say that such person cannot personally protect that right seems to be an absurdity.'

[15] In *Kanguatjivi v Kanguatjivi*[10] the plaintiff was a holder of a registered customary land right pursuant to the provisions of the Act, similarly to the plaintiff in the current matter. She sought an eviction order against the defendant who was a son of her late husband. In this matter Unengu AJ granted an eviction order on the basis that the defendant could not show that he had a better title than plaintiff to the land in question and as such applied the common law position regarding better title.

[16] Regarding the decision whether to grant condonation or not, the application must

[9] Joseph v Joseph and Joseph v Joseph (SA 44-2019 and SA 18-2020) [2020] NASC 22 (30 July 2020)
[10] *Kanguatjivi v Kanguatjvi* (I 309/2013) [2015] NAHCMD 106 (30 April 2015)

meet two requirements. In the matter of *Telecom Namibia Limited v Mitchell Nangolo & 34 Others*[11] Damaseb JP identified the following as principles guiding applications for condonation:

> '1. It is not a mere formality and will not be had for the asking. The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.
> 2. There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.
> 3. It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.
> 4. The degree of delay is a relevant consideration;
> 5. The entire period during which the delay had occurred and continued must be fully explained;
> 6. There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented. (Legal practitioners are expected to familiarize themselves with the rules of court).
> 7. The applicant for condonation must demonstrate good prospects of success on the merits. But where the non-compliance with the rules of Court is flagrant and gross, prospects of success are not decisive.
> 8. The applicant's prospect of success is in general an important though not a decisive consideration. In the case of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*, Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with the rules, should be considered.
> 9. If there are no prospects of success, there is no point in granting condonation.'

Conclusion

[17] The defendants/respondents had to make out a *bona fide* defence against the application brought by the plaintiff/applicant. This includes making a full disclosure of the defence, which they did, as well as showing that the defence is good in law. In this instance, the court finds that the defences disclosed is not good in law and as such no case was

[11] *Telcom Namibia Limited v Nangolo and Others* (LC 33 of 2009) [2012] NALC 15 (28 May 2012)

currently made out why the title and claim of the Plaintiff is not a good one. There is no review application pending nor any further process. As it currently stands, the last decision, the dismissal of the defendant's appeal to the Appeals Board remains the binding decision in this matter. For that reason the court is not granting condonation for the late filing of the answering affidavit of the defendant as there is no prospects of success and summary judgement is granted.

[18] I therefore grant the following:

(1) An order evicting the Defendant from the Plaintiff's customary land

(2) Cost of suit

Judge's signature	**Note to the parties:**
RAKOW Judge	Not applicable
Counsel:	
Plaintiff/applicant	**Defendant/Respondent**
Mr Mwadingi Of Mwadingi Attorneys Windhoek	Mr Shakumu Of Kishi Shakumu & Co. Windhoek