

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

Case Title: MILKA KINDA // JULIEN ALICIA GEINGOS	Case No: HC-MD-CIV-ACT-OTH-2019/01364
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE COLEMAN	Heard on : 31 January 2022 and 1 February 2022
	Delivered on: 1 February 2022
Neutral citation: <i>Kinda v Geingos</i> (HC-MD-CIV-ACT-OTH-2019/01364) [2022] NAHCMD 27 (1 February 2022)	
IT IS ORDERED THAT: <ol style="list-style-type: none">1. The oral lease agreement between the plaintiff and the defendant is hereby cancelled;2. Defendant is hereby evicted from Erf 2252, Wanaheda, Katutura, Windhoek with effect from 1 March 2022; and3. Defendant is ordered to pay plaintiff's costs.4. The matter is removed from the roll and regarded as finalized.	
Following below are the reasons for the above order:	
Introduction [1] This is an action for eviction by the executrix of the deceased estate of her late husband, August Kinda. The defendant is the daughter of the deceased by another mother. She occupies the house at Erf 2252, Wanaheda, Katutura, Windhoek, (the house) which is part of the estate.	

Plaintiff's case

[2] Plaintiff's case is that defendant had been occupying the house since 2018 in terms of an oral agreement between the parties. The terms of the agreement are that defendant would lease the house until it is sold and a deed of sale is signed; defendant would pay an amount of N\$ 7,200 per month; and as soon as a deed of sale is signed defendant will vacate the premises.

[3] Plaintiff's case is further that on or about 28 February 2019 she signed a deed of sale in respect of the house with Sandra Burmeister. It is for a cash sale. Despite communicating this fact to the defendant she refuses to vacate the property. According to plaintiff, defendant also did not make any payments in respect of the lease.

Defendant's case

[4] Defendant's case is that she agreed to vacate the house when it is sold, in the sense that ownership was transferred. She also takes issue with the deed of sale in that clause 15 of the agreement contains a suspensive condition, stipulating that the purchaser must obtain a loan from a financial institution secured by a mortgage against the house. She contends that since no loan was obtained the deed of sale lapsed. She also maintains that she made payments in respect of the lease.

The evidence

[5] Plaintiff and Anne-Doris Kaumbi, a legal practitioner tasked with the administration of the deceased estate, testified in support of plaintiff's case. The defendant is the sole witness for her case.

[6] There are a number of factual differences between the parties which I do not consider material. In my view the term of the oral agreement relating to when the parties agreed the defendant will vacate is material. Ms Kaumbi an officer of this court is unequivocal that the agreement was that defendant will vacate when the deed of sale was signed. I accept her position. The plaintiff understood the arrangement to be that the house is considered sold when the deed of sale is signed. In fact clause 1 of the deed of sale stipulates 'the property hereby sold . . . '.

Conclusion

[7] In my view the defendant became obliged to vacate the property when the deed of sale was signed. Her reliance on clause 15 of the deed of sale is without merit. First of all, she became obliged to vacate the house the moment the deed of sale was signed. Secondly, clause 15 should be considered *pro non scripto*¹ since it is clear the parties to the deed of sale did not intend clause 15 to be part of the agreement. It was intended to be a cash sale.

[8] In any event, it is clear that defendant had been in default of her lease payments. Defendant alleges that she made three payments which plaintiff denies. This in itself justifies the cancellation of the lease agreement between the parties.

Costs

[9] I see no reason why the general principle of costs should not apply in this matter. Thus costs should follow the cause and defendant must pay the plaintiffs costs of suit.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendant
F Gaes <i>of</i> Uanivi Gaes Incorporated, Windhoek	T Luvindao <i>of</i> Dr Weder, Kauta & Hoveka Inc. Windhoek

¹ *C F and P S Investments CC v PPA Lightco CC* 2020 JDR 0143 (GP) at para 40.