

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2020/04553

In the matter between:

**RAUHA HANGULA**

**PLAINTIFF**

and

**KATHILINA SHIRUNDA**

**FIRST DEFENDANT**

**REGISTRAR OF DEEDS**

**SECOND DEFENDANT**

**THE MASTER OF THE HIGH COURT OF NAMIBIA**

**THIRD DEFENDANT**

**Neutral citation:** *Hangula v Shirunda* (HC-MD-CIV-ACT-OTH-2020/04553) [2022]  
NAHCMD 553 (14 October 2022)

**Coram:** USIKU J

**Heard:** 16-18 May 2022 and 6 & 8 June 2022

**Delivered:** 14 October 2022

**Flynote:** Prescription – Acquisitive prescription – Section 1 of the Prescription Act 68 of 1969 – Plaintiff’s possession of the property irreconcilable with genuine belief that she was the owner of the property.

**Summary:** The plaintiff initiated action against the first defendant seeking a declaratory order confirming that she has acquired certain immovable property

through prescription as contemplated in s1 of the Prescription Act 68 of 1969. The first defendant defends the action and launched a counterclaim seeking an order for the eviction of the plaintiff from the property. The court dismisses the plaintiff's claim, upholds the counterclaim and grants eviction order against the plaintiff, together with ancillary relief.

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### ORDER

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1. The plaintiff's claim that she had acquired Erf 6949 Katutura (Extension 16), Windhoek, through acquisitive prescription, is dismissed.
  2. The plaintiff is ordered to pay the first defendant's costs of suit.
  3. The first defendant's counterclaim succeeds, and it is hereby ordered that the plaintiff and all persons holding under her, be ejected from Erf 6949 Katutura (Extension 16), held by the first defendant under Deed of Transfer No T.3176/1989.
  4. The plaintiff is ordered to pay costs of the first defendant occasioned by the counterclaim.
  5. The matter is removed from the roll and is regarded as finalized.
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### JUDGMENT

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USIKU J:

#### Introduction

[1] This matter concerns ownership of an immovable property described as: Erf 6949, Katutura (Extension 16), Windhoek, ("the property"). The property is registered in the names of Sebastian Vitumbo Shirunda and Kathalina Runguro Shirunda ("the first defendant") married in community of property to each other.

[2] The property is, however, occupied by the plaintiff and her family.

[3] In August 2019, the first defendant, relying on *rei vindicatio*, initiated action in the Magistrates Court for the district of Windhoek, for the eviction of certain Kalema

Kalenga and Andreas Kalenga, from the property. Kalema Kalenga is the husband of the plaintiff and Andreas Kalenga is the plaintiff's son. An order for eviction was granted in favour of the first defendant against the Kalengas, on 13 January 2020.

[4] On 11 August 2020, the Kalengas, including the plaintiff herein, were evicted from the property in terms of the eviction order granted by the aforesaid Magistrates' court. However, shortly thereafter, the plaintiff and her family returned and re-occupied the property.

[5] In October 2020, the plaintiff instituted the present action, seeking an order in the following terms:

'(a) Declaring, alternatively, confirming that the plaintiff acquired the immovable property situated at Erf 6949, Madglana Street, Katutura, Windhoek, Namibia through prescription as contemplated in section 1 of the Prescription Act, act 68 of 1969.

(b) Costs of suit (only in the event that the defendants elect to defend the matter, and in that event jointly and severally, the one paying the other to be absolved).

(c) Further and or alternative relief.'

[6] The first defendant defends the action and counterclaims for an order in the following terms:

'1. An order ejecting the Plaintiff and all other unlawful occupants for Erf 6949, Madglana Street, Katutura;

2. Cost of suit;

3. Further and/or alternative relief.'

[7] At trial, the plaintiff and the first defendant, each gave evidence and called no other witnesses.

#### Plaintiff's version

[8] In her testimony, the plaintiff avers that she moved into the property together with her family in 1983. She recalls that her first born was born in 1983 when she had already moved into the property.

[9] The plaintiff further states that she has occupied and has been in possession of the property for over 30 years. When she occupied the property, she did so openly, and with the intention to possess and exercise control over the property. In that manner, she and her family occupied the property and resided on the property and continue to use the property as their residential dwelling.

[10] According to the plaintiff, she occupied the property as if she was the owner and with the intention to acquire the property. She paid for the maintenance work to the property without the knowledge of Mr Shirunda and without seeking his prior consent.

[11] The plaintiff further testified that she knew Mr Shirunda, as she and Mr Shirunda were tenants at the Single Quarters in Katutura. When the property was allocated to Mr Shirunda in 1983, Mr Shirunda moved to Katima Mulilo and then to Rundu and the plaintiff went to stay in the house in 1983 until now.

[12] The plaintiff adds further that, at that time Mr Shirunda was not given ownership of the property. According to her, at that time everyone in Katutura was simply given a lease of the property at a nominal amount. The plaintiff paid for the lease and all other expenses like water and electricity.

[13] In cross examination, the plaintiff stated that Mr Shirunda had invited her husband (Kalema Kalenga) to occupy the property and she accompanied her husband to the property.

[14] When asked by the court about who she leased the property from since 1983, the plaintiff indicated that she leased it from the predecessor of National Housing Enterprise. However, the plaintiff cannot remember when she started paying rent nor does she remember when she stopped paying rent.

#### First defendant's version

[15] The first defendant testified that she was married to Sebastian Shirunda, ("Mr Shirunda"). Mr Shirunda died in April 2005. The first defendant was appointed as the executrix in the estate of Mr Shirunda.

[16] In 1985 Mr Shirunda informed the first defendant that he has found a property in Windhoek. He brought her to Windhoek and showed her the property.

[17] After her appointment as executrix, the first defendant approached Mr Kalenga and asked him to vacate the property. Mr Kalenga requested that he be given more time to find alternative accommodation. According to the first defendant, she gave Mr Kalenga permit to stay only between 1996 to 1999. In 2010 when she approached Mr Kalenga, the latter refused to move out of the property, stating that he had resided on the property for a long time. In 2018 she approached her lawyers to assist her in the matter.

[18] In January 2020, the first defendant obtained judgment and a warrant of eviction against Mr Kalenga and any other persons occupying the property. Mr Kalenga moved out but the plaintiff refused to vacate the property.

### Analysis

[19] The plaintiff rests her case on the possession of the property for 30 years and contends that in terms of s 1 of the Prescription Act 68 of 1969 (“the Act”), she has become the owner of the property. That section provides that:

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.’

[20] The continuous possession required by the section is the physical detention of the thing, with the intention to be the owner of the thing (*animus domini*). In addition, the possession must be peaceably, without a grant on the request of the possessor, and the possession must have been exercised openly, that the owner with the exercise of reasonable care, would have observed it.<sup>1</sup>

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<sup>1</sup> *Stoffberg v City of Cape Town* (1325/2017) [2019] ZASCA 70 (30 May 2019) para. 14.

[21] The mere occupation of a property for thirty years does not necessarily vests the occupier with a prescriptive title to that property. To create a prescriptive title, such occupation must be a 'user adverse' to the true owner and not occupation by virtue of a contract or a lease.<sup>2</sup>

[22] The onus rests on the party that relies on acquisitive prescription to show that his possession or use of the property, satisfies the requirements of the section<sup>3</sup>

[23] In the present matter, the plaintiff testified that she occupied the property since 1983. She paid rent to the predecessor of NHE at the time she moved in and during her occupation. She does not remember precisely when she started paying rent nor does she remember when she ceased paying rent. On 11 August 2020 she and her family were forcefully evicted from the property.

[24] For the plaintiff to have paid rent to NHE (or its predecessor), she must have entered into a lease agreement with NHE. She can, therefore, not claim that during the period that she was paying rent, she was possessing and occupying the property openly as if she was the owner. The payment of rent appears to me to be inconsistent with a genuine belief that she possessed the property as if she were the owner.

[25] On the careful reading of the evidence presented before court, the probabilities favour the version of the first defendant that the plaintiff and her family were granted permission to occupy the property by Mr Shirunda on the terms that they pay for water and electricity accounts. That agreement negates the plaintiff's contention that she possessed the property as if she were the owner of the property.

[26] It is worth noting that the plaintiff had deposed to an affidavit on 13 August 2020, (Exhibit "F") in which she stated among other things that she had been living on the property since 1993 as per agreement with the first defendant. That assertion is inconsistent with a genuine belief that she was the owner of the property. That assertion only reinforces the credibility of the testimony of the first defendant, that

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<sup>2</sup> Ibid.

<sup>3</sup> *Bishop v Stafford* 1974(3) SA 1 at 9D-E.

she had previously allowed Mr Kalenga to stay on the property until he (and his family) finds alternative accommodation, but should stay only up to 1999.

[27] Furthermore, there is the undisputed evidence tendered by the first defendant in regard to a letter (Exhibit 'D') written by the attorneys of Andreas Kalenga, the plaintiff's son, at the latter's instructions, to the effect that Andreas Kalenga's contention was that he was occupying the property on the basis of an agreement he had entered into with Mr Shirunda. The plaintiff did not put forth evidence, apart from her own word, that her occupation of the property stemmed from other factors than from an agreement between the registered owners of the property, on the one hand, and the plaintiff and her family, on the other hand.

[28] In my opinion, the plaintiff has not met the requirements of continuous possession of the property as if she were the owner, for a period of 30 years. On her own version, she was paying rent to NHE, and could not remember when she started paying rent and when she stopped. She could not have genuinely believed that she occupied the property as if she were the owner, while at the same time she was paying rent. In addition, there is evidence that the plaintiff and her family occupied the property on account of an agreement they concluded with Mr Shirunda, and subsequently, concluded another agreement with the first defendant, to the effect that they would occupy the property only until 1999. For those reasons, the plaintiff's reliance on acquisitive prescription stands to be dismissed.

[29] In regard to the first defendant's counterclaim, the first defendant has proved that she was married to Mr Shirunda and the property is registered in their joint names. She is the duly appointed executrix in the estate of Mr Shirunda. The property is being occupied by the plaintiff and her family against her will. The first defendant is therefore entitled to the relief that she seeks.

[30] As regard the issue of costs, I am of the view that costs should follow the result.

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

1. The plaintiff's claim that she had acquired Erf 6949 Katutura (Extension 16), Windhoek, through acquisitive prescription, is dismissed.
2. The plaintiff is ordered to pay the first defendant's costs of suit.
3. The first defendant's counterclaim succeeds and it is hereby ordered that the plaintiff and all persons holding under her, be ejected from Erf 6949 Katutura (Extension 16), held by the first defendant under Deed of Transfer No T.3176/1989.
4. The plaintiff is ordered to pay costs of the first defendant occasioned by the counterclaim.
5. The matter is removed from the roll and is regarded as finalized.

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B USIKU  
Judge



## APPEARANCES:

PLAINTIFF: N Tjombe  
Tjombe–Elago Inc., Windhoek

DEFENDANT: V Lutibezi  
Of K Kamwi Law Chambers, Windhoek