

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2020/00474

In the matter between:

KENNEDY SAMPAYA MBANGU

1ST APPLICANT

RUTH NTWALA MBANGU-LUBINDA

2ND APPLICANT

and

HAMPHREY KALOKELA

1ST RESPONDENT

ZAMBEZI COMMUNAL LAND BOARD

2ND RESPONDENT

MASUBIA TRADITIONAL AUTHORITY

3RD RESPONDENT

MINISTER OF AGRICULTURE, WATER & LAND REFORM

4TH RESPONDENT

Neutral citation: *Mbangu v Kalokela* (HC-MD-CIV-MOT-GEN-2020/00474) [2023]
NAHCMD 119 (16 March 2023)

Coram: USIKU J

Heard: 10 November 2022

Delivered: 16 March 2023

Flynote: Interdict – Communal land – Certificate of registration of customary land rights in terms of the Communal Land Reform Act 5 of 2002 is evidence of title

over the communal land concerned – Court granting interdict prohibiting the respondent from using or cultivating land in respect of which applicants hold customary land rights.

Summary: The applicants brought application seeking ejectment or interdict against the respondent, in respect of certain two portions of communal land. The applicants allege that the respondent, now then, enters upon the communal land in respect of which they hold customary land rights, for purposes of clearing it for cultivation. The court finds that the respondent has no right to enter upon, or use, the land in question and grants the applicants the interdictory relief.

ORDER

1. The first respondent is interdicted from entering upon, using or occupying the land in respect of which the first and second applicants hold customary land rights, as more fully described in the certificates of registration No CCLB-001800 and CCLB-001799.
 2. The first respondent is ordered to pay the costs of suit of the first and second applicants.
 3. The matter is removed from the roll and is regarded as finalized.
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JUDGMENT

USIKU J:

Introduction

[1] In this matter the first and second applicants have brought an application for the ejection of the first respondent from certain two portions of land situated in Bukalo Communal Area, in Zambezi Region. The application is brought on the basis that the applicants are holders of certificates of registration of customary land rights over the aforesaid portions of land and that the first respondent occupies and/or uses such land.

The parties

[2] The first applicant is Kennedy Sampaya Mbangu. The second applicant is Ruth Ntwala Mbangu-Lubinda.

[3] The first respondent is Hamphrey Kalokela. The second respondent is Zambezi Communal Land Board. The third respondent is Masubia Traditional Authority. The fourth respondent is the Minister of Agriculture, Water and Land Reform.

[4] The second to the fourth respondents have not opposed the application. In this matter, I shall refer to the first respondent as “the respondent” except where the context otherwise indicates.

Background

[5] The first applicant is a holder of customary land rights by virtue of certificate of registration No CCLB-001800 in respect of the land described therein. Whereas the second applicant holds customary land rights by virtue of certificate of registration No CCLB-0017899 in respect of the land described therein.

[6] The applicants allege that the respondent occupies or uses portions of communal land in respect of which they hold customary land rights.

[7] On 11 December 2019, the applicants addressed a letter to the respondent alleging that the respondent, from time to time, claims ownership of the applicants' portions of land and disturbs the applicants' peaceful occupation and possession thereof and demanded that the respondent desists from doing so.

[8] On or about 23 November 2020, the applicants brought the present application seeking an order in the following terms:

‘1. Ejectment of the first respondent on any portion of land that fall within the scope of the approximate size of land prescribed in the applicants' certificates of registration

of recognition of existing customary land right that the first respondent occupies or uses in any way.

2. In the event that an order in prayer 1 hereof is granted, an order directing the first respondent to vacate the aforesaid land, and, to remove any implement, equipment and or any item that he may have brought or kept on the aforesaid land, within 21 days from date of this court's order.

3. In the event that an order in prayer 2 hereto is granted and the first respondent refuses to vacate the aforesaid land or, fails in any way to vacate the aforesaid land, and or, refuses or fails to remove any implement, equipment and or any item that he may have brought or kept on the aforesaid land, within the 21 days as ordered by the court, an order directing the Deputy Sheriff for the Magisterial district of Katima Mulilo to immediately evict the first respondent from the aforesaid land and to remove and dispose of in any manner any implement, equipment and or any item that the first respondent may have brought or kept on the aforesaid land.

(In the alternative to prayer 1-3)

4. In the event that it is found that the first respondent occupies or uses the aforesaid land intermittently and he is not occupying or using the aforesaid land at the time when this application is heard by this Honourable court, an order interdicting the first respondent from occupying or using the aforesaid land in any manner in the future.

5. An order directing the first respondent and any other respondent that will oppose this application to pay the costs of this application on a scale as between attorney and own client, alternatively, on any scale that the court may determine, the one paying to be absolved.'

[9] The respondent opposes the application.

Applicants' application

[10] In their application, the applicants assert that the respondent unlawfully occupies and uses the portions of land in respect of which the applicants hold customary land rights.

[11] It is also alleged in the application that, in 2001, a land dispute arose between the late father of the first applicant and certain third parties over the land which is the subject of the present proceedings, and that on 14 November 2021, the Masubia Traditional Authority determined that dispute in favour of the father of the first applicant.

[12] During 2012, the applicants applied to the Zambezi Communal Land Board for the recognition and registration of their existing customary land rights, in respect of their respective *crop* fields situated at Uyoye village in Bukalo Area in Zambezi Region. The Zambezi Communal Land Board approved the applications in 2013 and issued certificates of registration of customary land rights No CCLB-001800 to the first applicant and No CCLB-0001799 to the second applicant.

[13] In October 2019, the first applicant received a letter dated 1 October 2019 from Zambezi Communal Land Board, informing him that the board has received an appeal letter from the Kalokela family, against the decision of the Masubia Traditional Authority in respect of the land dispute between the first applicant's family and the Kalokela family. In the letter, the board called upon both parties to be patient until they receive feedback from the board.

[14] In the same month, the first applicant received a letter dated 8 October 2019, inviting him to attend a hearing to be held on 25 October 2019, on an appeal by a certain Philemon Kalokela and family against the decision of the Masubia Traditional Authority. The land presently in dispute was the subject of the aforesaid hearing.

[15] Again, in December 2019, the first applicant received another letter from the board inviting him to attend a hearing on the same dispute. After receipt of this letter the first applicant sought legal advice and thereafter, his legal practitioner addressed a letter to the respondent requesting the latter to desist from disturbing the first applicant's peaceful occupation and possession of the land in question.

[16] During September 2020, the first applicant discovered that the respondent had started clearing portions of land belonging to the first and second applicants in preparation for the upcoming ploughing season. According to the first applicant, the respondent continues to do so, to date. The first applicant submits that the conduct of the first respondent leaves the applicant with no option but to approach the court for appropriate relief.

[17] The applicants therefore, submit that they are entitled to the relief set out in their notice of motion.

The respondent's opposition

[18] In his opposition, the respondent raises three points *in limine*, namely that:

(a) the founding affidavit served on him is not initialed on all pages by the deponent thereto, and by the commissioner of oaths, and therefore there is no proper application before the court and that the application be dismissed for that reason;

(b) there is no allegation made by the first applicant, in the founding affidavit, that he is authorized to bring the application on behalf of the second applicant. Since the first applicant is not so authorized by the second applicant, any relief sought on behalf of the second applicant be struck out; and that;

(c) there is an appeal still pending before the Zambezi Communal Land Board over a dispute concerning the same land and that the applicants are not entitled to bring the present application, before the appeal is finalised. The respondent submits that the application be dismissed for that reason.

[19] At the hearing, the respondent abandoned the first point *in limine*.

[20] In regard to the merits of the application, the respondent states that he does not occupy the applicants' land, and the only land he and his family occupy is a land situated in Kalokela village, which he has right to occupy. In other words, the respondent denies that he is in occupation of the applicants' portions of land situated at Uyoye village.

[21] The respondent submits that the applicants have not made out a case for the relief prayed for, and that their application be dismissed with costs.

Applicants' replying affidavit

[22] In a replying affidavit, the applicants state that the respondent did not file his answering affidavit on or before 8 July 2022, as was directed by the court order dated 14 June 2022 but filed it after hours, at 21h00, on 8 July 2022, and was only served on 11 July 2022. The applicants submit that, in the absence of a condonation application, the respondent is barred from filing an answering affidavit.

[23] The applicants also filed, together with the replying affidavit, a special power of attorney executed by the second applicant, granting the first applicant authority to institute the present proceedings on her behalf.

Condonation application

[24] On 31 October 2022, the respondent filed a condonation application in respect of the late filing of his answering affidavit. The condonation application is not opposed.

Analysis

[25] I shall first deal with the two points *in limine* raised by the respondent. Regarding the point *in limine* concerning the authority of the first applicant to bring the present proceedings on behalf of the second applicant, it was stated in the matter of *Namibia Protection Services (Pty) Ltd v Hainghumbi*¹ that, where the issue of authorization of the proceedings is raised in the answering affidavit, an applicant may bring documents proving the authority or the ratification of the institution of the proceedings, in reply. Furthermore, the institution of the proceedings may be ratified subsequent to being launched, even if there was no authority at the outset.²

[26] In the present matter, the first applicant has filed a special power of attorney executed by the second applicant authorising him to institute the present proceedings on her behalf. Therefore, the respondent's point *in limine* on the issue of authority, has no merit and stands to be dismissed.

[27] In regard to the point *in limine* about a pending appeal before the Zambezi Communal Land Board, s 39(1) of the Communal Land Reform Act 5 of 2002, ('the Act') provides that, a person aggrieved by a decision of a Chief or a Traditional Authority or any board, under the Act, may appeal against such decision to an appeal tribunal appointed by the Minister for the purposes of the appeal concerned.

¹ *Namibia Protection Services (Pty) Ltd v Hainghumbi* (HC-MD-LAB-APP-AAA-2021/00046) [2022] NALCMD 15 (23 March 2022), para 29.

² *Ibid.*

[28] It is common cause that the Zambezi Communal Land Board has ratified the allocation of the land concerned and has caused the applicants' customary land rights to be registered in terms of the Act.

[29] An appeal, recognized in terms of the provisions of the Act, is an appeal brought pursuant to the provisions of s 39(1) of the Act. On the evidence before court, no such appeal was launched and therefore, there is no appeal pending before the parties in regard to the same dispute pending before court. The point *in limine* on this aspect therefore, has not merit and stands to be dismissed.

[30] In regard to the first respondent's condonation application, I am of the opinion that the delay in filing the answering affidavit was not unreasonable, furthermore I am satisfied that the first respondent has furnished a reasonable explanation for the delay, in the circumstances. The condonation application, therefore stands to be granted.

[31] Insofar as the merits of the application is concerned, it is apparent that, the primary relief sought by the applicants is the ejection of the respondent from the land in question. The first respondent denies occupation of the land.

[32] The applicants have not alleged nor proved, a continuous occupation of the land by the respondent. The applicants' complaint is that the respondent continually clears the land with the intention of cultivating thereon. Indeed, in their notice of demand addressed to the respondent, dated 11 December 2019, the applicants did not demand that the respondent vacates the land, but demanded that the respondent desists from disturbing the applicants' occupation and possession of the land. In summary, the applicants' complaint is that the conduct of the respondent in clearing the land for cultivation (or similar usage), violate their rights as holders of customary land rights over the land. The evidence, rather points in the direction that the respondent uses applicants' land at irregular intervals for purposes of cultivation.

[33] Similarly, the applicants have not adduced evidence that the respondent has brought or kept any implements, equipment, or items on the land.

[34] In my opinion, in the absence of evidence that the respondent is in occupation of the land, or has brought upon the land implements, equipment or items, the prayer for ejection from the land, or for the removal of implements and equipment therefrom, cannot be granted.

[35] However, I am of the opinion that the applicants, as holders of customary land rights, are entitled to exclusive enjoyment and usage of their land. The respondent has no right to enter upon the land in question without the permission of the applicants.

[36] The respondent's conduct in entering upon the land for purposes of clearing it for ploughing, constitutes a wrongful interference with the applicants' exclusive right to use the land and amounts to an injury committed against the applicants.

[37] On the evidence, the respondent occasionally clears the land for aforesaid purposes and it appears that, unless prohibited from doing so, the interference would continue.

[38] I am further of the opinion that there is no other form of adequate redress to provide protection to the applicants other than an interdictory relief. The court shall therefore, grant the applicants the interdictory relief they seek.

[39] Insofar as the issue of costs is concerned, I am of the view that the general rule that costs follow the event, must find application.

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

1. The first respondent is interdicted from entering upon, using or occupying the land in respect of which the first and second applicants hold customary land rights, as more fully described in the certificates of registration No CCLB-001800 and CCLB-001799.
2. The first respondent is ordered to pay the costs of suit of the first and second applicants.
3. The matter is removed from the roll and is regarded finalized.

B USIKU
Judge

APPEARANCES:

APPLICANTS: C Mayumbelo
Of Chris Mayumbelo & Co, Windhoek

FIRST
RESPONDENT: L Ihalwa
Of Kishi Shakumu & Co. Inc., Windhoek