

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

PRACTICE DIRECTIVE 61

Case Title: Lydia Kandjimbi and Phillemon Joseph Juliana Roeder The Masters of the High Court of Namibia The Registrar of Deeds The Magistrate for the District of Usakos	Plaintiff 1 st Defendant 2 ND Defendant 3 RD Defendant 4 TH Defendant 5 TH Defendant	Case No: HC-MD-CIV-ACT-OTH-2020/04258 Division of Court: Main Division Heard on: 6 March 2023
Heard before: Honourable Lady Justice Rakow	Delivered on: 13 June 2023	
Neutral citation: <i>Kandjimbi v Joseph</i> (HC-MD-CIV-ACT-OTH-2020/04258) [2023] NAHCMD 314 (13 June 2023)		
Order: 1. The claim is dismissed with costs, such costs to be on a party-party scale. 2. The matter is finalized and removed from the roll.		
Reasons for order:		
RAKOW J <u>Introduction</u>		

[1] The plaintiff is Lydia Kandjimbi, an adult female person currently unemployed and residing at erf no 13 Omulunga Street, Windhoek, The first defendant is Phillemon Kaboy Joseph N.O. He was the executor for the late estate of Toivo Kandjimbi Huafiku Thomas. The second defendant, Juliana Roeder N.O. is now appearing on behalf of the first defendant. The third defendant is the Master of the High Court of Namibia but she did not file any opposition to this case, similarly, the fourth defendant is the Registrar of Deeds, and the fifth respondent, is the Magistrate for the district of Usakos.

History

[2] On 25 January 2005, the plaintiff's father Mr Toivo Kandjimbi Thomas passed away. He was the biological brother of Phillemon Kaboy Joseph. Mr Thomas was from the Aawambo Traditional Community and he died without a will. Part of his estate included a plot in Hakahana measuring 178m².

[3] It seems that the biological children and possible common-law wife of the deceased were not consulted during the deliberations regarding the estate but it is also true that the possible common-law wife did not testify, neither did the first defendant who is deceased or the mother of the deceased and the first defendant, who is also deceased. The plaintiff testified that they traveled to the North at the time of the death of her father and that no meeting was held. They only saw that the first defendant is taking all her father's livestock and properties. They were only left with a house at the village.

[4] On 19 November 2010 at Usakos the first defendant was appointed as the executor of the estate of the late Mr Toivo Kandjimbi Thomas. He then transferred the Hakahana erf into his name on 12 August 2011. After he passed on, the second defendant became the executor of his will and threatened the plaintiff and her siblings with legal action to get them to move from the house in Hakahana. The claim of the first defendant is basically that she wants her father's house back.

The claim

[5] The plaintiff is claiming for the following:

- a) Reviewing and setting aside the decision of the 5th Defendant to appoint the 1st Defendant as the executor of the estate of the late Toivo Kandjimbi Thomas;
- b) Reviewing and setting aside a decision of the 4th Defendant to transfer Erf 42, Hakahana into the name of the 1st (sic) Defendant;
- c) An order directing the 3rd Defendant to appoint an executor in terms of the law within a period of 30 days from the date of judgement;
- d) An order in terms of which the Defendants who oppose this action are directed to pay the cost of the Plaintiff on an Attorney-Client scale;
- e) Further and or alternative relief.

The evidence

For the plaintiff

[6] Penehafo Simon testified that she is the widow of the late Toivo Kandimbi Thomas. She is the plaintiff's biological mother and the first defendant is her brother-in-law. She and her deceased husband had seven children together. After her husband's death, there were no issues but at a later stage her brother-in-law, the first defendant told them that he was now the rightful owner of the house. They discovered that he transferred the house to his name without discussing it with her or her children.

[7] They also discovered that he appointed himself as executor and indicated that the deceased was not married. She got married traditionally to her deceased husband in 1986 in the North. She and the deceased had children together and he took her to a homestead in the North which they built together. The lobola paid for her was one cow. She admitted that according to the death certificate of the deceased, it indicated that he was single. A copy of the death certificate was handed in as an exhibit. She denied that the family agreed that the Hakahana property must be transferred to the first defendant.

[8] The plaintiff, Lydia Kandjimbi testified that the first defendant was her uncle, the brother of her father. She lived with her father and mother in the Hakahana house. Her father passed away on 25 January 2005 and they traveled to the North for his funeral. There was no meeting held at the village as to how the estate must be divided and who was to be appointed as the executor of the estate. She was eighteen years old at the time of her father's death and her youngest sibling was two years old.

[9] She further testified that the summons in this matter was issued in 2020 only because that was the time they were told to leave the house. She heard about other immovable property in Usakos but only knew about the Hakahana house because her parents also stayed there. She saw that the value of the house was about N\$70 000 on the deed documents. The information provided for the death certificate was given in 2018 by the eldest sister of her deceased father.

For the defendants

[10] Juliana Roeder testified on behalf of the first and second defendants. She is the Executor of the estate of the first defendant who was her late husband. She remembered that the father of the plaintiff, Mr Toivo Kandjimbi Thomas passed away on 25 January 2005. On 17 November 2010, the first defendant was appointed as executor of the estate of the late Mr Thomas at the Usakos Magistrate's Court. On 22 June 2011, the first defendant caused the transfer of erf 42, Hakahana into his name. On 22 September 2012, the first defendant passed away and left her, his spouse to whom he was married in the community of property behind.

The arguments

[11] It was argued on behalf of the plaintiff that it is common cause that the applicable customary law was not proven during the trial in this matter. The defendant is therefore not able to rely on customary law because this was not proven. There is further no evidence that there was no decision made by the family members and no consultation took place. There is also no evidence of any decision taken in terms of customary laws and practices. It is also common cause that the defendant was a secondary witness. Most of what she tried to confirm under oath, unfortunately, amounts to hearsay evidence. She was not present at any of the meetings which she purported to testify for.

[12] The plaintiff further argued that in view of the need for the Honourable Court to do justice between man and man, and in view of the circumstances of this case, we humbly submit that the plaintiff has proven her case on a balance of probabilities and that the prayers contained in her particulars of claim should succeed.

[13] On behalf of the defendants it was argued that it was claimed by the plaintiff that the value of the deceased's estate exceeded the jurisdiction of the fifth defendant, the plaintiff could not indicate what the value of the estate was. It was argued that no evidence was led to prove that

the Magistrate of Usakos (fifth defendant) indeed acted ultra vires.

[14] The customs observed in the reserve (as opposed to customary law) can be proved in the same manner as any other custom, i.e by ordinary persons who know the nature of the customs and the period over which they have been observed. It has authoritatively been held that the party relying on such a custom must prove it beyond a reasonable doubt.

[15] The deceased is native, had no valid will, and if married, his marriage was out of the community of property. In light of the above-stated legal provisions, it is our submission that the deceased's estate was to be distributed in accordance with Aawambo (Ovambo) customary law/customs, whereby both the plaintiff and her mother are not legally required to be consulted.

[16] As per *Nehemia*¹, it was argued children inherit nothing from their deceased fathers, but the property return matrilineally to his clan. If a father wants to give something to his children, he must do so when still alive or write a valid Will. Those customary law/customs and/or practice is still applicable in Namibia in accordance with Article 66 of the Namibian Constitution. It is axiomatic that the plaintiff cannot inherit from her father who died intestate. In terms of Aawambo customs, she is automatically barred from inheriting from her father. Doing so will be contrary to the customs. It was therefore not a legal requirement for the plaintiff to be consulted regarding her father's estate. She has no legal rights in the property.

[17] The plaintiff could not prove that the deceased's estate was beyond the jurisdiction of the Magistrate of Usakos (more than N\$100 000: One Hundred Thousand Namibia Dollars). The only evidence before Court is Exhibit B which indicates that the value of the property, as of 12 August 2011, in the amount of N\$70 000 (Seventy thousand Namibia Dollars). That evidence was not disputed by the plaintiff at all and, the Court should accept it as the true and correct value of the property at the relevant time.

Issues for determination

[18] What law or regulation was applicable at the time of the death of the father of the plaintiff? What is the impact of the fact that the parents of the complainant were married in terms of customary law, if they were so married? How does that affect the case of the plaintiff?

Legal considerations

¹ *Gabriel v Nehemia* (HC-MD-CIV-MOT-GEN-2018/00367) [2019] NAHCMD 564 (6 December 2019).

[19] In terms of the Native Administration Proclamation 15 of 1928 the following is said about succession:

'18. Succession

(1) All movable property belonging to a Native and allotted by him or accruing under native law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under native law and custom.

(2) All other property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to native law and custom.'

[20] In the matter of *Gabriel v Nehemia* (HC-MD-CIV-MOT-GEN-2018/00367) [2019] NAHCMD 564 (6 December 2019), the factual matrix was summarized by Deputy Judge President, Angula DJP as follows:

[36] It is common cause that the deceased as well as the parties to the present proceedings are black persons. It is further common cause that the deceased and the respondent were married out of community of property. As outlined herein before, when I dealt with the historically statutory provisions of intestate succession amongst various ethnic groups in Namibia, it emerged that intestate succession in respect of black persons has been regulated by the provisions of the Native Administration Proclamation, 1928. My finding is that the provisions of the Intestate Succession Ordinance, 1946, never regulated intestate succession in respect of black persons, but only regulated and still regulates interstate succession in respect of white persons.

[37] It is argued on behalf of the respondent that since sections 18(1), (2), (9) and (10) of the Native Administration Proclamation, 1928 and the Regulations published in GN 70 of 1954 have been repealed, the statutes regulating the intestate succession of the deceased's estate in the present matter are the Intestate Succession Ordinance, 1946 and the Intestate Succession Amendment Act, 2005.

[38] The respondent's argument is premised on the incorrect reading of the Intestate Succession Amendment Act, 2005 in that, that Act did not repeal the Regulations promulgated in Government Notice 70 of 1954. This is because subsection 1 of section 1 the Act reads: 'Section 18 of the Native Administration Proclamation, 1928 is amended by the repeal of subsections (1), (2), (9) and (10).' No mention is made of the Regulation published in GN 70 1954 having been repealed. As a matter of fact, the said Regulations are still on the statute book.

[39] It is further clear, in my view, from the reading of section 2 of the Intestate Succession Amendment

Act, 2005 that Act retained and did not repeal the rules of intestate succession in respect of estates of black persons. In this connection section 2 reads:

'Despite the repeal of the provisions referred to in subsection (1), the rules of intestate succession that applied by virtue of those provisions before the date of their repeal continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said provisions not been repealed'.

[40] It follows therefore, in my view, that from the reading of the provisions of section 2 of the Intestate Succession Amendment Act, 2005, the intestate succession Regulations which apply to intestate succession estates of deceased black persons, are still applicable.

[41] There is a further reason why the argument advanced on behalf of the first respondent cannot be sustained. This is: the Estates and Succession Amendment Act, 2005 which repealed subsections (1), (2), (9) and (10) of the Native Administration Proclamation, 1928, did not stipulate that since those provisions have been repealed, the provisions of the Intestate Succession Ordinance, 1946 will hence forth apply to all intestate successions in the Republic. It thus fair to conclude that had the Legislature intended that the provisions of the Intestate Succession Ordinance, 1946 would apply to the estates of black persons following the repeal of the aforesaid subsection of the Native Administration Proclamation, 1928, it would have said so in clear and precise language. As matters stand, the first respondent's argument that the provisions of the Intestate Succession Ordinance, 1946 apply to the deceased estates of all persons in the Republic and thus to the estates of the deceased in the present matter, is not supported by any evidence or law. It is baseless and is liable to be rejected. I proceed to apply the intestate succession rules published in GN 70 of 1954 to the facts of the present matter.

[42] As regards the provisions of regulation 2(a)(i) of the regulation published in GN 70 of 1954, it is common cause that the deceased, at the time of his death was not a partner in a marriage in community of property or under ante-nuptial contract. Section 17(6) of the Native Administration Proclamation, 1928, provides that the marriage between black persons solemnised north of the Police Zone is automatically out of community of property. The deceased and the respondent were married at Engela in the Ohangwena Region, which is situated north of the Police Zone. This regulation 2(a)(i) therefore does not apply to the present matter.

[43] As far as the provisions of regulation 2(a)(ii) are concerned, it is common cause that the deceased was not at the time of his death a widower or divorcee, of a marriage in community of property or under an ante-nuptial contract and was not survived by a partner to a customary union entered into subsequent to such marriage. Accordingly, his estate cannot devolve as if he were a white person and thus the provisions of the Intestate Succession Ordinance, 1946 do not apply to the deceased's estate in the present matter.

[44] Lastly, as regards the provisions of regulation 2(b) it is common cause that the deceased does not fall in any of the classes stipulated in regulation 1(i) or (ii). It follows therefore that the deceased estate

'shall be distributed according to native law and custom' as per regulation 2(b).

[45] In the light of the conclusion I have arrived at, as regard to applicable law, it follows as a matter of law that the estate of the deceased is to be administered and distributed according to customary law as stipulated by regulation 2(b) of the Regulations published in GN 70 of 1954. I proceed to consider the respondent's alternative argument.

[46] The respondent argues, in the alternative, that if it is found by this Court, that the provisions of the Intestate Succession Ordinance, 1946 are not applicable to the deceased's estate in the present matter, then in that event, it is submitted, the applicant has failed to provide a *prima facie* proof of the inheritance lineage of his family.

[47] Professor Amoo in his book² *Property Law in Namibia*, correctly, in my view, points out that the customary rules on intestate succession are different from community to community, depending on whether a particular community follows a matrilineal or patrilineal system of succession. It follows therefore that with regard to immovable property, the rights of a widow of such marriage will be determined by the relevant customary law.

[48] It is a matter of record and general knowledge that the Ovambo community, to which the parties in this matter belong, follows a matrilineal system. Historian Martti Eirola, a Finnish missionary who was born and bred in what was then Ovamboland states in his book, *The Ovambogefahr; the Owamboland Reservation in the Making (1992)* about the intestate succession amongst the Ovambo traditional community at page 41 as follows:

'There was no common property within the household, but everything was divided between the master, his wives and his fully-grown children. When a man died, his wives and children inherited nothing from him, but the property returned matrilineally to his clan. Correspondingly, a man has no right to his wife's property, as it belonged to her clan.'

[49] In my view the facts of the present matter support what Eirola says in his book. This is demonstrated by the fact that the property was allocated by the family members to the deceased's mother and not to the deceased paternal uncles. This fact is further demonstrated by the fact that before the deceased's mother died it was agreed between the applicant and the deceased's mother and the members of the family of the applicant that the applicant, as a maternal cousin to the deceased, would inherit the property.

[50] I have therefore arrived at the conclusion that there is sufficient evidence before this Court which proves that the applicant's family lineage follows the matrilineal rules of inheritance. The respondent not being related to the deceased in any degree of consanguinity, as Eirola states, in terms of the rules of intestate succession of the Ovambo, has no right to inherit from her deceased husband.'

² Amoo SK: *Property Law in Namibia* 2014 at page 214-215.

[21] In *Kaputuaza v Executive Committee of the Administration for the Hereros and Others*³ wherein the court, dealing with the admissibility of native customs, stated as follows:

‘Evidence was tendered concerning the alleged Herero customary law and considerable time was spent in canvassing this issue and questioning the qualifications of the persons who tendered the evidence. Mr Botha contented that customary law should be proved by qualified experts in the same manner as foreign law. It seems to me, however, that in so far as Herero customary law might be applicable, such law is part of the law of South West Africa of which the Court can take judicial notice; consequently it need not be proved in the same manner as foreign law. In the process of taking such judicial cognisance this Court may inform itself from history books. (See the remarks of Fagan CJ in *Consolidated Diamond Mines of South West Africa Ltd v Administrator, SWA, and Another* 1958 (4) SA 572 (A) at 610A.)’

Conclusion

[22] From the above, it is clear that the Ovambo follow the matrilineal rules of inheritance and as such the maternal family of the husband, although traditionally married, stands to be the parties inheriting from the deceased. That is the default possession in law as per the extract from Gabriel which was by the defendant quoted. No additional traditional law was proved by the parties. This remains the default position. In the arguments placed before the court, there is no reason put forward for the position to change. For that reason, it is the order of the Court that the first respondent was indeed the holder of the right to the house, and as such the second respondent remains the legal holder of the right to the property in Hakahana.

[23] The claim is therefore dismissed with costs.

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

1. The claim is dismissed with costs, such costs to be on a party-party scale.
2. The matter is finalized and removed from the roll.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable

³ *Kaputuaza v Executive Committee of the Administration for the Hereros and Others* 1984 (4) 295.

Counsel:	
Plaintiff:	1st and 2nd Defendant:
K Amoomo Of Kadhila Amoomo Legal Practitioners, Windhoek	E Nangolo Of Sisa Namandje & Co. Inc., Windhoek