

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI  
JUDGMENT**

CASE NO: HC-NLD-CIV- ACT-DEL-2017/00228

In the matter between:

**ONGWEDIVA TOWN COUNCIL**

**APPLICANT**

and

**SEM AMUNYELA KAVILI  
RESPONDENT**

**1<sup>ST</sup>**

**REBBECA MIKA**

**2<sup>ND</sup> RESPONDENT**

**MARTHA NDAHAFI**

**3<sup>RD</sup> RESPONDENT**

**RUBEN NGHOOMOKA**

**4<sup>TH</sup> RESPONDENT**

**JOHANNA NDUME**

**5<sup>TH</sup> RESPONDENT**

**MARIANA SHAANIKA**

**6<sup>TH</sup> RESPONDENT**

**IIHELELE ELLSIN**

**7<sup>TH</sup> RESPONDENT**

**SHIKDONG MATHEUS SHIIMI**

**8<sup>TH</sup> RESPONDENT**

**ANGULA DANIEL**

**9<sup>TH</sup> RESPONDENT**

**HANGULA LUKAS**

**10<sup>TH</sup> RESPONDENT**

**JOHANNES MUKAMBA PAULUS**

**11<sup>TH</sup> RESPONDENT**

**VAPOPYA EPIFANIA KAULINGE**

**12<sup>TH</sup> RESPONDENT**

**MAGGY OMAGANO NANGOLO**

**13<sup>TH</sup> RESPONDENT**

**PENELAO SELMA SILVERA**

**14<sup>TH</sup> RESPONDENT**

**IPANDULWA NEKAVU**

**15<sup>TH</sup> RESPONDENT**

**ONDALYOKWIITHANA NENKAVU**

**16<sup>TH</sup> RESPONDENT**

**Neutral citation:** *Ongwediva Town Council v Kavili* (HC-NLD-CIV-ACT-DEL-2017/00228)  
[2018] NAHCNLD 35 (16 April 2018)

**Coram:** CHEDA J  
**Heard:** 08 March 2018  
**Delivered:** 16 April 2018

**Flynote:** In a summary judgment application where respondent opposes the application and shows that there are disputes of facts the court should not grant the application but allow the matter to proceed to trial. The court should bear in mind that the majority of people in Namibia are indigent and do not fully understand legal principles. They should accord them sufficient time for them to understand.

**Summary:** Applicant (the plaintiff) sued respondents (the defendants) for ejectment based on its ownership of a piece of property. Respondents opposed and raised a question of disputed facts. The court held that where a dispute of facts is genuine, the case cannot be resolved on the papers. Matter referred to trial.

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### ORDER

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1. The application for summary judgment is dismissed.
2. The parties must bear their own costs.
3. The matter is to proceed to trial and must be placed back on the Case Management Roll.

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### JUDGMENT

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CH

EDA J:

[1] This is an application for summary judgment. Plaintiff is Ongwediva Town Council, a local authority in Namibia while 1-17<sup>th</sup> respondents are villagers around Ongwediva.

[2] Plaintiff issued summons out of this court for eviction and/ejection of defendants and the particulars of claims are as follows:

1. Declaring the planning, surveying, allocation, partitioning, alienation and/or subdivision of the land including the erection of the permanent structures on the land falling within the Ongwediva Town Lands as unlawful and of no force and effect.

2. Directing the second to the third Respondents/defendants and any other respondent, to dismantle and/or remove their structures on the said Land within Town Land No. 881, Ongwediva Town and which is part of the Ongwediva Town Lands on or before the expiry thirty days from the date of the order of the Honourable Court directing and/or ordering the Respondents/defendants to do so.

3. Alternatively, if the Respondents/Defendants fail to comply with the order of the above honourable court referred to in paragraph 2 above, directing the Deputy sheriff for the district of Ongwediva to dismantle and/or to remove those structures within town land No. 881 Ongwediva Town and which is part of the Ongwediva Town Lands, at the Respondents'/Defendants' costs.

4. An order evicting the Respondents/Defendants from the Applicant's property which is Ongwediva Town.

5. In the event that the defendants fail to vacate the premises, an order directing the Deputy Sheriff for the district of Ongwediva to evict the Respondents/Defendants and remove all the structures.

6. Costs of suit on an attorney own client scale'.

[3] Defendants now (respondents) defended this action. Plaintiff (now applicant) in turn applied for a summary judgment which was opposed by the respondents. In the opposition, respondents raised a number of issues and argued that there are disputes of facts in this matter which cannot be resolved on papers. In support of that application they relied on the affidavit filed by first respondent who is the Headman of the property. In that affidavit he chronicled the historical background of this land dispute.

[4] It is our legal position that a summary judgment application is determined on motion proceedings except where a dispute of facts has arisen which cannot be resolved on papers. This is trite law. The test for the existence or otherwise of a dispute of facts was formulated in the case of *Stellenbosch Farmers Winery (Pty) Ltd v Stellenbosch Winery Ltd* 1957 (4) SA 234 (C) at 235 E-G where *Van Wyk J* (with whom *De Villies JP* and *Rosenow J* concurred) stated:

'...where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order. ...Where it is clear that facts, though not formally admitted cannot be denied, they must be regarded as admitted.'

[5] This rule has been with us for a long time and has been followed in numerous cases, see also *Tamarillo (Pty) Ltd v Aitken, BN, (Pty) Ltd* 1982 (1) SA 398(A) at 430 – 431 and the famous *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 at 634 H-I where *Corbett JA* remarked:

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.'

[6] First respondent is the Headman of the area where respondents have properties. In his affidavits he alluded to the fact that he was responsible for allocating these plots to them and according to him, this was in accordance with the laws of the country which empowered him to do so. However, applicant's view is contrary to all these averments. In my view these diametrically opposed views are of a factual nature which cannot be resolved on the papers.

[7] First respondent is of the strong view that his constitutional right in the handling of this piece of land was trampled upon as he is a custodian of the land. This again is a factual issue. It is these court's approach that only a genuine and a *bona fide* dispute of facts should exist to the satisfaction of the court in order for it to refuse applicant's application for summary judgment thereby referring a matter to trial.

[8] It therefore means that respondent must in his/her affidavit seriously and unambiguously address the said dispute of fact in order to qualify in noting the summary judgment application, see *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA).

[9] The genuineness of respondent's averments cannot be ascertained by a mathematical formula but by factual circumstances of the case, taking into account what the deponent understands to be at stake.

[10] What should be borne in mind and which in my view, the courts should not ignore is the need for litigants, in particular the indigent and formally disadvantaged and/or marginalized Namibians to be taken abode in the expropriation and/or take over possession of land. It is a fact that the majority of our people are not privileged to understand the intricacies of the laws relating to land reform and resettlement.

[11] Therefore, they should not be left outside the land legal discourse due to the errors of history. In *Hange & others v Orman NLLP* 2014 (8) 451 LCN para 18-19 I stated:

'[18] Applicants, as stated are illiterate, throughout the negotiations about the alleged termination of their services and consent to vacate the farm was through other people whose proficiency in their own language they question. They are of the opinion that the money that was paid to them was for terminal benefits, but, they did not agree to vacate the farm.

[19] It is a fact that applicants belong to the previously disadvantaged group of society and some of the consequences of their socio-historical background manifest itself in their illiteracy. This is a fact which the court, in my view, can ill afford to ignore as by doing so, it will be abdicating its judicial duty of dispensing justice fairly to all manner of people irrespective of their social background. It is undisputed that apart from negotiating from a weaker strength their plight was exacerbated by lack of faith and alleged misinterpretation and/or lack of translational skills by those who were handling their matter and were purportedly helping them.'

[12] I still hold the same view and can go further and state that where litigants plead ignorance of a legal procedure, it is the courts' duty to assist them to understand it better.

The need for equality before the law cannot be over emphasized as it is clearly stated in Article 10(1) and (2) of the Namibian Constitution, which read:

'Article 10(1) and (2)

'(1) All persons shall be equal before the law.

(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.'

[13] This has always been this court's stance. All parties must be given an equal opportunity to be heard in a court of law. Of late this court has been inundated with land disputes of this nature. Time has now come that they be resolved once and for all. In light of the presence of the dispute of facts in this matter, justice can only be served by allowing the parties to be heard through *viva voce* evidence.

[14] It is my opinion that there is a need for the parties to delve further into the circumstances surrounding this matter in order for the court to come up with a decision based on the facts.

[15] In the result the following is the court order:

1. The application for summary judgment is dismissed.
2. The parties must bear their own costs.
3. The matter is to proceed to trial and must be placed back on the Case Management Roll.

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M Cheda  
Judge

## APPEARANCES

FOR THE PLAINTIFF: N Ndilula  
of Samuel Legal Practitioners, Ondangwa

FOR THE DEFENDANTS: H Shimutwikeni  
of Henry Shimutwikeni & Co. Inc., Windhoek