

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

JUDGMENT

Case No: HC-NLD-CIV-ACT-CON-2017/00118

In the matter between:

**LAYAMBEKWA LINOVENE NANGHALA**

**PLAINTIFF**

and

**FRIEDA EINDE SISCO NELAO NALUNO**  
**LAMEK NALUNO**

**FIRST DEFENDANT**  
**SECOND DEFENDANT**

**Neutral citation:** *Nanghala v Naluno* (HC-NLD-CIV-ACT-CON-2017/00118)  
[2020] NAHCNLD 05 (21 January 2020)

**Coram:** NAMWEYA AJ

**Heard:** 23 – 25 October 2019

**Delivered:** 21 January 2020

**Flynote:** Eviction from property of defendants Plaintiff proved she was the registered owner of the property – Incumbent on the defendants to establish their right to continue to occupy and hold the property against the owner – First defendant claims she never relinquished ownership of the property – Second defendant allegedly fraudulently sold the property without consent of the first defendant – Court

found the deed of sale entered into between plaintiff and the second defendant result in plaintiff lawfully acquiring ownership of property – Accordingly, court granting judgment for plaintiff.

**Summary:** Plaintiff purchased the property Erf 1085, extension No, 3 Ondangwa, Oshana Region, Republic of Namibia – Defendants were the previous registered owners of the property in question which they continued to occupy and refused to vacate –The only defence availed by first defendant is that she never sold or signed any document giving consent for the transfer of ownership of property by second defendants – Consequently court order ejectment of defendants from property..

*Held:* that Plaintiff is the rightful owner of the property Erf 1085 by virtue of the deed of transfer she holds – Accordingly, she is entitled to the order of ejectment of the first and second defendants from the property.

*Held:* further that on the counterclaim, first defendant failed to prove that the deed of sale entered into between plaintiff and the second defendant is null and void.

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## ORDER

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### 1. On the main claim:

(a) The First and Second Defendants are hereby be ejected from Erf 1085, extension No, 3 Ondangwa, Oshana Region, Republic of Namibia. They should vacate the said property on or before 29 February 2020

(b) First defendant to pay plaintiff's costs on the scale as between party and party.

### 2. On the counterclaim;

(a) The defendants counter claim is hereby dismissed.

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## JUDGMENT

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NAMWEYA AJ:

[1] In this matter the plaintiff, is suing first defendant and second defendant. First defendant and Second defendant are married to each other. The plaintiff is represented by Ms. Boois and the first defendant is represented by Ms. Mugaviri. Second defendant is not participating in the proceedings.

[2] In these proceedings, the plaintiff prays for an order ejecting first and second defendants from the property described as Erf 1085, extension No, 3 Ondangwa, Oshana Region, Republic of Namibia.

[3] The First Defendant opposed the action and also filed a counterclaim where she prays the court declares null and void the deed of sale entered into between plaintiff and the second defendant; an order for plaintiff to sign all necessary documents to have the property registered into the first defendant's name within seven days from date of the order, failing which an order authorising the deputy sheriff to sign the said documents on behalf of the plaintiff; and an order for cost of suit on attorney and own client scale.

[4] For the order of ejectment, plaintiff is only required to prove that she is the lawful owner of the property and/or she is in lawful control thereof. In the counterclaim, first defendant is required to prove that the deed of sale entered into between plaintiff and the second defendant is null and void.

The Evidence

[5] The plaintiff called two witnesses. The first to testify was the plaintiff. She testified as follows.

[6] She is an adult female employed by the Ministry of Education as a teacher at Litamaro Combined School, residing at Enghala, Ongwediva, Oshana Region.

[7] She stated further that she found out about the sale of the property, through Panda Real Estate in Ongwediva. Her friend Ndinela Sheendelwako had introduced Panda Real Estate to her when she confided in her that she wanted to buy property.

[8] She stated that the law firm Shikongo Law Chambers lodged the deed of transfer and she was given the deed of transfer by a Secretary in the law firm, and it had already been signed by Mr Usiku of the law firm. He was, however, not present when she signed it but Ms Hamutenya was present. This was on or about 25<sup>th</sup> of February 2011 at the Shikongo Law Chambers' offices in Ongwediva.

[9] She testified further that the transfer of the property was finalized on the 8<sup>th</sup> of April 2011. The title deeds indicated that the property, was transferred from Einde Nelago Naluno and Lamek Naluno to Layambeka L Nanghala (the plaintiff). The title deed number for the property is T 1511/2011.

[10] She testified further that she got a loan for the property from Standard Bank Oshakati of N\$255 500 and it was approved on or about 25<sup>th</sup> of February 2011.

[11] Accordingly, she is paying N\$3 331.64 for the bond monthly with Standard Bank, Oshakati, and so far, she has managed to pay 27 564.49 including interest.

[12] In 2011, she testified, she requested the Police at Ondangwa Police Station to remove the defendants from her property. The police asked her to get a court order from the Magistrate. The Ondangwa Magistrate advised her to obtain legal representation. She obtained legal representation Kishi Legal Practitioners who used to be in Oshakati at that time. She claimed that the signature on the deed of sale was not hers but it was a forged one.

[13] She claims in her testimony that she is the lawful owner of the property and that the property was lawfully transferred to her. In conclusion, she testified that since 2011, the defendants were aware that the property belongs to her but they continued to be in unlawful possession of it.

[14] Her cross-examination evidence revealed inconsistencies in her testimony. The plaintiff testified that she bought the said property from both first and second defendants. She also testified that both first and second defendants signed documents related to the transfer of the property. She contradicted herself on the aspect whether first defendant had signed the document or not. That inconsistency is crucial to the claim of the first defendant who alleges in her claim that she never transferred her ownership of the property in question; and so, did not relinquish her ownership of the property. No document, however, was showed to her for her to agree or to dispute any signature appended to it as being her signature except the deed of transfer T 1511/2011 for Erf No 1085, Ongwediva, which she acknowledged.

[15] The plaintiff's second witness to testify was a certain Ms. Rebekka Ndeshipanda Shipepe, an adult female self-employed and the sole owner of Panda Real Estate since 2004.

[16] She met Mr. Naluno, who is the second Defendant in this matter, after a telephonic conversation when he called her to inform her about the sale of his house on a date that she does not recall but sometime close to the sale of the property in November 2010. She then had Ms Nanghala as one of her clients who was looking for property. Since she was on her list of clients looking for property to buy in Ondangwa, she invited the plaintiff to view the property, on a date that she did not recall, but in November 2010.

[17] She was the witness for the parties, first defendant and the plaintiff, when they signed the agreement of sale on separate dates.

[18] Second defendant signed on the date that she did not manage to write on the contract because she usually used one date for both signatures and that was at his workplace, Telecom, Ondangwa in her presence. Plaintiff signed on the 22<sup>nd</sup> November 2010 at Panda Real Estate offices at Otweya Square Building, Ongwediva, in her presence. Second defendant's wife was not present in any of the above mentioned meetings.

[19] The property was bonded by Standard Bank, when it was in the ownership of Mr Naluno. Therefore, the bank transferred and settled the existing bond for Mr

Naluno and transferred the new bond amount to plaintiff's name. She is currently servicing the bond.

[20] Panda Real Estate received a commission of N\$5 000 which was deducted from the purchase price of N\$260 000.

[21] Second defendant stated that he was married at the time of the signing of the agreement of sale. She failed to ask where the wife was because she was under the impression that he was the sole owner of the property.

[22] In cross-examination the plaintiff's second witness stated that that only second defendant signed for the transfer of the said property. Evidence of this witness contradicts the evidence on the aspect of whether the first defendant ever signed any document giving effect to the transfer of the said property. It was, however, not established whether something ominous happened during the process of her assistance to the plaintiff to purchase the property or to obtain the said deed of transfer T 1511/2011. It must be noted, however, that inconsistencies and contradictions pointed at are not material to the validity of the deed of transfer but rather to challenging the modalities that operated when the deed was obtained.

[23] After the close of plaintiff's case, the first defendant applied for the granting absolution from the instance. The court dismissed the application for absolution from the instance.

[24] It is noteworthy to mention that Ms Boois, counsel for the plaintiff moved an application from the bar and thereafter by motion requesting this court to condone her application to plead. In the practice of the court, a trial commences after pleadings have closed and judicial case management proceedings have been completed. To ask the court to permit the plaintiff to plead after one year has passed since the counterclaim was filed is unfair to the opposing parties and to the court. For this reason, the court rejected plaintiff's application.

[25] Ms. Mugaviri, counsel for the first defendant, argued that since the plaintiff did not plead to the first defendant's counterclaim, first defendant was entitled to a default judgment. This argument was not pursued any further. Eventually the first

defendant was called to the stand as she still had to respond to the claim of the plaintiff.

[26] First defendant testified that she is unemployed. She testified further that she is married to the second defendant out of community of property and they have two children together. They have, however, been separated since 2010.

[27] The second defendant concluded a loan agreement at Standard Bank in 2007 to purchase the property. Despite the defendant being Government employees and having a housing subsidy, their assets had to be combined for the bond to be approved.

[28] First defendant testified further that she does not know the plaintiff and she saw her (plaintiff) for the first time during April 2011 when she demanded that her children and she vacate the property. She, however, refused to leave the property.

[29] With this information, first defendant contacted the second defendant immediately. He informed her that he had sold the property to plaintiff and she must find another place to live. She stated that she told the second defendant that she would not leave the property because it was their primary home with the children and they had nowhere else to go.

[30] She testified that she asked second defendant how he managed to sell the property without her consent, considering that the mortgage bond over the property was in their names. Second defendant did not respond. She also asked second defendant how he managed to sell the property if she did not sign any documents consenting to the sale. Second defendant did not answer this question, too.

[31] Thereafter, she stated, she sought legal assistance through the Directorate of Legal Aid. In 2011 Inonge Mainga was appointed as her legal practitioner (at the time). She testified further that she informed her legal representative that the signature on the Power of Attorney to Transfer was not hers and she suspected that the second defendant had forged and/or falsified her signature to effect transfer of the property into plaintiff's name.

[32] It is also her testimony that during 2012, plaintiff went to Ondangwa Town Council to have the municipal water account suspended and she succeeded. First defendant then approached her legal practitioner to have the suspension of the water account uplifted. Her legal practitioner managed to t her water account uplifted, and to date she is the one paying for the water account at the Ondangwa Town Council.

[33] Further, during 2014, the plaintiff's then legal practitioners attempted to have the matter settled by reversing the transfer and making second defendant reimburse the plaintiff for the purchase price amount of N\$350 000. However, the second defendant failed to honour his obligations.

[34] With the settlement in mind, during 2015, second defendant and first defendant concluded a loan agreement with Standard Bank for second defendant to reimburse plaintiff for the aforementioned purchase price by making monthly instalment payments. He, however, once again failed to pay the money over to the plaintiff, first defendant testified.

[35] It is further her testimony that somewhere in April 2016, the plaintiff returned to the property, and informed first defendant that she had the keys to the property and that the property belonged to her because she purchased same from the second defendant. She further informed her that she did not need first defendant's consent for the property to be transferred into her name because the second defendant and first defendant were married out of community of property. She did not sign a Power of Attorney to transfer and/or sign any form of documentation to effect transfer ownership of the property into plaintiff's name, first defendant testified further.

[36] First defendant concluded that, as previously stated, it was only during 2011 that she heard that second defendant had sold their property, but she did not know to whom the property had been sold until sometime in 2011 when she received an eviction letter from plaintiff's legal practitioner.

[37] Nothing significant emanated from cross-examination and first defendant maintained that she never signed any document giving consent for the transfer of the



property to the name of the plaintiff. She did not point out anything sinister conduct committed by the plaintiff during the purchase of the property. She, however, stated that second defendant sold the property to the plaintiff by falsifying her signature. She did not call any witness or produce any documentary evidence bearing on the sale of the said property. I now proceed to weigh the evidence.

[38] All that plaintiff was required to prove is that she is the owner of the property, if an order of ejectment is to be granted in her favour. She did so and ownership was established by the deed of transfer tendered in evidence. Inconsistent aspect in her evidence is with regard to the procedure of acquiring the deed of transfer. She did not do anything wrong during the process of purchasing the said property.

[39] First Defendant testified that she co-owned the said property with the second defendant, her husband. First defendant, however, did not produce any agreement to establish that such co-ownership with the second defendant existed.

[40] Second defendant was not called to confirm the existence of any agreement the terms of which authorizes or prohibits him to alienate or sell the property he co-owned with the first defendant. This court is cognizant of the fact that the first and second defendants were married out of community of property; therefore any co-ownership is not by operation of law. Assuming that the second defendant sold the said property, albeit by falsification of document or otherwise, in my view such conduct concerns breach of the co-ownership agreement between first and second defendant. It does not concern the validity of the purchase agreement.

[41] Second defendant further demonstrated how she got to know that the second defendant had sold the property to the plaintiff. First defendant seems unreasonable to hold it against the plaintiff for having purchased the property from the second defendant. She (first defendant) testified as to what terms of their agreement was breached by the second defendant. In light of that there was nothing in evidence to suggest that the second defendant acted in any capacity other than as co-owner of the property when he signed the deed of sale and presumably on behalf of the first defendant. The allegations pertaining to fraud, as contended, only pertain to the conduct of the second defendant and do not establish fraudulent conduct on the part

of the plaintiff. On the evidence, a case for fraud against the first defendant has not been made out.

[42] First defendant took steps to retain ownership of the property but the attempt failed. First defendant's attempt to get it back from plaintiff involved buying it back from the plaintiff. This, in my view, is seen as a confirmation that the property is lawfully owned by the plaintiff.

[43] First Defendant testified further that second defendant remained mute as to how he managed to sell the property without her consent. One can fairly assume from this evidence that the first defendant and second defendant held co-ownership in vacuum and she could not point at any breach on the part of the second defendant. For the first defendant to file a suit against the plaintiff is rather ill-fated for the reason that if there is any breach in relation to the selling of the said property, it is between the first and second defendants. First defendant was unable to prove *mala fide* conduct or fraud on the part of the Plaintiff when Second defendant and Plaintiff concluded the purchase transaction that led to the transfer of ownership of the property into the name of the plaintiff.

[44] When it was pointed out to first defendant in cross-examination that she stopped servicing the mortgage bond on the property which the plaintiff lawfully purchased. First defendant said that she did not sell her property though she has stopped servicing the mortgage bond on the property. To stop servicing a mortgage bond is in my view, a clear testimony of first Defendant's acknowledgement that she had lost ownership of the property. Her defiance to vacate the property is rather a show of baseless protest and not a claim of one's right.

[45] It was argued on behalf of the plaintiff that he who alleges proves; in the sense that the first defendant who alleges that the transaction between the second defendant and the plaintiff is fraudulent must prove it. The entire testimony of the First Defendant dismally falls short of proof of fraudulent conduct on the part of the plaintiff. Even on the part of the Second Defendant, First Defendant was expected to show proof of what agreement was breached when taking into account the nature of the alleged co-ownership of the property that existed between her and the Second Defendant. In absence of any terms regulating co-ownership agreement of the property, there can only be a speculation of potential breach of that agreement that

cannot be imputed to plaintiff, who appears to be a *bona fide* purchaser for value of the property.

[46] All issues of law to be resolved at the trial in terms of the pretrial order are:

- (a) Whether the plaintiff is the rightful legal owner of Erf 1085, Ondangwa, Oshana Region, Republic of Namibia?
- (b) Whether the first and second defendant are the rightful legal owners of Erf 1085, Ondangwa, Oshana Region, Republic of Namibia?
- (c) Whether the second defendant had authority to legally dispose of Erf 1085, Ondangwa unilaterally without the knowledge and consent of the first defendant
- (d) Whether the plaintiff lawfully purchased Erf 1085, Ondangwa from the first and second defendant?
- (e) Whether the sale and subsequent transfer of the property into the plaintiff's names should be declared null and void?

[47] The ownership held by the plaintiff is evidenced by the deed of transfer T 1511/2011. The same deed of transfer demonstrated that the same property was transferred from the names of both first and second defendant. That also confirms that the first and second defendants were the rightful legal owners of the same property (Erf 1085, Ondangwa) up to the point that it was sold to the plaintiff by second defendant. The deed of transfer produced in evidence establishes that Plaintiff is the rightful legal owner of the property. As to whether the first and second defendant are the rightful legal owners of Erf 1085, Ondangwa, Oshana Region, Republic of Namibia; the only document placed before the court in an attempt to establish such ownership is the deed of transfer T 1511/2011 but that deed of transfer indicates that ownership was transferred to the plaintiff. That being the case, I hold that first and second defendants lost ownership of the property in question when the property was purchased and transferred to the plaintiff, bearing in mind that there is no evidence tending to show that on the face of the deed of transfer, the deed of transfer is questionable. First and second defendants hold no ownership of the property from the point when the property was sold lawfully to the plaintiff. Currently, plaintiff is the one who is servicing the mortgage bond on the property in question, as I have mentioned previously.

[48] Having found that Plaintiff is the rightful legal owner of the property, I conclude she is entitled to the order of ejectment of the First and second defendants from the property.

[49] In the result, I order as follows:

**1. On the main claim:**

(c) The First and Second Defendants are hereby be ejected from Erf 1085, extension No, 3 Ondangwa, Oshana Region, Republic of Namibia. They should vacate the said property on or before 29 February 2020

(d) First defendant to pay plaintiff's costs on the scale as between party and party.

**2. On the counterclaim;**

(b) The defendants counter claim is hereby dismissed.

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M Namweya  
Acting Judge

