

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,
OSHAKATI



NORTHERN LOCAL DIVISION

CASE NO: HC-NLD-CIV-ACT-

OTH-2018/00273

In the matter between:

HILMA L KASHIDULIKA

PLAINTIFF

And

ERASTUS IIKENO

DEFENDANT

Neutral Citation: *Kashidulika v Iikeno* (HC-NLD-CIV-ACT-OTH-2018/00273) [2021]
NAHCNLD 25 (15 March 2021)

CORAM: SIBEYA J

Heard: 14 October 2020

Order: 22 October 2020

Reasons: 15 March 2021

Flynote: Special Plea -*Locus standi* – Evictions – Communal land – sections 26 and 43 of the Act- who can bring eviction proceedings – Only bodies referred to in section 43 or any person with title over the land in dispute – absence of allocation certificate connotes absence of title over communal land – special plea upheld.

Summary: The plaintiff instituted eviction proceedings against the defendant from a traditional homestead located in Ohaushombo village in the Oshana region. The plaintiff's claim is based on her customary land right which she inherited from her deceased parents in terms of section 26(2)(b) of the Communal Land Reform Act 5 of 2002.

The defendant's case is that the plaintiff is not one of the three prescribed persons in terms of section 43(2) who *ex lege* are entitled to lodge and prosecute the eviction proceedings in terms of the said legislation. The defendant further submitted that the issue that the plaintiff does not have any certificate over the land in question means that plaintiff has no title over the said land and has no right claim such land even at common law

The court agrees that plaintiff has a substantial and direct interest in the land concerned, however that does not clothe the plaintiff with the authority to institute the present proceedings before court. The absence of a registration certificate of the right of leasehold suppresses the plaintiff's claim of ownership or possession of the communal land which could otherwise entitle the plaintiff to evict an unlawful occupier of the land.

The court *held* that the plaintiff has no *locus standi in judicio* and upheld the special plea.

ORDER

1. The special plea by the defendant that the plaintiff has no *locus standi in judicio* is upheld;
2. There is no order as to costs;
3. The matter is removed from the roll and is regarded as finalised.

REASONS

SIBEYA AJ:

Introduction

[1] Before approaching the High Court or any tribunal for recourse one needs to establish that they have the necessary authority to bring their grievances before the said institution. This court in this judgment is tasked to adjudicate a point of law raised by the defendant on the standing of the plaintiff to bring this action before court.

[2] The plaintiff instituted eviction proceedings against the defendant from a traditional homestead located in Ohaushombo village in the Oshana region (hereinafter referred to as the land). The plaintiff's claim is based on her customary land right which she inherited from her deceased parents in terms of section 26(2)(b) of the Communal Land Reform Act 5 of 2002 (The Act). It is common cause that the land in question is customary land as provided for in s 15 of the Act.

[3] At the commencement of the trial the defendant raised a point of law on the *locus standi* of the plaintiff. The court will thus determine the issue of standing before considering the merits of the case.

[4] The plaintiff is Ms Hilma L Kashindulika, resident of Erf 2666, Atusheni village, Eenhana, Ohangwena region. The defendant is Erastus Ikeno, resident of Ohaushombo Village, Oshana Region. Where reference is made to the plaintiff and the defendant jointly, they shall be referred to as the "the parties".

[5] The plaintiff is represented by Ms. S. Kahengombe while the defendant is represented by Ms. M. Amupolo.

Background

[6] The plaintiff alleges in her pleadings that she is an adoptive child of Mr Andreas Lukas and Mrs Hilma Sheehama who held customary land rights over the land, which she inherited upon the death of her parents.

[7] The defendant has allegedly denied plaintiff access to the land and contested plaintiff's ownership of same through the Oukwanyama Traditional Authority. The defendant contends that he was awarded certain rights over the land by the Oukwanyama Traditional Authority, however such rights were revoked and set aside by the decision of the Appeals Tribunal of the Ministry of Land and Resettlement.

Defendant insist that his certificate issued by the land Board pursuant to the Traditional Authority decision which was set aside is valid, as it has not been cancelled in terms of section 27(1) of the Act. Defendant thus has a right in terms of the certificate to remain on the land as the plaintiff has no better title than his certificate. The defendant further states that the plaintiff makes no reference to a registration certificate of the right of leasehold. Plaintiff does not have a certificate of registration over the customary land and therefore lacks *locus standi* to institute legal action for eviction of a person who occupies the said land.

[8] Plaintiff alleges that defendant is in unlawful occupation of the property, and is acting in wilful contempt of the Appeal Tribunal's decision. Despite several demands from both the plaintiff and the Oukwanyama Traditional Authority to vacate the property, defendant has refused to vacate the said land.

Issue for determination

[9] The parties filed a case management report which was made an order of court on 31 August 2020. The parties agreed for the special plea on *locus standi* to be decided upon before the merits of the case are adjudicated.

[10] The court is tasked to determine the following issues:

- 10.1. Whether section 43(2) preclude the plaintiff from evicting defendant from Ohaushombo village?
- 10.2. Whether plaintiff has sufficient interest in the right which is the subject matter of this litigation?

The Law

[11] The centremost principle is that a person's standing to institute a particular action or motion proceeding is a matter of law.

[12] An analysis of a party's *locus standi*, involves a two-stage process. Firstly, it involves an examination of whether the litigating party has a sufficient interest in the

right which is the subject matter of the litigation¹. This is the common law rule on standing or *locus standi in judicio*. Secondly, it involves an examination of whether the litigating party has the capacity to sue or be sued.

[13] The defendant's special plea is based on Section 43(1) of the Communal Land Reform Act, 5 of 2002, which provides as follows:

'Section 43(1) No person may occupy or use for any purpose any communal land other than under a right acquired in accordance with the provisions of this Act, including the right referred to in section 28(1) and 35(1).

(2) A Chief, Traditional Authority or the board concerned may institute legal action for the eviction of any person who occupies any communal land in contravention of subsection (1).'

[14] It is now opportune to examine the submissions made by the parties to determine as to which of the protagonists is correct.

The defendant's submissions

[15] The defendant submits that the plaintiff is not one of the three prescribed persons in terms of section 43(2) who *ex lege* are entitled to lodge and prosecute the eviction proceedings in terms of the said legislation. The defendant further submits that the plaintiff does not have any certificate of registration of right of leasehold over the land in question and even at common law plaintiff has no title over the said land. Defendant submits further that although the plaintiff has a substantial and direct interest in the land concerned, that does not clothe the plaintiff with the authority to institute the present proceedings before court.

[16] In the premises, plaintiff not being a Chief, Traditional Authority and a Board and/or a holder of a certificate under the said legislation therefore has no legal standing (*locus standi*) to institute the eviction proceedings, so the submissions went.

Plaintiff's Submission

[17] The plaintiff submits that her customary land right flows from her inheritance of such right over the land held by her parents, which she inherited in terms of section

¹ *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR726 (SC).

26(6) of the Communal land Act. Plaintiff further submits that it is based on this inheritance that the Tribunal ruled that the right over the property be reallocated to the plaintiff and that the allocation granted to the defendant be cancelled.

[18] It is on the above premise on which the plaintiff submits that she has an interest in the eviction of the defendant from the land. As pleaded, she claims to have inherited the customary land right and that the Appeal Tribunal has ordered that the right over the land be reallocated to her.

[19] Plaintiff submits that she has gone to great lengths to ensure that her rights in the land are enforced. The Tribunal decided in terms of section 39(6) and regulation 25 of the Communal land Act, to order the Traditional authority to cancel the right which it allocated to the defendant over the land and re-allocate same to the plaintiff in accordance with the applicable provisions of the Act.

[20] It is on the backdrop of the decision of the Tribunal that she finds her right to the land. She submits that the defendant continues his occupation of the land unlawfully.

[21] Plaintiff cites Section 26(2) (b) of the Communal Land Act which provides as follows:

‘ . . . (2) Upon the death of the holder of a right referred to in subsection (1) such right reverts to the Chief or Traditional Authority for re-allocation forthwith –
(a) . . .
(b) in the absence of a surviving spouse, or should he or she not consent as contemplated in paragraph (a), to such child of the deceased person as the Chief or Traditional Authority determines to be entitled to the allocation of the right in accordance with customary law.’

[22] In conclusion plaintiff submits that the issue that only the Chief, Traditional Authority and the board has the power to institute eviction proceedings in terms of section 43(2) has been decided by the Supreme Court in the matter of *Joseph v Joseph* and *Joseph v Joseph*², which held:

‘The plain meaning of s 43 does not give the Chief, Traditional Authority or Land Board the sole right to evict persons from land not allocated to them. The only change to common

² (SA 44-2019 and SA 18-2020) [2020] NASC (30 July 2020) at para [36].

law is that it gives the Chief, Traditional Authority and Land Board locus standi to bring eviction proceedings in respect of land they are neither the owners nor the possessor of. As mentioned, there are other persons who may have such right under common law and there is no indication in the Act that the intention was to abolish their common law rights.’

[23] Furthermore at paragraph 40 of the same judgment Frank AJA, stated that, section 43 of the Act does not prevent a person who has a right to communal land allocated to him or her from protecting such right. This may be by use of a vindicatory action available to possessors under common law.³

[24] Thus, plaintiff concludes that she is not precluded by virtue of section 43(2) from bringing proceedings to evict defendant from the land which he occupies without authorization. Since the decision to allocate the defendant was set aside, other decisions stemming from the same decision that is set aside were nullified with the substratum, so it was argued.

Analysis

[25] It is settled law that he who allege bears the burden of proof of such allegation on a balance of probabilities to sustain his or her claim. I cite with approval Angula, DJP in *Mungendje v Kavari*⁴ who summarized the principles as follows:

‘[75] The following common law principles are applicable in determining *locus standi*. The applicant bears the onus of alleging and proving that he or she has the standing to bring the application. In accordance with the general rule that it is for the party instituting proceedings to allege and prove that he has *locus standi*, the onus of establishing that issue rests upon the applicant. It is an onus in the true sense; the overall onus⁵ Second, the factual basis for the *locus standi* asserted by the applicant must appear from the founding papers. ‘An applicant must establish its *locus standi* in its notice of motion or founding affidavit’⁶. Third, the applicant must show that there is a legal nexus between him or her and the subject matter for the relief sought; and that he has a direct and substantial interest in the relief claimed.’

³ *Joseph v Joseph v Joseph v Joseph (supra)* at para 40.

⁴ (HC-MD-CIV-MOT-GEN-2017/00399) [2018] NAHCMD 153 (22 November 2017).

⁵ *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575 H-I.

⁶ *Coin Security Namibia (Pty) Ltd v Jacobs* 1996 NR 297 (HC).

[26] In adjudicating this matter, I set out facts that are common cause between the parties, which are the following:

26.1 The plaintiff is the adoptive daughter of Mr and Mrs Lukas;

26.2 The plaintiff has a direct interest in this matter;

26.3 The defendant has a certificate from the Traditional authority which has not been cancelled;

26.4 Both parties are not in possession of title over the property in question.

[27] In determining whether the plaintiff has the necessary *locus standi in judicio* I proceed to consider the submission of the parties.

[28] Ms Amupolo from the onset stated that the defendant raised the special plea in terms of section 43(2). She contends that the plaintiff has no title over the land in question and at the time of the hearing, the defendant had physical control of the said land.

[29] Communal land is governed by section 43 of the Communal Land Act. In terms of section 43, three bodies are clothed with the powers to evict. S 43 has been subjected to interpretation by the Supreme Court. The court is mindful of the judgment of *Joseph v Joseph and Joseph v Joseph* where it was pronounced that s 43 of the Act does not prevent a person who has a right to communal land allocated to him or her from protecting such right through the use of a vindicatory action available to possessors under common law.

[30] The defendant has interpreted the meaning of right in terms of the *Joseph v Joseph and Joseph v Joseph* judgment to refer to a person that has a title conferred unto him or her by the Chief, Traditional authority of the Land Board. The Land Board must first register the allocation and subsequently provide the applicant with a certificate of leasehold, so it was argued.

[31] Plaintiff claims that she obtained a right over the land by virtue of section 26(6). The Plaintiff at the hearing was not in possession of any allocation of land rights or certificate from the Chief, the Traditional authority or the Land Board making the land fall into the confinement of section 43. There was no indication that the Land Board

caused the communal land to be registered in the names of the plaintiff. It appears further that the plaintiff was not issued with a certificate of leasehold over the land.

[32] The Plaintiff does not dispute that the customary land rights are registered in the name of defendant as they have not been duly cancelled in terms section 27(1) of the Act. The Plaintiff contends that cancellation is not required in order to change the allocation of land rights. The easy response to this contention is that the legislation provides that an existing land right continues to exist until such customary land right is cancelled as stated in s 27(1). A cancellation of the customary land right by the chief or Traditional Authority is only effective when such cancellation is ratified by the Land Board. As alluded to above the customary land right and consequent certificate were issued to the defendant and were not cancelled as prescribed by the Act.

[33] The position of the Legislation is that once a right holder passes, that right which the deceased once held passes on to the Chief or Traditional Authority to re-allocate to a beneficiary.⁷

Conclusion

[34] The procedure remains that in the absence of an allocation certificate from the Chief, Traditional Authority or the Land Board, the rights to the communal land vests in the state, until such a time as the Chief or Traditional Authority has allocated the land to a specific person.

[35] The plaintiff was unable to provide the allocation certificate or any title over the property in question and in the absence of same the court is only left with the provisions of section 43(2) and that unfortunately without any allocation vests the land in the Chief or the Traditional Authority.

[36] This court holds the view that the defendant established that the plaintiff had no registered right over the land and consequently she had no certificate of leasehold issued to her. This court is satisfied that the plaintiff has in the premises not been allocated the title or leasehold over the property and thus she has no standing to bring eviction proceedings in terms of section 43(2) of the Act.

⁷ S 26(11) and (2).

Costs

[37] Considering that both parties are funded by the Directorate of Legal Aid, this court will not make an order as to costs.

Order

[38] In the circumstances I make the following order:

1. The special plea by the defendant that the plaintiff has no *locus standi in judicio* is upheld;
2. There is no order as to costs;
3. The matter is removed from the roll and is regarded as finalised.

O S SIBEYA
JUDGE

APPEARANCES:

PLAINTIFF: Ms. S. Kahengombe
Of Samuel and Associates, Oshakati

DEFENDANT: Ms. M. Amupolo
Of Jacobs Amupolo Lawyers and Conveyancers, Ongwediva