



NOT REPORTABLE

CASE NO: SA 56/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between

ISSASKAR KAUNE

Applicant

and

REGISTRAR OF DEEDS

First Respondent

MASTER OF THE HIGH COURT OF NAMIBIA

Second Respondent

GOTTFRIEDINE KAUNE KAMBATUKU

Third Respondent

VICTOR KAUNE

Fourth Respondent

KATJIUKIRUE KAUNE

Fifth Respondent

TAMAA KAUNE

Sixth Respondent

KAKUVEONGARERA KAUNE

Seventh Respondent

MBAJOROKA KAUNE

Eighth Respondent

KAKUVANJENGUA KAUNE

Ninth Respondent

TJIUNATJO KAUNE

Tenth Respondent

UASUTUA KAUNE

Eleventh Respondent

MURAERA KAUNE

Twelveth Respondent

RASEUATJO KAUNE

Thirteenth Respondent

HIJEE KAUNE

Fourteenth Respondent

RIUNDJUA KAUNE

Fifteenth Respondent

KAMII KAUNE	Sixteenth Respondent
NDJIUOO KAUNE	Seventeenth Respondent
KAUNAHANGE KAUNE	Eighteenth Respondent
HIMEZEMBI KAUNE	Nineteenth Respondent
RUTJINDO KAUNE	Twentieth Respondent
MUKANDI KAUNE	Twenty-First Respondent
TJAVANGA KAUNE	Twenty-Second Respondent
VISTORINE KAUNE	Twenty-Third Respondent
WILLEMIE KAUNE	Twenty-Fourth Respondent
JOGBETH KAUNE KAMUHANGA	Twenty-Fifth Respondent
MBEUTONA KAUNE	Twenty-Sixth Respondent
ERWIN PETRUS VAN STRATEN NO	Twenty-Seventh Respondent
ATTORNEY-OF THE REPUBLIC OF NAMIBIA	Twenty-Eighth Respondent

CORAM: SHIVUTE CJ, SMUTS JA and FRANK AJA

Heard: 25 October 2017

Delivered: 30 November 2017

RULING ON APPLICATION FOR CONDONATION

SHIVUTE CJ (SMUTS JA and FRANK AJA concurring):

Background

[1] The applicant issued summons against the intestate heirs of his deceased father's estate in which he sought, amongst others, a declarator that he inherited his late father's farm and an order that the farm be transferred to him - to the

exclusion of other intestate heirs. The applicant pleaded that during 1982 their late father, Phillipus Kaune, summoned the applicant and four of his other children to a meeting where he informed them that he had decided that the applicant would inherit the farm. Mr Phillipus Kaune died intestate on 30 June 1988.

[2] The applicant further pleaded that the heirs of the late Phillipus Kaune elected or accepted that the estate of the deceased would in terms of Proclamation 15 of 1928 (the Proclamation) devolve in accordance with Ovaherero customary law, alternatively, Ovaherero custom and traditions. That in July 1988, the executors to the estate of the late Phillipus Kaune were appointed under Ovaherero customary law and in or about July or early August 1988 and at Otjoruharui, Aminuis Constituency, the executors of the late Phillipus Kaune's estate distributed his estate to the heirs in terms of Ovaherero customary law. As a consequence of such distribution and in terms of the late Phillipus Kaune's express Wish (or Eraa in Otjiherero language), the farm was inherited by the applicant.

[3] The fourth to nineteenth, twenty-first to twenty-third and twenty-sixth respondents disputed that the applicant lawfully inherited the farm from the late Phillipus Kaune in terms of Ovaherero customary law and opposed the farm being transferred to and registered in the name of the applicant. They pleaded that during a meeting held on 10 April 1981, which the applicant did not attend, the late Phillipus Kaune made a statement to the effect that the farm was for all his children. These respondents pleaded in the alternative that if it were to be found that the meeting alleged by the applicant to have taken place during 1982 was held or that the late Phillipus Kaune made the statement as alleged by the applicant, such

statement could not in law constitute a valid testamentary bequest. This was so, because customary law did not know of the concept of individual ownership of immovable property as registered in the Deeds Office or otherwise, and therefore the Proclamation does not find application to the immovable property registered in the name of the late Phillipus Kaune.

[4] Furthermore, the respondents pleaded that by virtue of the provisions of s 3(2) of the Estates and Succession Amendment Act 15 of 2005 read with the provisions of s 18(1) and (2) of the Proclamation, the late Phillipus Kaune's movable property had to be distributed according to Ovaherero custom and law. Insofar as the statement attributed to the late Phillipus Kaune purports to amount to a testamentary disposition, such statement does not comply with the provisions of s 2 of the Wills Act 7 of 1953 for a valid testamentary disposition and is therefore invalid.

[5] On 10 August 2010, second respondent (the Master of the High Court) appointed the twenty-seventh respondent as executor (the executor) of the estate of the late Phillipus Kaune under Letters of Executorship No. 6/2010. The applicant contends that at the time the executor was appointed, the estate of the late Phillipus Kaune had already devolved in terms of Ovaherero customary law or Ovaherero custom and tradition and the appointment of the executor is thus of no force or effect as such estate had already devolved.

Proceedings in the High Court

[6] The applicant as plaintiff in the High Court testified and called two witnesses. Thereafter he closed his case. None of the witnesses called by the applicant was an expert in Ovaherero customary law or Ovaherero customs pertaining to succession or inheritance. Despite filing an expert notice and summary, when faced with an objection to him calling this witness the applicant elected to close his case. After the close of his case the respondents applied for an order of absolution from the instance which the court granted with costs on 22 August 2016. It is against this judgment that the applicant intends to appeal.

The appeal has lapsed

[7] The applicant filed a notice of appeal against the judgment and order of the High Court timeously on 19 September 2016. Rule 5(5)(b) of the now repealed rules of this court¹ requires of an appellant to lodge with the registrar the record of proceedings 'within three months of the date of the judgment or order appealed against'. In terms of rule 8(2), the appellant must, 'before lodging with the registrar copies of the record enter into good and sufficient security for the respondent's costs of appeal'. The appellant is also required by rule 8(3)(a) to 'when copies of the record are lodged with the registrar, inform the registrar in writing whether he or she - (a) has entered into security in terms of this rule; or (b) has been released from that obligation, either by virtue of waiver by the respondent or release by the court appealed from'. In the case of the applicant, the 3 month period to comply with all these requirements expired on 21 November 2016 and the applicant failed

¹ New Rules of the Supreme Court of Namibia were promulgated by Government Notice No. 249, published in Government Gazette No. 6425, dated 29 September 2017 and have come into operation on 15 November 2017. Legal practitioners intending to practice at the Supreme Court are strongly urged to familiarise themselves with the new rules to ensure that they are applied correctly.

to comply with any of the above requirements. As a result the appeal lapsed and may only be revived upon the grant of condonation for the non-compliance with the rules and the reinstatement of the appeal.²

[8] By letter dated 5 December 2016, the applicant's legal practitioners were formally notified by the Deputy Registrar of the Supreme Court that the appeal had lapsed. It is also apparent from the record that following the lapse of the appeal, the executor, had commenced with the finalisation of the estate. The applicant's legal practitioner says in his affidavit in support of the application for condonation that upon receiving the letter from the executor's legal practitioners informing him of the decision to finalise the estate, he was 'immediately shaken into action, hence this application'. I turn next to consider and decide the application for condonation and reinstatement.

Application for condonation and reinstatement

[9] The applicant filed an application for condonation and reinstatement of the appeal on 7 February 2017. The application for condonation is opposed by the executor only and no other respondent took part in the proceedings in this court.

Explanation for non-compliance

[10] The affidavit seeking to explain different lapses in observing the Rules of Court was deposed to by the applicant's legal practitioner instructed to prosecute the appeal, but who was not involved in the trial, Mr Kamuhanga. The executor deposed to an answering affidavit on his own behalf. Curiously, no replying

² *Ondjava Construction CC v HAW Retailers t/a Ark Trading* 2010 (1) NR 286 (SC) para 2.

affidavit was filed on behalf of the applicant meaning that the allegations made by the executor in his answering affidavit remain uncontested.

[11] Mr Kamuhanga's explanation for the non-compliance with the Rules of Court may be summarised as follows: On 26 September 2016, he attended to the offices of the company responsible for transcribing court proceedings to prepare the court record. On 15 November 2016, he received the tax invoice from the company. On 5 December 2016, Mr Kamuhanga received a letter from the Deputy Registrar informing him that the appeal had lapsed. Upon perusal of the letter, in his own words:

'I immediately realised that I misread the applicable rule pertaining to time periods in which the court record and security were to be filed and thought the 3 months period started running as from the noting of the appeal and not from the date of judgment appealed from.'

[12] On 15 and 16 December 2016 copies of the court record were provided to legal practitioners of the respondents. On 25 January 2017, Mr Kamuhanga directed a letter to the executor's legal practitioners tendering an amount of N\$50 000 as security for his costs, stating that the offer was 'under petition' (the meaning of which has not been given despite an opportunity at the hearing to clarify the expression that does not appear to be a term of art in this jurisdiction). On 26 January 2016, he received a letter from the executor's legal representatives in which he was informed that as the appeal had lapsed the executor had commenced with the finalisation of the estate and would proceed to sell the farm on auction. His reaction to this letter was captured in the following passage from his affidavit:

'I immediately was shaken into action – hence this application - and regret any inconvenience which the resulting delay may have occasioned, and humbly crave that my conduct in this regard be condoned by this Honourable Court as the bulk of the time was spent on combing through the court record making sure that same was a complete and reflection of the proceedings in the court *a quo*.'

[13] On 30 May 2017, Mr Kamuhanga filed a certificate of urgency dated 29 March 2017, seeking an earlier hearing date. In the founding affidavit, he states that he 'formed the view that the condonation and reinstatement application will be heard without appellant having to comply with the requirements of having to furnish security and filing the court record'.

Executor's answering affidavit

[14] The executor countered the assertion that Mr Kamuhanga attended to the offices of the company transcribing records, by pointing out that the record of proceedings had already been prepared by order of the trial court, that as representatives of the parties were in possession of the running record, no transcription services were necessary and all the company had to do was to bind the record if so requested. Regarding the explanation that Mr Kamuhanga had misread the rules pertaining to the time periods within which to file the record and provide security, the executor asserts that the explanation is not reasonable as the rules were clear and unambiguous. He further points out that Mr Kamuhanga had written a letter to the executor's legal practitioners asking, amongst other things, whether the executor would consent to the late filing of the appeal record. The executor submits that the asking for an agreement in circumstances where the

rules do not make provision for an agreement³, points to a conclusion that far from having misread the rules, Mr Kamuhanga did not appear to have read the rules at all. The executor contends as the non-compliance with the Rules of Court is time related, Mr Kamuhanga has not explained the entire period.

Analysis of the evidence and submissions

[15] Despite being informed by the Deputy Registrar of the Supreme Court, as early as 5 December 2016 that the appeal had lapsed, the applicant only filed his condonation application more than two months later on 6 February 2017 and not as soon as is reasonably possible as required by numerous authorities of this court.⁴ He does not satisfactorily explain this delay as pointed out below. He has included the transcript of oral argument on absolution from the instance in the court *a quo* in breach of what was held by this court in the *Channel Life v Otto*⁵ on that score, thereby unnecessarily burdening the record of proceedings.

[16] In any event, the applicant's non-compliance with the rules is time related. Yet, the explanation offered does not cover the entire period for the delay as required by cases decided in this court.⁶ Despite having been informed on 5 December 2016 that the appeal had lapsed, during the period from 6 December 2016 to 15 January 2017 nothing appears to have been done to bring an application for condonation and reinstatement timeously. There is not even an

³ In terms of rule 5(6)(b) of the Rules of Court the executor could only agree to the extension of the period to file the record before the period has prescribed.

⁴ Such as *Beukes & another v SWABOU* [2010] NASC 14 at para 12; *Rainer Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) paras 4 and 5.

⁵ 2008 (2) NR 432 (SC).

⁶ For example, *Shilongo v Church of the Evangelical Lutheran Church in the Republic of Namibia* 2014 (1) NR 166 (SC) and *Disciplinary Committee for Legal Practitioners v Murorua & another* 2016 (2) NR 31 (SC).

allegation that the legal practitioner had gone on leave at that time, if that was indeed the position. Clearly, the explanation is not full and complete. Furthermore and as noted above, Mr Kamuhanga says that he had 'attended at the offices of the transcribers on 26 November 2016 for transcription services in respect of the record' and that a copy of the tax invoice was sent to him by facsimile on 15 November 2016.

[17] The executor observes that the tax invoice sent to Mr Kamuhanga by the transcribers on 15 November 2016 is dated 8 November 2016 already and yet no explanation is offered why it was sent some seven calendar days later or why it was signed (signifying approval thereof) by Mr Kamuhanga only on 1 December 2016. All these, including the fact that oral arguments should not have been part of the record were brought to Mr Kamuhanga's attention in the answering affidavit. Yet, no replying affidavit has been filed, leaving gaps in the explanation and apparent inconsistencies therein unexplained. It would appear from the applicant's explanation that Mr Kamuhanga filed a notice of appeal and attended only once at the offices of the transcribers. There are no indications that he had followed up on the request and appears to have left the responsibility for the compilation of the record entirely in the hands of the transcribers. It is now settled that the responsibility for the compilation of the record is that of the legal practitioner and not the transcribers'⁷

[18] It is my considered view that the applicant has not put up a reasonable explanation for the non-compliance with the Rules of Court. The observations

⁷ *Katjaimo v Katjaimo* 2015 (2) NR 340 (SC) para 21; *Tweya v Herbert & others* [2016] NASC 76 para 26.

made in the *Shilongo* matter (cited in footnote 6 above) at para 18 of that judgment apply with equal force to the facts of this application. Like in the *Shilongo* case:

‘The applicant in this matter has run foul of far too many rules of this court. He was selective in his endeavour to explain the non-compliance with the rules: applying for condonation only in respect of the two transgressions of the rules and brushing the rest of the transgressions aside. The applicant’s explanation for the non-compliance with the rules of court in respect of the failure to lodge the record of appeal timeously is entirely unsatisfactory as it does not explain the entire period. Over and above that, his interpretation of the rules cannot be accepted . . . ’

[19] To the above sentiments should be added the observation that the applicant’s legal practitioner appears to have been ‘shaken into action’ not so much by the realisation that he did not comply with the rules as advised by the Deputy Registrar, but rather by the executor’s decision to finalise the estate in light of the lapse of the appeal. This is an unsatisfactory explanation.

Prospects of success

[20] While the explanation on behalf of applicant for the non-compliance with the Rules leaves much to be desired, all the blame lies with his legal practitioner. I would thus be loath to refuse condonation without considering the prospects of success. In short, due to the fact that the applicant himself is not to blame or at fault in respect of the non-compliance with the Rules I am of the view, on the facts of this matter, that it would not be equitable to dispose of this matter without considering the prospects of success.

[21] One of the reasons for the court *a quo* granting an order of absolution was that no admissible (expert) evidence was led to establish either Ovaherero

customary law or Ovaherero customs and traditions. It was necessary to establish that in terms of such laws or customs the wish of the applicant's late father (if accepted) amounted to a valid disposition for the purposes of succession in Ovaherero customary law or pursuant to Ovaherero customs and traditions.

[22] For witnesses to merely state that the disposition was in accordance with such customary law or customs is nothing but conclusions by lay persons in this context without disclosing the basis for such conclusions. The applicant had to lay the basis for the conclusions by way of expert testimony and to indicate that there is indeed a basis for such conclusions. In fact as no basis was laid for the conclusions, they amounted to the stating of inadmissible opinion evidence.

[23] As it was essential to applicant's case to establish that the wish of his late father amounted to a valid bequest by his late father to him of his late father's farm in accordance with the mentioned customary law or customs, the failure to lead the expert evidence amounted to a fatal omission. The court *a quo* thus had no choice but to grant the order of absolution from the instance based on this reason only.

[24] In light of the conclusion reached above, it is not necessary to deal with any of the other issues raised by the parties relating to the prospects of success.

Quoting out of context

[25] In his heads of argument, counsel for the applicant quoted passages from the record of proceedings in the High Court to criticise ‘the conduct of the presiding officer during the trial’. Counsel implied that the learned judge did not treat applicant’s witnesses with respect. Counsel cited two instances from the record that he says created an impression that the judge regarded the presence of witnesses as ‘an irritation to the court’. This is how counsel put the first alleged disrespectful conduct on the part of the judge:

‘When addressing the witnesses of the appellant, the court had the following to say: “rather than them sitting outside and doing nothing they may have something productive they want to go and milk cows” (stress mine)’.

[26] The second passage was summarised by counsel in the following terms:

‘The interpreter informed the court that appellant needed to go to the toilet and the learned Judge said the following:

COURT: Yes, let him say if he needs a break I will give him the break.

APPELLANT: Yes, My Lord I win need to go and it is already running now.

COURT: *We will not have enough cleaners to clean the court room* (stress mine) (sic)’.

[27] A closer reading of the portions of the record from which the alleged offensive remarks were extracted reveals that counsel for the applicant quoted the trial court entirely out of context. The remark about the ‘milking of cows’ was made against the backdrop of the trial judge wanting to know how long the applicant’s witnesses would be kept waiting before they were called upon to testify. This query was made out of concern that the witnesses were not unnecessarily kept at court

while another witness was testifying. This the learned judge made abundantly clear when he said:

‘The only reason why I am asking is that then they may actually be released but you keep them on alert on 20 minutes notice for them to come court. Rather than them sitting outside and doing nothing they may have something productive they want to go and milk cows.’

[28] The applicant’s instructed counsel clearly understood the context in which the remarks were made and was appreciative of the court’s gesture which he characterised as ‘a caring approach’, reacting to the court’s suggestion as follows:

‘My Lord, I would want to be a witness before His Lordship one day. It is a caring approach My Lord. I appreciate that . . .’

[29] As to the second remark, the context was the request by the witness who was busy testifying mentioning to the interpreter that he wanted to answer a call of nature. The interpreter enquired from the judge whether it would be convenient for the court to take a break. The witness quipped: ‘I need to go; it is already running now’. It would appear that the witness was already leaving the witness box when the judge said to him: ‘You must wait for me to release you. I must release you. You just cannot go’, before calling out the name of one of the counsel for the respondents and informing him:

‘There is a call of nature. We will not have enough cleaners to clean the court room. Court will adjourn for five minutes. When you are ready send a court orderly to call me.’

[30] It is self-evident that the request for an adjournment by the witness was made in jest and the judge reciprocated. There can be therefore no scope for an apprehension of hostility or disrespect towards the witness in question. Any assertion to the contrary clearly bears no relation to the context explained above and falls to be rejected.

Matter of concern

[31] During the hearing of the application, it was brought to our attention that the executor had brought an urgent application for the eviction of the applicant from the farm in dispute and obtained an order from Mr Justice Usiku of the High Court to that effect. On 15 August 2017, Mr Kamuhanga sent a letter to the Judge-President of the High Court, which was copied to the registrar of this court. In the letter, Mr Kamuhanga promised a possible 'bloodbath' if the police were to enforce the court order as he had apparently advised his client to not obey the court order. The letter reads in parts:

'In conclusion and in congruence with the contents of paragraphs 18 - 19. I am duty bound to advice my client that the 'purported order' of Usiku J is a nullity and we shall ignore it as if it had not been made by the High Court and that there is no duty on him to appeal same for the same reasons.

We will need a response from the Judge-President by Thursday latest because the Police Force may be approached by Mr Alwyn Petrus van Straten [the executor] to enforce this NULLITY and it may lead to a bloodbath if my client refuses to comply with a nullity, which he has every right NOT to comply with the purported Court Order (NULLITY).' (Emphasis as in the original)

[32] Mr Kamuhanga confirmed in oral argument that he did indeed advise his client to ignore the court order because he considered it to be a nullity. It is a

serious matter for a legal practitioner and officer of the court to advise a client to defy a court order, let alone to threaten violence towards law enforcement agents of the State. Court orders are part of the rule of law upon which the Namibian State is founded. There are obviously mechanisms in place to set aside a court order, such as appeal or review and until a court order is set aside, it must be obeyed. Disobedience of court orders undermines the rule of law and a legal practitioner must be the last person, if at all, to encourage the undermining of the rule of law. I am therefore of the considered opinion that the decision by Mr Kamuhanga to advise his client to disobey a court order should be referred to the Council of the Law Society of Namibia to investigate whether Mr Kamuhanga's conduct in relation to the advice and threat of violence amount to unprofessional or dishonourable or unworthy conduct. I would propose an appropriate order.

[33] In the result, it is my considered view that the applicant has not only ridden roughshod over many Rules of Court, but he was also selective about in respect of which rules to seek condonation. But even when he attempted to explain the non-compliance with the rules, the explanation was woefully inadequate and a laid back approach towards the rules was regrettably adopted. The prospects of success are in any event non-existent as the applicant failed to lead evidence on the thrust of his action. Moreover, instead of offering a sufficient and complete explanation for the various infractions of the rules, counsel for the applicant resorted to quoting the trial court out of context in an attempt, it would appear, to cast unjustifiable aspersions on the conduct of the trial.

[34] The trial court is entirely justified in its summation of its findings that there was in the first place no admissible evidence that the late Phillipus Kaune made the statement or expressed the wish alleged by the applicant. Secondly, that it had not been established what the Ovaherero customary law, Ovaherero custom and tradition with respect to succession and inheritance was. And lastly, that there was no evidence that there were no assets in the estate of the late Kaune. On the contrary, the incontrovertible evidence was that the farm remained registered in his name. It is therefore beyond comprehension that counsel for the applicant was insistent in the submission that the estate of the late Kaune had been finalised. In these circumstances, the application for condonation and reinstatement ought to be refused with costs.

Costs

[35] Counsel for the executor, Mr Heathcote who appeared together with Mr Jacobs, urged us to make a costs order to be paid by Mr Kamuhanga *de bonis propriis*. I am of the view, however, that although the matter was evidently handled with ineptitude, it was not conducted in a manner that can be said to amount to misconduct on the part of the legal practitioner. Furthermore, given the fact that this is a case where the application for condonation has been refused on the grounds of both insufficient explanation for the non-compliance with the rules and the lack of prospects of success on the merits, it does not appear to me to be an appropriate case to make an order other than a normal costs order.

Order

[36] The following order is accordingly made:

- (a) The application for condonation and reinstatement is refused with costs, such costs to include the costs of two instructed counsel and one instructing counsel.

- (b) The registrar of this court is directed to forward a copy of this judgment to the attention of the Council of the Law Society of Namibia (the Council) for the Council to investigate the issues raised in paras 31 and 32 of this judgment.

SHIVUTE CJ

SMUTS JA

FRANK AJA

APPEARANCES

APPLICANT:

T K Kamuhanga

Instructed by AngulaCo Inc

TWENTY-SEVENTH RESPONDENT:

R Heathcote (with him S J Jacobs)

Instructed by van der Merwe-

Greeff Andima Inc