



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1157/2012

In the matter between:

**AGNES KAHIMBI KASHELA**

**PLAINTIFF**

and

**KATIMA MULILO TOWN COUNCIL**

**FIRST DEFENDANT**

**CHARLES NAWA**

**SECOND DEFENDANT**

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**THIRD DEFENDANT**

**CAPRIVI CABINAS**

**FOURTH RESPONDENT**

**MR NDIMI**

**FIFTH DEFENDANT**

**PAULO COIMBRA**

**SIXTH DEFENDANT**

**MR KOEGENBERG**

**SEVENTH DEFENDANT**

**JLTALJAARD N.O.**

**EIGHTH RESPONDENT**

**Neutral citation:** *Kashela vs Katima Mulilo Town Council and 7 Others (I 1157/2012)*  
[2017] NAHCMD 49 (01 March 2017)

**Coram:** Miller AJ

**Heard:** 19, 20 October 2016

**Delivered:** 01 March 2017

**Summary:** Plaintiff seeking an Order for Court to grant judgment against the defendant for amount of monies allegedly due to plaintiff because of rental monies that the first defendant received from the 3<sup>rd</sup> to 8<sup>th</sup> defendant from leasing part of plaintiff's land. The first and second defendants contend that the plaintiff did not validly acquire any customary land rights over the land in question, i.e. if the area of a local authority thus established is in an area of communal land, the ownership of the immovable property vests henceforth in the local authority so established.

*Court held* *the land vests in the State and subsequently, it vests in the First Defendant by virtue of Local Authorities Act, Act 23 of 1992 when it was declared a township in 1995.*

*Held further* *once the land or portion of land ceased to be communal land in terms of Section 15(2) of the Communal Land Reform Act, read with Section 3 of the Local Authorities Act, the effect is that the Town Council becomes the owner of the land, as a result the land ceased to be communal/customary land.*

*Held further* *the plaintiff's claim is dismissed.*

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**ORDER**

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1. The plaintiff's claim is dismissed.
  2. The plaintiff is ordered to pay the costs of those defendants that entered an appearance to defend
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**JUDGMENT**

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Introduction

[1] Before the commencement of the hearing, the parties asked me to hear the matter on the basis of a stated case, to decide whether or not the plaintiff validly acquired and still holds customary land rights over the portion of land in question, which is the subject of her claim.

[2] In so far as may be necessary, I will assume that what the parties wanted me to decide was whether the plaintiff had any right to the relief claimed in the particulars of claim. More particularly, whether subsequent to the transfer of the land over which the plaintiff claims she inherited and was granted permission to occupy, she was entitled on that basis to claim the relief claimed in the particulars of claim.

[3] The plaintiff is Agnes Kahimbi Kashela, an adult widow who resides at Kozo Village, Katima Mulilo, Zambezi Region, Namibia. The plaintiff is member of the Mafwe Traditional Community.

[4] The 1<sup>st</sup> Defendant is Katima Mulilo Town Council, a local authority duly established in accordance with the provisions of the Local Authorities Act, 23 of 1992, with its head Office situated at 1328 Lifasi Street, Katima Mulilo, Zambezi Region, Namibia. The second defendant is Charles Nawa, the acting Chief Executive officer of the first defendant, who is cited in his official and representative capacity, and who is employed by the first defendant at its head office situated at 1328 Lifasi Street, Katima Mulilo, Zambezi Region, Namibia. It must be recorded that the 3<sup>rd</sup> to 8<sup>th</sup> Defendants did not oppose this application or file any document in view of this application.

#### Brief Facts

[5] During or about April 1985, the Plaintiffs late father, Mr Andrias Njwaki Kashela was allocated customary legal rights to the exclusive use and occupation of the land by the then Chief of the Mafwe Traditional Authority Mr. Richard Mamili.

[6] Mr Andrias Kashela and his family occupied the land exclusively in terms of their customary law. In 2001, Mr Andrias Kashela passed away and the plaintiff acquired those customary rights in accordance with the prevailing customary laws and norms of the Mafwe Traditional Community. At the time of the death of Mr Andrias Kashela, the plaintiff was the only surviving daughter of the late Kashela. The plaintiff's mother had predeceased her father.

[7] In terms of customary laws, the customary right to use and occupy the communal land would automatically devolve upon a member of the family, primarily based on the decision of the family members or if a dispute arises, to be resolved in terms of the customary laws of the Mafwe Traditional Community.

[8] At some point in time, which is not clearly stated by the parties, the First defendant allegedly, unlawfully took possession of portions of the plaintiff's land and unlawfully rented those portions to the fourth, fifth, sixth, seventh and eighth defendants without compensating the plaintiff as allegedly required by law, specifically Article 16 of the Namibian Constitution.

[9] The plaintiff then claims that the first defendant has unlawfully been enriched at the expense of the plaintiff in that the first defendant has taken receipt of rental money to which the plaintiff is entitled. The first defendant has accordingly been enriched by the receipt of the rental moneys paid to it in respect of leases on the land in respect of which the plaintiff exercises exclusive customary law rights.

[10] Moreover, the plaintiff claims that the First defendant offered to sell to the fourth to eighth defendant the land they unlawfully occupy and which she claims that it is subject to the plaintiff's exclusive customary right, therefore the First defendant owes her a sum of N\$ 2 415 000.00 as reasonable and just compensation as contemplated under Section 16(2) of the Communal Land Reform Act:<sup>1</sup>

'(2) Land may not be withdrawn from any communal land area under subsection (1)(c), unless all rights held by persons under this Act in respect of such land or any portion thereof have

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<sup>1</sup> Act 5 of 2002.

first been acquired by the State and just compensation for the acquisition of such rights is paid to the persons concerned.’

[11] As well as with Article 16(1) and (2) of the Namibian Constitution, which states:

*‘(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.*

*(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.’*

[12] The First and second defendant allege that the plaintiff could not have acquired the said land in terms of the customary law because in customary laws, it is the first born son of the deceased that is entitled to acquire such rights and secondly that the said land was proclaimed as part of the Katima Mulilo Town Council, on the 2<sup>nd</sup> of October 1995 per Government Gazette number 1164, under Government Notice 176-182.

[13] In the heads of argument, the first and second defendants contend that the plaintiff did not validly acquire any customary land rights over the land in question. Accordingly, the plaintiff is thus not entitled to the relief claimed and as such, the claim must be dismissed with costs.

### The Issue

[14] The issue to be decided here is whether or not, the plaintiff validly acquired and still holds customary land rights over the portion of land in question.

### The Applicable Law

[15] In terms of Article 100 of the Namibian Constitution;

*'Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State, if they are not otherwise lawfully owned.'*

[16] In Namibia certain areas of land are designated as communal land. Their distinguishing feature is that the ownership thereof vests in the State who according to the provisions of the Communal Land Reform Act, Act No. 5 of 2002. The statutory regime pre-dates the independence of Namibia at a time when Namibia was still administered by the Republic of South Africa. Although the State is the owner of the land, it holds the land in trust on behalf of traditional communities and their members who live there. Currently the communal land is administered in terms of the provisions of the Communal Land Reform Act, which is administered on behalf of the State by the Ministry of Lands, Resettlement and Rehabilitation. As part of its functions the Minister grants rights to occupy specific areas within the communal land to specific individuals who reside at or wish to conduct business from the specific areas. In common parlance this authority is referred to as a "Permission To Occupy" or in its abbreviated form as a "PTO".

[17] When circumstances require it, the Local Authorities Act, Act 23 of 1992 entitles the Minister of Local Government and Housing to establish by notice in the Gazette any area as a local authority and to declare that portion of communal land to be a municipality, town or village under the name specified in that notice.

[18] The defendants in their written submissions submit that and took issue with the plaintiff on the following:

18.1. In 1991, the state was issued with a certificate of registered state title (CRT) No.4789/1991 over the portion of land described as farm Katima Mulilo Townlands no. 1328, the full extent of which is laid out on diagram no. A332/1991 attached to the CRT and for that reason, the state became the owner of the land in issue in 1991.

18.2. It is further submitted that the portion of land known as farm Katima Mulilo Townlands was declared a township during 1995.<sup>2</sup> The said land then became vested and owned by the first defendant, a local authority declared as such in terms of the Local Authorities Act, Act 23 of 1992. It is further submitted that the land ceased to be communal land over which customary land rights could be exercised as per Section 15 (2) of the Communal Land Reform Act, read together with Section 3 of the Local Authorities Act. For these reasons, the defendants submit in their written submissions that the customary land rights the Plaintiff's late father had over the land in question were terminated at that time. Accordingly, they further submit that the plaintiff could not have inherited such rights from her father upon his death in 2001 as such rights were no longer in existence.

[19] On the other hand, the plaintiffs submit that Section 28 of the Communal Land Reform Act, states that: "Any person who immediately before the commencement of this

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<sup>2</sup> Government Gazzette No. 1164, Government Notice 176 -182.

Act held a right in respect of the occupation or use of communal land, being a right of a nature referred to in section 21, and which was granted to or acquired by such person in terms of any law or otherwise, shall continue to hold that right, unless . . .” It is on this Section that the plaintiff submits that she held a right that was granted in respect of the occupation and use of communal land; the right she held and exercised were in the nature of the residential and farming rights referred to in Section 21; The rights were granted to or occupied by her in terms of the customary law.

[20] It was further submitted that the rights the plaintiff holds are limited real rights and pertain to the land itself and this argument the plaintiff relied on Article 10 and 16 of the Namibian Constitution. It is then for these reasons that the plaintiff submits that the rights of the plaintiff can be extinguished by just compensation as provided for in Article 16(2).

[21] Moreover, the plaintiff states that Section 20 of the Communal Land Reform Act states that the power to allocate or cancel any customary land right in respect of any portion of land in the communal area of a traditional community vests in the Chief or Traditional Authority as the Chief may determine.

[22] Be as it may, if the area of a local authority thus established is in an area of communal land, the ownership of the immovable property vests henceforth in the local authority so established. The rights of ownership insofar as they concern amongst others the alienation of such immovable property is not unlimited but curtailed by several provisions contained in the Local Authorities Act.

[23] The State has a vested interest in the manner in which local authority councils go about their business and how they dispose of and treat the land within their areas of jurisdiction.

[24] It is for this reason that the Minister is granted statutory powers when a Town Council like the first respondent wishes to sell land to a third party, inasmuch as the Minister's prior consent is a requirement. Plainly it is the intention of the Legislature that town councils should not be permitted to alienate its land without the consent of the Minister.

#### Applying the Law to the facts

[25] The land vests in the State by virtue of a certificate of registered state title (CRT) No.4789/1991 and subsequently, it vests in the First Defendant by virtue of Local Authorities Act, Act 23 of 1992 when it was declared a township in 1995.

[26] Once the land or portion of land ceased to be communal land in terms of Section 15(2) of the Communal Land Reform Act, read with Section 3 of the Local Authorities Act, the effect is that the Town Council becomes the owner of the land. As a result, from the date that the land ceased to be communal/customary land, no traditional leader could exercise customary powers over it. The effect is that all customary rights relating to PTO's cease to exist.

[27] Irrespective of when the plaintiff became the owner or continued the customary rights, which is not the case as it ceased the moment the land became part of the Local Authority, the claim of the plaintiff is in any event not based on the value of the land at the time ownership passed to the first defendant.

[28] As for the plaintiff's right to claim compensation for the loss of land in terms of Article 16(2) of the Namibian Constitution, such claim would be against the State who in fact expropriated the rights of occupation.

[29] Although it is not necessary for me to deal with the following issue because it is obiter dicta, I have decided to deal with it nonetheless. The issue is the following:

29.1. The claim against the First defendant has in any event become prescribed.

[30] As a result, I make the following Orders:

1. The plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the costs of those defendants that entered an appearance to defend.

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MILLER AJ

**APPEARANCE:**

PLAINTIFF:

Mrs. Zenda and Mr. Odendaal

Of:

Legal Assistance Centre, Windhoek

1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANT:

Mr. Mukwata

Of:

Kwala and Company Incorporated, Windhoek