

IN THE HIGH COURT OF SWAZILAND

Civ. T.735/91

In the matter of

WILSON S. GULE

Applicant

and

ORAH GULE (born Dlamini) AND OTHERS

Respondents

CORAM : Hull, C.J.
FOR APPLICANT : Mr. Ntiwane
FOR 1ST RESPONDENT : Mr. Shabangu
FOR 3RD RESPONDENT : Mr. Lukhele

O R D E R
(26/02/93)

Hull, C.J.

By paragraph 2(b) of his notice of application dated the 8th of April 1991, the applicant sought orders ejecting the first and third respondents from a house and store situated on lot 230 Figgs Peak Township in the Hhohho District.

It is not in dispute that the applicant is the sole registered owner of the lot.

Both respondents resist the orders sought against them.

In each case, one of the bases on which they do so is, as between the parties to the present proceedings, in my view misconceived. I can conveniently dispose of it at once.

As between the parties in these proceedings, the claims of the first and third respondents to resist the orders sought on the basis that Lot 230, or some interest therein, forms

2/.....

part of the estate of the late Gladys Gule, do not in my view lie. The first respondent in her opposing affidavit contended inter alia that she was entitled to the property as executrix dative of Gladys Gule's estate. But of course that appointment has been set aside. In his opposing affidavit, the third respondent did not claim a right to occupy as a relative in terms of whatever rules may govern the administration of Gladys Gule's estate). What he claimed (as he still does) was that he was entitled to possession by virtue of an agreement that he made with the applicant. It was not until the present hearing that he sought to go further. I do not think it is open to him to do so but in any case any argument based on the supposed nature of Gladys Gule's estate is in my opinion misconceived. The order that I made on 11th November 1992 related to the prayer in paragraph 2(a) of the applicant's notice of application, i.e. concerning the appointment of the first respondent as Gladys Gule's executrix dative. That issue, my order on it and my reasons for the order, are separate matters from the present issue as it is now before the court.

In relation to the store situated in Lot 230, it therefore follows that the applicant is entitled to the order of ejection that he seeks against the first respondent, for her claim to resist ejection rested on her appointment as executrix dative.

As far as her opposition to the order which is sought for her ejection from the house on the lot is concerned, it appears to me from the affidavits that there are real and genuine issues of fact in dispute between her and the applicant. These relate to the purposes for which the house is being used and in particular the extent to which it is the first respondent's home. They also relate to the extent to which the first respondent has contributed to the costs

or improvement of the house. The determination of these facts may then well give rise to questions of law as to her rights as a wife (or possibly as a former wife) in Swazi customary law of the applicant - indeed it seems apparent to me that they will do so. That in turn might lead eventually to a ruling by this court that the dispute falls properly within the customary jurisdiction.

However the applicant has chosen to bring these proceedings to this court i.e. the civil jurisdiction. The first respondent is therefore entitled to oppose the matter here. In the meantime the matter of facts in dispute have to be resolved.

In the exercise of my discretion I do not consider that it is appropriate simply to dismiss this part of the applicant's notice of application or that it is necessary to order the matter to go to trial. As between the applicant and the first respondent it is in my view sufficient to order that oral evidence be taken on the factual issues, and that the deponents to the affidavits should for that purpose be available as well for cross-examination.

Having regard to section 30 of the Transfer of Duty Act 1902, I am of the view that the applicant is on the papers entitled to the order that he seeks for the ejectment of the third respondent from the store. The written document on which the third respondent relies does not comply with the requirements of subsection (1) of the section. The applicant did give him notice to vacate by the end of December 1990. No other good basis for resisting the order sought has been shown.

Accordingly, I make orders as prayed for the ejectment of the first and third respondents from the shop on Lot 230.

4/.....

In respect of the claim by the applicant for the ejectment of the first respondent from the house on the Lot, oral evidence is to be taken, on the issues described above, at a date and time to be set by the Registrar on the application of either party. At the conclusion of that evidence, they will be at liberty of course to make further submissions.

The third respondents must pay the applicant's costs of this application.

The other costs shall be in costs in cause between the applicant and the first respondent.

The first respondent's counter-claim is dismissed.



David Hull
CHIEF JUSTICE