

THE HIGH COURT OF SWAZILAND

NTOMBENHLE M. MAKHUBU

Applicant

And

SIJABULILE NKAMBULE

1st Respondent

MASTER OF THE HIGH COURT

2nd Respondent

ATTORNEY GENERAL

3rd Respondent

Civil Case No. 1262/2006

Coram: S.B. MAPHALALA – J

For the Applicant: MR. O. NZIMA

For the 1st Respondent: MR. P. SHILUBANE

JUDGMENT

(24th November 2006)

[1] This matter concerns the confirmation of a rule which the Applicant obtained *ex parte* on 24th March 2006, to the following effect:

(a) That the normal rules of court as to notice, time limits, service and procedure be and are hereby dispensed with and the matter is heard urgently.

(b) That the 1st Respondent be and is hereby directed to deliver to the Applicant and/or her attorneys all monies collected as rentals since January 2001 from twelve leased rooms at Esigodvweni area, Matsapha, in the Manzini District.

(c) That the 1st Respondent be and is hereby evicted from the main house, Esigodvweni area, Matsapha with immediate effect.

(d) That the Deputy Sheriff for the District of Manzini be and is hereby directed to compile an inventory of all the items in the premises at Esigodvweni area, Matsapha and as well lock the main house.

(e) That the 1st Respondent be and is hereby restrained from collecting any rentals from the leased rooms and that rentals be paid at the offices of Nzima & Associates, P.O. Box 5477, Ilanga Centre Building, Manzini with immediate effect.

(f) Costs of suit at the scale as between attorney and own client scale.

(g) That prayers (b), (c), (d) and (e) operate with immediate effect as an interim rule returnable on the 21st April 2006.

[2] The application is founded on an affidavit of one Ntombenhle W. Makhubu in her capacity as executrix testamentary of the estate of late Zodvwa Nkambule being EM 126/2001. A number of annexures are filed in support thereto which includes the last Will and Testament of the said Zodvwa Nkambule (born Manyatsi) annexed as "NM2". The 1st Respondent has filed her opposition and to that effect has filed an Answering affidavit accompanied by a number of pertinent annexures. The Applicant then filed her replying affidavit in accordance with the Rules.

[3] The 1st Respondent in her Answering affidavit has raised two points *in limine* which have however been abandoned by Counsel for Respondent and the matter proceeded on the merits. For the sake of completeness I proceed to outline these points as follows:

"2.1 *In limine*, I am advised and accept that:

2.1.1 The Applicant should have foreseen that a dispute of the fact would arise in this matter and therefore erred in bringing an application for the custody of the minor child

which requires the court to hear oral evidence as to what the best interests of the minor child are.

2.1.3 The application is fatally defective in that same was never served on me even after the rule nisi had been granted and notwithstanding that the Applicant undertook to do in her Founding affidavit."

[4] When the matter came for arguments Counsel for the Respondent abandoned the points in law *in limine* as reflected above in paragraph [3]. I then heard the matter on the merits.

[5] Before addressing the arguments on the merits I find it important to sketch a brief history of the dispute between the parties. The Applicant as I have stated earlier in this judgment is the executrix testamentary of the estate of late Zodvwa Nkambule. The deceased had one minor child namely Nolwazi Fortunate Nkambule who was born on 4 June 1992. The said child is now under the Applicant's care, custody and guardianship since the demise of her mother in November 2000. According to the Applicant she is struggling to provide for the child since her source of income is very limited. As of now, the situation has become desperate, and/or worse in the face of unpaid school fees and other basic necessities.

[6] The deceased in her last Will and Testament (annexure "MM2") at paragraph 4.1 thereof has bequeathed the main house at Esigodvweni, Matsapha and the land upon which it is situated to her daughter Nolwazi Fortunate Nkambule. The 1st Respondent is in occupation of the said property including the main house and its contents. The 1st Respondent also collects rentals from all the tenants in the rented flats of the property.

[7] The 1st Respondent on the other hand states that since the death of the deceased the minor child has been in his custody as the blood brother of the deceased. He has been maintaining the child from his own income. The 1st Respondent is also of the view that it is disputed that the property in question belonged to the deceased *moreso* as it is on Swazi Nation land and the homestead belongs to the Nkambule family by Swazi law and custom and not

the deceased who was married to his brother by Swazi law and custom.

[8] The thrust of the Applicant's case on the merits is that the property that is the subject-matter in these proceedings belongs to the deceased and that she actually made provision for its disposal in her Will. The Last Will and Testament of the deceased still remains unchallenged to date even though it was read in the presence of the 1st Respondent on the 30th April 2003. The Applicant was appointed Executrix Testamentary and the Master issued Letters of Administration in her favour.

[9] It was further contended for the Applicant that she has a clear right to administer the estate by virtue of her appointment as Executrix Testamentary. The 1st Respondent is dealing with the estate property by collecting rentals and not accounting for same. There is no other remedy available to Applicant other than an interdict to be operational against the 1st Respondent.

[10] The crux of the opposition by the 1st Respondent to the above-cited claims by the Applicant is that the land in question in this case is held by Swazi law and custom and in terms of Section 211 of the Constitution ownership of such land is vested in the King.

[11] A further argument by the 1st Respondent is that the rule *nisi* in this case was granted *ex parte* and therefore in view of the legal authority in *Lawsa Re-issue Vol. 3 Part 1 paragraph 123 - 124* the Applicant bears the *onus* to have the rule confirmed. That in the present case Applicant has failed to discharge such *onus*.

[12] Starting with the first argument in opposition that this issue is governed by Swazi law and custom and in terms of Section 211 of the Constitution. The said Section provides *in extenso* as follows:

211 (1) From the date of commencement of this Constitution, all land (including any existing concessions) in Swaziland, save privately held title-deed land, shall continue to vest in Ingwenyama in trust for the Swazi nation as it vested on the 12th April 1973.

(2) Save as may be required by the exigencies of any particular situation, a citizen of

Swaziland, without regard to gender, shall have equal access to land for normal domestic purposes.

(3) A person shall not be deprived of land without due process of law and where a person is deprived, that person shall be entitled to prompt and adequate compensation for any improvement on that land or loss consequent upon that deprivation unless otherwise provided by law.

(4) Subject to subsection (5), all agreements the effect of which is to vest ownership in land in Swaziland in a non-citizen or a company the majority of whose share-holders are not citizens shall be of no force and effect unless that agreement was made prior to the commencement of this Constitution.

(5) A provision of this chapter may not be used to undermine or frustrate an existing or new legitimate business undertaking of which land is a significant factor or base.

[13] It appears to me after hearing the arguments of Counsel in this regard that *Mr. Shilubane* for the 1st Respondent is correct. The land on which the property in question is located is under Swazi law and custom and therefore governed by that legal regime. It will also appear to me that the provision in the Will that the main house and the land upon which it is situated be bequeathed to Nolvazi Nkambule would therefore be contrary to Swazi law and custom.

[14] In the result, for the afore-going reasons I have come to the considered view that the matter ought to proceed in terms of Swazi law and custom and therefore the present application is dismissed with costs.

S.B. MAPHALALA
JUDGE