



**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE No. 1159/06**

In the matter between:

**BEAUTY JUMAIMA THOMO**

**PLAINTIFF**

**AND**

**KENNETH HAROLD VILAKATI**

**1<sup>ST</sup> DEFENDANT**

**FRANCINAH MASIPINYA  
(born NKOMO)**

**2<sup>ND</sup> DEFENDANT**

Neutral Citation: *Beauty Jumaima Thomo v Kenneth Harold Vilakati and another (1159/2006)* [2012 SZHC] 125 (14<sup>th</sup> June 2012)

**Coram: SEY J.**

**Heard: 3 April 2012**

**Delivered: 18 June 2012**

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**RULING ON ABSOLUTION FROM THE INSTANCE**

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**SEY J.**

- [1] This is an application for absolution from the instance brought by the Defendants upon closure of the Plaintiff's case in terms of Rule 39 (6) of the Rules of the High Court which provides, inter alia, that "at the close of the case for the plaintiff, the defendant may apply for absolution from the instance....."
- [2] The Defendants contend that the matter before Court touches upon issues of Swazi Law and Custom and that the said issues were dealt with under Swazi Law and Custom by the traditional structures. It is further contended by the Defendants that this Court lacks jurisdiction to deal with the matter which falls exclusively within Swazi Law and Custom as the decision complained of emanated from the Umphakatsi. The Defendants also argued that the Plaintiff has neither appealed against the decision of the Umphakatsi nor applied for a review of the said decision which would have given her the leeway to obtain the order sought and therefore the Court lacks the necessary jurisdiction.
- [3] Arguing further on behalf of the Defendants, Mr. Nzima cited **Section 151 (3) (b) and Section 233 of the Constitution of Swaziland 2005** and he submitted that land under Swazi Law and Custom is governed by Chiefs on behalf of the iNgunyama and cannot be dealt with by the High Court.

- [4] In response, Mr. Mdluli submitted that the Court does have jurisdiction over this matter by virtue of the fact that the Plaintiff's cause of action is ejectment of the Defendants from the houses that were built by the Plaintiff. Counsel further submitted that it is common cause that the land upon which the said houses are built is under Swazi Nation Land which said land is held by the King in trust for the Swazi Nation and that clearly the Plaintiff cannot own the land but that she has every right of possession over that piece of land.
- [5] It is further contended by the Plaintiff that Section 151 (3) (b) of the Constitution as aforesaid does not apply to this matter herein for the reason that the Plaintiff does not seek a declaratory order as to who owns the said piece of land.
- [6] Mr. Mdluli further cited the provisions of **Section 19 (1) and (2) and Section 35 (1) and (2) of the Constitution of Swaziland** and he submitted that these sections read together clearly shows that the High Court does have original jurisdiction over this matter because the Plaintiff is arbitrarily being deprived of her right of possession over the homestead which she had built on her own without assistance from the Defendants.
- [7] Another point argued by the Plaintiff is that the issue of jurisdiction should have been raised *in initio* and that the Defendants having failed to do so and having gone to the extent of cross examining

the witnesses have submitted themselves to the jurisdiction of the Court.

[8] On the issue of jurisdiction of the Court, let me reiterate straightaway that the rule is settled that lack of jurisdiction over the subject matter may be raised at any stage of the proceedings. It is also trite that jurisdiction over the subject matter is conferred only by the Constitution or the law and it cannot be acquired through a waiver or enlarged by the omission of the parties or conferred by the acquiescence of the Court. Consequently, questions of jurisdiction may be cognizable even if raised for the first time on appeal. To put it in other words, if the matter is one that falls exclusively within Swazi Law and Custom as the Defendants herein have contended, then the Court has no jurisdiction to entertain the matter and the Court is precluded from proceeding on the merits of the contentions and in fact is duty bound to dismiss the suit.

[9] The test for absolution was formulated in ***Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409 G-H*** in these terms:

“...When absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff (***Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).***)”

[10] This implies that a Plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolute non-suit because without such evidence no Court could find for the plaintiff. Now, in this matter before this Court, the Plaintiff, who is about 90 years old, is claiming for “an order evicting and/or ejecting both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and all those claiming title from the Defendants from Plot 64 New Village Township.....”

[11] It is the Plaintiff’s evidence that she obtained the piece of land from the Logoba Royal Kraal under Prince Nkhosini as Chief and Mr. Ntentwane Mamba as the headman. She said it was the Logoba Umphakatsi who gave her the land and that she had *kukhontaed* it by paying the sum of E2000 in lieu of a beast. She further testified that after she had paid what was due, she started to build in the year 1995 or thereabout and that she improved the land by constructing one big house with a sitting room, dining room, three bedrooms, a kitchen, toilet and bathroom.

[12] The Plaintiff further testified that the Defendants had no place to stay and so she had allowed them to occupy the main house and to collect rent on her behalf from the other one roomed flats which had been let to tenants. She said she had agreed with the Defendants that they were to occupy the main house free of charge until the 1<sup>st</sup> Defendant obtained employment. Testifying further, the Plaintiff told

the Court that after the 1<sup>st</sup> Defendant obtained employment she asked the Defendants to leave but that they refused to go. She said that she subsequently reported the matter to the Umphakatsi.

[13] Under cross examination, she confirmed that she had *kukhontaed* that piece of land at New Village. She also denied counsel's allegation that she had surrendered the land to the Umphakatsi and that the latter had given it to the Defendants. Furthermore, the Plaintiff denied that the allocation to the Defendants was done by the Royal Kraal on the 23<sup>rd</sup> of November 2003 and she insisted that she had never surrendered the land to the Umphakatsi as she had already built on it.

[14] It is common cause that the land upon which the house in issue has been built is situated at New Village in the Manzini Region. The Plaintiff's case is that she *kukhontaed* for the said land and this is explicitly clear in her testimony. There is also the evidence of PW1 Sibusiso Simelane, the Vice Secretary to the Chief's Inner Council, who confirmed that the land was allocated to the Plaintiff through *Kukhonta* under Swazi Law and Custom.

[15] PW1 also testified that the Plaintiff had gone to the Chief's Inner Council to lodge a complaint that the place they had allocated to her had been taken from her by some people. He said as the Chief's Council they went in a group to find out who was trying to take the homestead from the Plaintiff. He said on their arrival they met the

2<sup>nd</sup> Defendant and when they asked her what was going on she told them that she was the one who had renovated the homestead. It is PW1's evidence that the Chief's Council had informed the 2<sup>nd</sup> Defendant that they would not accept her answer because as the Chief's Council they knew that the home belonged to the Plaintiff and that she had no authority to repair that homestead and that she and the 1<sup>st</sup> Defendant should vacate the homestead. PW1 further testified that the Defendants did not comply and that they refused to vacate the Plaintiff's homestead. In cross examination PW1 told the Court that the Plaintiff did not surrender the land back to the traditional authorities of Logoba Chief's Kraal and that the Defendants did not kukhonta for the land.

[16] Judging from the evidence adduced by the Plaintiff and her witness, PW1, it is indisputably clear to me that the Chief's Inner Council had dealt with the Plaintiff's complaint under Swazi Law and Custom. The Constitution provides that all land including any existing concessions in Swaziland shall continue to vest in iNgcwenyama in trust for the Swazi Nation save for privately held title-deed land; and, that citizens, without regard to gender, shall have equal access to land for normal domestic purposes. It further provides that a person shall not be deprived of land without due process of law and where a person is so deprived, he will be entitled to prompt and adequate compensation for any improvement on that land or loss consequent upon that deprivation unless otherwise provided by law.

[17] Furthermore, in Section 233 (1) of the said Constitution the Chiefs are described as “the *footstool of iNgunyama and iNgunyama rules through the Chiefs.*” In **Mariah Duduzile Dlamini v. Augustine Divorce Dlamini and 2 others, Case No.550/2012**, her Ladyship **Ota J** opined that “it cannot be gainsaid that Swazi Law and Custom is not only enforced via the Swazi National Courts established pursuant to Section 7 of the Swazi Courts Act 80/1950, but is also enforced by traditional structures, through chiefs heading the different communities.”

[18] In the Supreme Court of Swaziland judgment in the case of **Maziya Ntombi And Ndzimandze Case No: 02/12**, His Lordship **M.C.B. MAPHALALA JA** pronounced as follows:

“Decisions of the Chief’s Inner Councils are legally enforceable equally as those of the Swazi Courts established under the Swazi Courts Act No. 80 of 1950. Swazi Law and Custom has long recognised the judicial function of Chiefs and their Inner Council in disputes between their subjects which are not justiciable in Courts of General Jurisdiction applying Roman-Dutch Common Law.”

[19] Moreover, A person affected by the decision of the Inner Council has a right of appeal to the Chief who can either confirm or reverse its decision. Thereafter, decisions of the Chief’s Inner Council are appealable to the Swazi Courts established in terms of the Swazi Courts Act No. 80 of 1950. The Act confers both civil and criminal jurisdiction upon Swazi Courts in accordance with section 7 and 8 of



the Act thereof.

[20] In the present case, Mr. Mdluli contends that the Plaintiff's cause of action is ejectment of the Defendants from the houses that were built by the Plaintiff and that she is not in any way claiming ownership of the land upon which the homestead is built. It is worthy of note that the issue of ejectment had been dealt with by PW1 in his evidence. However, what is glaringly missing from the evidence of both the Plaintiff and her witness are facts relating to the outcome of the said complaint. It seems that the matter had not been finalised and it appears to me that the Plaintiff did not pursue the complaint she had lodged to the Chief's Inner Council which undoubtedly has the competence to adjudicate upon and settle such disputes in terms of Swazi Law and Custom.

[21] The Constitution gives the High Court unlimited original jurisdiction in civil and criminal matters as well as appellate and review jurisdiction over Subordinate Courts and Swazi Courts. However, the High Court has no original jurisdiction in matters in which a Swazi Court has jurisdiction in terms of section 151 (3) (b) of the Constitution. To my mind, the proper course would have been for the Plaintiff to have sought a final order from the Chief's Inner Council on the issue of the ejectment of the Defendants from her homestead before instituting this present action in the High Court.

[22] In the light of all the foregoing, an inescapable conclusion is to grant

the Defendants absolution from the instance.

In the result, I make the following ruling:

- (a) Absolution from the instance is hereby granted.
- (b) There would be no order as to costs.

**For the Plaintiff**

**MR. M.H. MDLULI**

**For the Defendants**

**MR. O.**

**NZIMA**

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE  
..... DAY OF .....2012**

.....  
**M.M. SEY (MRS)**

**JUDGE OF THE HIGH COURT**





