



IN THE HIGH COURT OF SWAZILAND

Civil case No: 3330/05

In the matter between:

DIANA DLAMINI

Applicant

AND

DAN MAKAMA

Respondent

Coram:

M.C.B. MAPHALALA, J

For Applicant
For Respondent

Attorney Mandla. Mkhanazi
Attorney Sakhele. Hlophe

Summary

Swazi law and Custom – application for release of cattle in terms of the “Sisa Custom” – ownership of cattle paid in respect of children born out of wedlock – respondent ordered to release sisaed cattle to the applicant– ownership of the cattle vests on the parents of the girl who gave birth to the children out of wedlock.

JUDGMENT
28/03/2012

- [1] An application was instituted for an order directing the respondent to release, return and deliver a herd of three cattle together with their progeny to the applicant; she also prayed for an order directing the respondent to pay costs of suit.
- [2] The applicant is a widow; her daughter Juliet Themba gave birth to two children outside marriage, and, the family of the children acquired their custody in terms of Swazi Law and Custom, one cow was paid in respect of the boy and two cows were paid in respect of the girl. The cattle were subsequently sised to the respondent by Wilson Makama.
- [3] The applicant argued that in terms of Swazi Law and Custom, the three cows belong to her as the surviving parent of Juliet Themba. She further argued that Swazi Law and Custom dictates that cattle paid in respect of an illegitimate child belong to the parents of the girl who gave birth to the children. She alleged that on numerous occasions she had approached the respondent with a view of taking back the cattle and their progeny but he refused to release the cattle; she further alleged that even when Juliet Themba was seriously sick and needed money for medical treatment the respondent had refused to release the cattle so that she could sell them to cater for her medical expenses. The said Juliet Themba subsequently died.

[4] The respondent opposed the application and filed an Answering Affidavit. In *limine* he argued that when the applicant launched the proceedings she knew very well that there were material disputes of fact which could not be resolved by way of Motion proceedings, and, that clearly, she should have proceeded by way of Action Proceedings.

[5] The respondent concedes that in 1990 three cattle were paid in respect of the children to the family of Wilson Makama of Siphocosini which was responsible for the upkeep of the children. He denied that the cattle were subsequently sised to him by Wilson Makama.

[6] He alleged that he was the breadwinner of the family of Wilson Makama where the minor children grew up. He also alleged that an agreement was reached between himself, the father of the children and Juliet Themba that the proceeds of the cattle would accrue to him as the person who had raised the minor children.

[7] However, he does concede that the applicant and Juliet Themba approached him on several occasions with a view of repossessing the three cattle; and, that he subsequently released them. He alleged that sometime in 1992, the applicant came to his homestead whilst she was in financial problems and requested him to hand over one cow, which he did; and, that the cow was

later sold by the applicant for E730.00 (Seven hundred and thirty emalangeni), to Matiya Makama, the respondent's brother.

[8] He further alleged that in 1993 Juliet Themba collected the second cow from his homestead which she handed over to Abednigo Mabhedi Mbuyisa, the applicant's brother. According to the respondent, the third cow was slaughtered during the funeral of Juliet Themba. The respondent's wife Maina Makama has filed a confirmatory affidavit in support of her husband.

[9] Abednigo Mbuyisa has also filed a Confirmatory Affidavit in support of the respondent. In particular, he stated that the cattle were paid to the Makama homestead where Juliet Thema was brought up. He further stated that ever since the cattle were brought to the Makama homestead, there was a dispute over their ownership between the applicant and the Makama family. He also confirmed that the applicant demanded the cattle on several occasions until they were released to her. He concluded by stating that he requested and was given one cow by Juliet Themba when he was in financial problems.

[10] The respondent further alleged that the dispute over the cattle was "handled and arbitrated" in terms of Swazi Law and Custom at Siphocosini Royal

Kraal where it was decided that the cattle belonged to the Makama family and forms part of the estate of Wilson Makama.

[11] A letter marked “DMI” is annexed to the Answering Affidavit purported to have been written by the Indvuna of Siphocosini Royal Kraal and addressed to Attorneys CJ Litter and Company who are the respondent’s attorneys in this matter. The letter is entitled Arbitration in the Diana Mbuyisa / Dan Makama and it is dated 20th March 1995. It reads in part as follows:

“....The Siphocosini Libandla has finally concluded the arbitration in the above matter.

You are therefore informed that the evidence we obtained indicated that Dan Makama is the rightful heir to the late Makama of Siphocosini. As for the estate of the late Makama, that is a matter Mr. Makama could pursue in court. Our main role in this matter was to ascertain as to who is now the head of the Makama homestead in Siphocosini....”

[12] This letter doesn’t assist the court in determining the owner of the cattle in terms of Swazi Law and Custom. The Libandla seems to have assumed that since the cattle were in the kraal of Wilson Makama, they now belong to his heir, the respondent.

[13] The applicant has filed a Replying Affidavit in which she denied that the children stayed with or were supported by the respondent or his family. She argued that the minor children Gugu Makama and Siphosethu Makama lived with her sister and her husband Wilson Makama at Siphocosini; and, that the respondent lived at his homestead at Sigangeni area. She denied that Wilson Makama was related to the respondent at all even though they shared the same surname. She also denied that the respondent was the breadwinner in the family of Wilson Makama at Siphocosini.

[14] She reiterated that the cattle were sisaed to the respondent by Wilson Makama since there was no kraal at the Makama homestead at Siphocosini, and, that there was nobody who could look after the cattle. She denied the existence of an agreement between the respondent, the children's father and Juliet Themba that the proceeds of the cattle would accrue to the respondent as the person who had brought up the children.

[15] She denied that the respondent released the cattle either to her or to Juliet Themba. She further denied that another cow was slaughtered during the funeral of Juliet Themba and stated that no cow was slaughtered during the funeral. Furthermore, she stated that the respondent did not assist in any way towards the funeral expenses.

[16] She further denied that the “cattle dispute” was deliberated by the Siphocosini Royal Kraal; and, stated that the only dispute which was deliberated related to his claim that he was the head of the homestead of Wilson Makama. She also alleged that there was no consensus within the Libandla over this matter.

[17] One of the children Gugu Makama has filed a Confirmatory Affidavit in support of the applicant. She confirms that she knows the respondent as a family friend and residing at Sigangeni area. She denied that she is related to the respondent at all or that she ever stayed with him at any point in her life.

[18] Gugu Makama further revealed that when the cattle were paid in 1990, she was twelve years of age and she became aware of the incidents surrounding the sisa of the cattle. She alleged that their father is from Ntfonjeni area in the Northern Hhohho region and that they grew up at the homestead of Wilson Makama at Siphocosini; and, that they attended Siphocosini Primary School.

[19] She recalled that when she was seventeen years of age, she accompanied her sickly mother to the respondent’s homestead to sell one cow for her

medical expenses, but the respondent refused. She alleged that her mother was bitter when she died because of the refusal by the respondent to release one cow to be sold to cater for her medical expenses. Similarly, she confirmed that the respondent's wife Maina Makama and Abednigo Mabhedhi Mbuyisa were not known to her family, and, that they are not in any way related to their family.

[20] During the hearing both parties agreed to have the matter referred to trial in order to resolve factual disputes. In her evidence in-chief, the applicant reiterated her allegations contained in the Founding Affidavit. She further told the court that she was born at Siphocosini and grew up at her elder sister's marital home at Siphocosini. She also told the court that the cattle were fetched by the respondent from Ntfonjeni in the homestead of the father of the children at the instance of Wilson Makama. Thereafter, the respondent invited them to his homestead to see the cattle; they found one cow and two oxen.

[21] The applicant narrated the various occasions when she demanded the release of the cattle from the respondent but to no avail. She personally approached the respondent to release the cattle, and, he refused; she sent another man to the respondent to have the cattle released but he refused. On another occasion, she went with her children to the respondent's

working place in Mbabane to demand the release of the cattle, but he locked himself in the house and called the police; he accused them of threatening to assault him over the estate of Wilson Makama.

[22] She told the court that the respondent's father was Paulos Makama and not Wilson Makama, and that the children were cared for by her elder sister who was married to Wilson Makama.

[23] She maintained her evidence under cross-examination. She denied knowledge of a cow that was sold at her instance to respondent's brother Matiya Makama in 1992 for E730.00 (Seven hundred and thirty emalangenis); she told the court that he didn't even know the said Matiya Makama except the name. She further denied the allegation by the respondent that she had sold the cow because she needed money to conduct a cleansing ceremony for the death of her husband; she told the court that she never wore the mourning gowns at all.

[24] She further denied as false that in 1993 Juliet Themba gave another cow to Abednigo Mbuyisa; she told the court that Juliet only wanted to sell a cow to raise money for her medical expenses when she fell sick but the respondent had refused to give her the cow. She further denied that the third cow was slaughtered during the funeral of Juliet Themba as suggested

by the respondent; she insisted that not a single one of the three cattle was released either to her or to Juliet as suggested by the respondent otherwise she would not have taken the matter to court.

[25] In his evidence in-chief, the respondent told the court that he saw the applicant for the first time at the homestead of Wilson Makama at Siphocosini; that the Makama family of Ntfonjeni brought the cattle to his homestead at Sigangeni on the instruction of Wilson Makama, and, that the cattle were in respect of the custody of the children of Juliet Themba.

[26] He told the court that Wilson Makama had given the cattle to him because he was looking after the children. He conceded that his father was Ben Makama and not Wilson Makama; he further conceded that applicant's sister Etty Mbuyisa was married to Wilson Makama. He alleged that his father was a brother to Wilson Makama, and, that originally they were staying in the same homestead at Sigangeni before Wilson Makama built the home at Siphocosini. This was denied by the applicant and her granddaughter Gugu Makama as reflected in the preceding paragraphs. No supporting affidavit was filed by the respondent to substantiate these allegations.

[27] Initially in his evidence in-chief as well as his opposing affidavit, the respondent told the court that the cattle were brought to his homestead; later in his evidence, he told the court that he fetched the cattle from the parental homestead of Tony Makama at Ntfonjeni in 1991. Tony Makama is the father to the two children. He conceded that he was not related to Tony Makama.

[28] He referred to a meeting held at Siphocosini at the homestead of Wilson Makama in March 1992 where a delegation of two people accompanying the applicant demanded the cattle; the applicant's eldest sister Jennetta, Abednigo Mbuyisa and his wife also attended. He alleged that he advised them to take the cattle since he doesn't keep people's property; however, they refused to take the cattle because the owner Juliet Themba was not in attendance at the meeting, and, that she had to decide where the cattle would be kept. The question which begs the answer is why they held a meeting demanding the cattle if they later refused to take them.

[29] It is worth mentioning that the respondent does not refer to the said meeting in his Opposing Affidavit; neither does his wife, Maina Makama nor Abednigo Mbuyisa mention the said meeting in their confirmatory affidavits.

[30] The respondent's evidence in-chief that the first cow was sold at the instance of the applicant to conduct a cleansing ceremony to remove the mourning gowns is not supported by the evidence. In his Opposing Affidavit he says nothing about the mourning gowns but merely alleges that the applicant was in financial problems. His wife says nothing in her Confirmatory Affidavit about the sale of the cow to Matiya Makama or the mourning gowns.

[31] His evidence that the Siphocosini Royal Kraal ruled that the cattle should be given to Abednigo Mbuyisa since Juliet was not married is not supported by Annexure "DM1", the letter from Siphocosini Royal Kraal.

[32] In his Opposing Affidavit, the respondent alleges that the second cow was collected by Juliet Themba from his kraal and she handed it to Abednigo; in his evidence in-chief, he said the cow was fetched from his homestead by the son of Abednigo Mbuyisa at the latter's instance. His wife stated that the cattle were released to the applicant on various occasions and on one occasion to Juliet Themba. Abednigo Mbuyisa in his confirmatory Affidavit merely states that "on several occasions the cows were demanded by my sister and that they were released to her". This statement is ambiguous and does not assist the respondent. In his affidavit, Abednigo Mbuyisa further states that "on one occasion when I was in financial crisis I

asked for one cow from the late Juliet Themba who was my niece, who then handed over one cow to myself”.

[33] In his affidavit the respondent, states that the third cow was slaughtered during the funeral of Juliet Themba; neither the respondent’s wife nor Abednigo Mbuyisa refers to this incident in their evidence in-chief. Similarly, the respondent does not refer to this incident in his evidence in-chief. He said the third cow went missing, and later they found a skull. He alleged that he took them to Solomon Ginindza who was keeping his ox, and he wanted to replace the dead cow; and that he told him to give the applicant the ox but Solomon Ginindza offered to sell the ox to the applicant for E1,200.00 (One thousand two hundred emalangeni) but the applicant offered to buy it at E1,000.00 (One thousand emalangeni) which was declined by Solomon Ginindza. Clearly this piece of evidence is contradictory. The said Solomon Ginindza never filed a supporting affidavit nor was he brought to testify in his favour. It is worth mentioning that during the cross-examination of the applicant, the respondent’s attorney never mentioned a cow that went missing and later found dead.

[34] The evidence by the respondent that Wilson Makama and Ben Makama were related to each other does not find support in the evidence adduced; similarly, there is no evidence that they once stayed together in one homestead at Sigangeni area before Wilson built his home at Siphocosini.

[35] In his evidence in-chief the respondent told the court that the first cow was sold to his brother Matiya Makama after the applicant asked him to find him a buyer; he handed the cow to her, and she later sold it for E730.00 (Seven hundred and thirty emalangeni). In his evidence in-chief, he said the money was to be used for the cleansing ceremony and removing mourning gowns; under cross-examination, he said the money was used to buy mielies. The applicant denies selling the cow to Matiya Makama; she further denied that she wore a mourning gown after the death of her husband. His counsel never disputed her evidence that she never wore a mourning gown or that she never sold a cow to Matiya Makama.

[36] Another contradiction in his evidence relates to the second cow alleged to have been given to Abednigo Mbuyisa. In his affidavit he said the cow was collected by Juliet Themba in 1993 and handed it over to Abednigo; the latter in his evidence said when he was in financial problems, he asked for one cow from Juliet Themba, and she handed the cow to him.

[37] Under cross-examination, he denied that one cow was slaughtered during the funeral of Juliet Themba and said the cow was sold to another person in his absence; in his affidavit he said the cow was slaughtered during the said funeral. In his evidence in-chief he said the cow went missing and later

found dead. His attorney when cross-examining the applicant put it to her that the cow was slaughtered during the funeral of Juliet Themba.

[38] The respondent's wife testified that the first cow was sold to Matiya Makama at the instance of the applicant who needed money for the cleansing ceremony; and that the said Matiya Makama had given her money to buy him a cow. She further told the court that she gave applicant E700.00 (Seven hundred emalangeni) plus a bag of mielies costing E30.00 (Thirty emalangeni) in the presence of the respondent. On the contrary, the respondent told the court that his wife gave the applicant E500.00 (Five hundred emalangeni) part-payment of the purchase price, and that he paid the balance to the applicant on a subsequent day when they met in Mbabane.

[39] In her confirmatory affidavit, the respondent's wife said one cow was released to Juliet Themba and the others released to the applicant. In her evidence in-chief she said the first cow was sold to Matiya Makama for E730.00 (Seven hundred and thirty emalangeni) at the instance of the applicant; and that the Siphocosini Royal Kraal directed the respondent to hand over the cow to Abednigo; and the third cow went missing and the respondent replaced it with a cow that was kept at the homestead of Solomon Ginindza. Abednigo Mbuyisa in his evidence in-chief said he

requested the cow from Juliet Themba; he said nothing about the Siphocosini Royal Kraal directing that the respondent should give him the cow.

[40] The evidence of Abednigo is equally contradictory. In his affidavit he stated that on several occasions the applicant demanded the release of the cattle, and, that they were released to her; he further stated that he borrowed one cow from Juliet Themba. In his evidence in-chief he told the court that he knows only one cow which he borrowed from Juliet Themba and does not know the other two cows. More importantly, under cross-examination, Abednigo Mbuyisa confirmed that Swazi Law and Custom dictates that cattle paid in respect of a girl who has given birth to children out of wedlock belong to the parents of the girl.

[41] It is common cause that the applicant is the mother of Juliet Themba; and that the applicant, Juliet Themba and her children grew up at the homestead of Wilson Makama of Siphocosini who was married to her elder sister Etty Mbuyisa. Similarly, it is not in dispute that Juliet Themba gave birth to two children Gugu Makama and Siphosethu Makama out of marriage with Tom Makama of Ntfonjeni in the Hhohho region.

[42] The family of Tom Makama paid the cattle for the customary fine for the two children born out of wedlock. The respondent, at the instance of Wilson Makama fetched the cattle from Ntfontjeni and kept them at his kraal at Sigangeni area; the respondent was already keeping two cows belonging to Wilson Makama in his kraal. It is apparent from the evidence that Wilson Makama intended to sisa the cattle from Ntfontjeni to the respondent.

[43] It is not in dispute that the applicant, Juliet and her children stayed at Siphocosini at the homestead of Wilson Makama; they did not stay at the homestead of the respondent at Sigangeni. The allegations by the respondent that the cattle were paid to his family because he was responsible for the upkeep of the children is not borne by the evidence; similarly, the allegations by the respondent that he was the breadwinner of the minor children and responsible for their upbringing is not supported by the evidence. The respondent resides at his homestead at Sigangeni area and the children resided at the homestead of Wilson Makama at Siphocosini; furthermore, the father to the respondent is Ben Makama and not Wilson Makama.

[44] There is no evidence that the respondent's family of Sigangeni is related either to the family of Wilson Makama of Siphocosini or the family of Tom

Makama of Ntfontjeni in the Hhohho region save for sharing the surname. Similarly, the respondent has not furnished any evidence that he was the breadwinner of the family of Wilson Makama where the children grew up.

[45] The allegations by the respondent that the three cattle were not sised to him is therefore rejected. Similarly, the allegations by the respondent that an agreement was concluded between himself, the father of the children, and Juliet Themba that the proceeds of the three cattle would accrue to him as the person who raised the children is not supported by the evidence tendered; what is clear from the evidence is that the cattle were paid in respect of a fine for the two children born out of wedlock.

[46] One of the children Gugu Makama who is now a major has deposed to a confirmatory affidavit in support of the applicant's replying affidavit and state in part as follows:

“2.1. I am a grand daughter to the applicant and one of the subject children in the matter.

2.2. I hereby confirm that I have known the respondent as a family friend resident at Sigangeni and that we are not related in anyway and neither have I stayed with him at any point in my life.

- 2.3. When the cattle were paid I was twelve years and I became aware of the incidents surrounding the “sisa” of the cattle.**
- 2.4. Myself and my brother Siphosethu Makama were born by a Makama of Hhohho region but grew up at the Makama home at Siphocosini and went to Siphocosini Primary school.**
- 2.5. When my mother fell sick, I was aged 17 years. Myself and my mother once visited the home of the respondent wherein my mother sought to have a cow sold to take care of her medical bills; however, the respondent refused.**
- 2.6. I know that my mother died bitter about the respondent’s refusal to assist in time of need, yet he held grandmother’s cattle on request.**
- 2.7. I confirm that the said Maina Makama and Abednego Mabhedi Mbuyisa are unknown to my family and that we are not related in any way.”**

[47] The respondent has not filed any affidavit disputing the evidence of Gugu Makama. Similarly the respondent has not filed any affidavit disputing the Replying Affidavit of the applicant; in that affidavit she states that the children never stayed with the respondent, and, that the children were never

supported by the respondent or his family. She states further that the children always lived with her sister and her husband Wilson Makama at Siphocosini, and not at the respondent's home at Sigangeni. She states that the respondent was merely a friend of the family of Wilson Makama, and, that there was no relationship between the respondent, the applicant or the children; hence, she denied that the respondent was a breadwinner who supported the children.

[48] The applicant further states that the cattle were sisaed to the respondent following an agreement between her brother in-law Wilson Makama and herself since there was nobody to look after the cattle at the homestead of Wilson Makama; she denied that there was another agreement as alleged by the respondent to give the cattle to him allegedly for the upbringing of the children.

[49] She further reiterated that she made several attempts to have the cattle released but the respondent refused; she denied that any of the cattle were released to her or to her daughter. She reiterated that the respondent refused to release one cow to be sold to cater for the medical expenses of Juliet Makama when she was sick. She denied that any cow was slaughtered during the funeral of Juliet Themba.

[50] The applicant further denied that the cattle dispute was ever deliberated at Siphocosini Royal Kraal. Her evidence in this regard is supported by Annexure “DM1” where the chief’s headman states that the issue they had to determine related to the person who was the rightful heir to inherit the homestead of Wilson Makama.

[51] Rule 6 (13) permits the filing of further affidavits upon delivery of a replying affidavit in order to dispute or clarify allegations raised in the replying affidavit. If the allegations raised in the replying affidavit are not disputed they stand as correct. It is common cause that the respondent did not ask for leave to deal with the allegations of facts in the replying affidavit.

[52] The evidence of the respondent and his witnesses with regard to whether or not the cattle were released to the applicant and Juliet Themba is contradictory. I have analysed the evidence in the preceding paragraphs showing the inconsistencies. There is no need for me to repeat this analysis of the evidence. The respondent’s attorney has acknowledged the inconsistencies in the respondent’s evidence, but argued that they are immaterial. I do not agree. The contradictions and inconsistencies referred above are material and they cast serious doubt on the evidence of the respondent and his witnesses. On the other hand, the applicant was

consistent in his evidence and during cross-examination. It is the finding of this court that the cattle were not released by the respondent to the applicant or her daughter Juliet Themba.

[53] Lastly, Swazi Law and Custom dictates that cattle paid as a fine in respect of children born out of wedlock belongs to the parents of the girl. The cattle do not belong to the girl who gave birth to the children out of wedlock.

[54] In the circumstances the application is granted with costs on the ordinary scale.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT