



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Case No: 96/08

In the matter between:

THOMAS MOTSA

APPLICANT

and

FANANA MOTSA

1ST RESPONDENT

MBOKODVO MOTSA

2ND RESPONDENT

Neutral Citation : Thomas Motsa and Fanana Motsa & Mbokodvo Motsa
(96/08) [2017] SZHC 133 (28 JUNE 2017)

Coram : MABUZA -PJ

Heard : 2/7/2012; 3/7/2012; 6/7/2012; 31/7/12; 26/01/15;
9/2/2015; 23/6/15; 18/4/15

Delivered : 28 JUNE 2017

SUMMARY

Swazi Law and Custom – Dispute arising out of ownership of land on Swazi Nation – No Title Deed on such land – Land under jurisdiction of Chief – Hierachy of fora under Swazi Law and Custom not followed for dispute of land – High Court *in casu* has no original jurisdiction – Matter to be referred to Ndabazabantu – Each party to pay its own costs.

JUDGMENT

MABUZA -PJ

- [1] The pleadings in this matter were launched during or about 16th January 2008. The application was brought by Thomas Motsa against Fanana Motsa (1st Respondent) and Mbokodvo Motsa (2nd Respondent).
- [2] The application sought the following prayers:
- (a) Directing the Respondents and those who hold title through them to vacate certain homestead and fields situate at Kwaluseni area next to the Deyane mountain belonging to the Applicant.
 - (b) Granting costs of the application only in the event this application opposed.

(c) Granting further and or alternative relief.

[3] The application is opposed by the Respondents. A founding affidavit deposed to by the Applicant Thomas Motsa on the 16th January 2008 sets out the evidence that supports his cause of action. Its contents are reproduced hereunder:

“The founding affidavit

I am the owner, in terms of Swazi law and custom, of certain homestead and fields situated at Kwaluseni area in Manzini District next to Deyane Mountain and adjacent the Shabalala homestead.

The land on which the homestead was build was allocated to my father, now deceased, by the Kwaluseni Royal Kraal through the traditional method of land acquisition, known as kukhonta.

In time the land devolved to me through the traditional system of inheritance.

The 1st and 2nd Respondents are claiming ownership of the same piece of land and they have erected three “stick and mud” dwellings which they let to different tenants.

The Respondent’s claim emanates from the fact that their parents were at some time in the distant past asked by my mother, now deceased to look after the homestead when my mother was taken ill and she came to live with me at my work place at Bhunya in order to receive medical attention.

The Kwaluseni Royal Council has also ruled that the land belongs to my family.

A copy of the ruling by the Royal Council is annexed and marked “A”.

During or about the month of October or November 2006 the 1st Respondent assaulted me in an effort to get me to abandon the land.

10.1 I made a complaint to the Royal Swaziland Police and he was subsequently arraigned and sentenced to six months imprisonment.

10.2 Again in about the month of January 2007 the 1st Respondent assaulted me and set dogs upon me.

10.2.1 I made a complaint with the Royal Swaziland police and he was convicted and sentenced to ten months imprisonment.

The Royal Swaziland Police have now advised me that unless I get an order from this honourable Court for the eviction of the Respondents I am in danger of loosing my life in this dispute.

The behaviour of the Respondents has made it impossible for me to tolerate their frequent visits to my homestead and I fear that both my family and myself are not safe anymore.

The Respondents claim to the land is not backed by any lawful evidence as the Royal Kraal which is the sole authority for allocating land at Kwaluseni had denied allocating land to them or their parents.”

[4] It is my considered opinion that the police gave the Applicant wrong advice. They should have advised that the Applicant obtain a peace binding order

the defiance of which is contempt of court which carried a more serious penalty possibly a custodial sentence. This in my view would have had a more salutary effect on the Respondents.

[5] The Respondents (who are siblings) claim emanates from the fact that the property in question was allocated to their grandfather Mabuya Motsa and after his demise it devolved to their father Sangoma Motsa who is deceased. Following the death of their father it devolved to the Respondents.

[6] The matter was enrolled before this Court on the 25 January 2008. The 1st Respondent Fanana Motsa made an appearance on that day and stated his wish to be heard. I directed that oral evidence be led. The 2nd Respondent Mbokodvo Motsa did not make any appearance on that day.

[7] Because of his non-appearance on the 8th February 2009, an order was obtained against the 2nd Respondent directing him and those holding title through him to vacate the property described above the order. The 1st Respondent later died leaving the matter part heard and the 2nd Respondent continued with the matter.

[8] The 2nd Respondent later moved an application for rescission of the above order which was granted by consent of the parties.

[9] On the first date of the hearing of oral evidence both the Applicant and the 2nd Respondent were present in Court. Mr. Mbokodvo Motsa after being duly sworn in presented his evidence in respect of the matter. He had stated earlier that he could not afford to hire the services of an attorney to draft and file opposing affidavits on his behalf. I allowed him to lead oral evidence in lieu of an opposing affidavit.

[10] After taking the oath, 2nd Respondent testified that he and his family were not aliens in the disputed piece of land as they were born there. That the Applicant came to that area and asked for a piece of land from 2nd Respondent's father who gave him three fields and the Applicant built his homestead on these three fields. 2nd Respondent's father thereafter took the Applicant to Umphakatsi to introduce him and to inform Umphakatsi (council) that he had given the Applicant a piece of land for his own use. The Council went to the said piece of land and set the boundaries and the Applicant thanked the Council. 2nd Respondent testified that now the

Applicant wanted to cross the boundaries and trespass on 2nd Respondent's family land and this could not be allowed.

[11] The 2nd Respondent was cross-examined by Mr. Magagula the attorney for Applicant. The 2nd Respondent revealed that he was born at Kwaluseni where he resided at the time of this hearing, but not at the disputed home. He confirmed that his father's name was Sangoma and his mother LaNkambule and that his parents were both deceased. He confirmed that the Council at Kwalusen Royal Kraal deliberated upon the dispute relating to the property during 2006 and thereafter issued a ruling. He denied that the Council went to the property to inform him and his family to vacate the property. He said that the Council came to check if the boundaries that they had put were still being adhered to.

[12] Gideon Magagula (DW2) testified that he was the secretary to the Council at Kwaluseni Royal Kraal. He stated that sometime ago, the dates he could not recall, the Applicant reported a dispute to the Council concerning a piece of land at Kwaluseni.

[13] All the stakeholders were called in order to discuss the matter. These included Ntjenane Motsa who is an elder of the Motsa clan. The Applicant was also present. Subsequent to the discussions the Council decided to refer to the minutes of the previous Council. It was discovered that there was a previous dispute lodged with that Council and that after its deliberations a decision was taken. The decision was that the said land belonged to the Motsa clan.

[14] It was also discovered that Sangoma Motsa, the father to the 2nd Respondent had been allocated some land by the Motsa clan and that when the Applicant returned from Bhunya where he was employed, he found that Sangoma had erected a structure on the Motsa land. The land was allocated to both the Applicant and Sangoma and the Nkhokhokho tree divided them. Each party was to keep within his boundaries. That was agreed to and blessed on that day.

[15] Magagula testified that after some time during the life of the Council to which he was a secretary the dispute arose again. This Council discussed the matter and made a ruling that they too would abide by the previous Council ruling. The decision of the old Council was upheld and the two

families were ordered to maintain the boundaries as demarcated by the old Council.

[16] A few days later the Applicant returned to the Council and expressed his dissatisfaction with their decision arguing that the land above the Nkhokhokho tree belonged to his family. The Council informed him that they had given their decision on the dispute. He confirmed that he was the author of Exhibit A.

[17] During cross-examination he reiterated that the Applicant had lodged a complaint during early 2007 and the Council had made its ruling during the same year and that it was a written ruling.

[18] He informed the Court that Exhibit A was written for this Court's benefit but that the Council had already taken the decision to abide by the previous Council's ruling. The contents of Annexure "A" are reproduced hereunder.

"FROM: KWALUSENI ROYAL KRAAL
P.O. BOX 2424
MANZINI
DATE: 17TH AUGUST 2006
TO: THOMAS MOTSA

SUBJECT: DECLARATION OF LAND SETTLEMENT

This letter serves to confirm that the homestead located next to Deyane Mountain, adjacent to the Shabalala homestead, belongs to Mr. Thomas Motsa and the family naturally by *khonta*.

Lankambule had been asked by Mrs Dorah Motsa to look after her homestead while she was taken by her children, who were at work at Usuthu Pulp Company in Bhunya, to take care of her closely.

In due course, LaNkambule's husband Sangoma (who had been staying at work SEB), came back and decided to occupy the homestead with LaNkambule. They then produced children who grew up in that homestead. Later LaNkambule separated with her husband and left the home and her children. Her husband, Sangoma Motsa adopted another wife and stayed in the same homestead. Time went by when both – Sangoma Motsa and the new wife died and the homestead was left vacant. LaNkambule's children then came back to re-occupy the land – thinking that it was theirs. That's when the real owners – the Mrs Dorah Motsa's children intervened in the matter, and then the matter was taken to the Umphakatsi Inner Council for settlement. LaNkambule's children were then told clearly that the homestead in question belongs to Thomas Motsa's Family.

Signed: Gideon O. Magagula
Secretary
Indvuna

Signed: Musa Dlamini

[19] It was put to Magagula that the Applicant had instructed his attorney that the Council met during 2006 at the behest of the Applicant to discuss the land dispute. He responded that he recalled that occasion but it was not the first

time as the previous minutes reflected that it had been discussed by the previous Council on the on the 8/11/2003 and 29/11/2003.

[20] It was put to him that when the Council met to discuss the land dispute at the behest of Thomas, the Council ruled in his favour. Magagula denied this. However, he was shown a document Annexure “A” dated 17/8/2006 which was signed by him as secretary and Musa Dlamini as Indvuna. He admitted his signature and recognised that of the Indvuna.

[21] After he had given his evidence in chief on the 26/01/2015, the matter was postponed to the 9/2/2015 in order for him to be cross-examined. On the 9/2/2015 he was unavailable. By then the 2nd Respondent was appearing in person as his Counsel, Mr. Magongo was no longer available having been reported ill on the 31/7/2013. On the 9/2/2015 it was again postponed to the 6/3/2015 but it failed to take off and was postponed *sine die*. It was reset for hearing on the 23/6/2015 when it was again set down for hearing on the 6/8/2015. On that date it was postponed *sine die* because Magagula could not be located. I suspect his unavailability is due to the fact that he is the unauthorised author of Annexure “A”, which was not sanctioned by the Council.

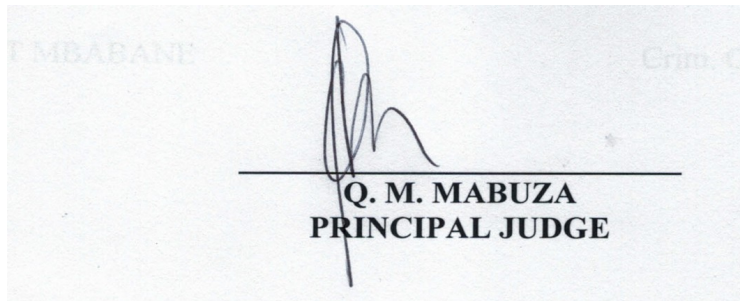
[22] I have decided to issue a judgment based on the evidence that was led before me in order to have closure to this matter at the High Court.

[23] The Council on two previous occasions and (8/11/2003 and 29/11/2013 ruled that the Nkhokhokho tree form the boundary between the two families. That decision is in my view sound, equitable and fair and is unassailable. It would serve no purpose for me to interfere with it.

[24] Otherwise it is clear to me that this Court has no jurisdiction to deal with this matter because it was concluded by the Council (Umphakatsi). The hierarchy herein is after the Council heard the matter and issued a ruling, then the litigant aggrieved with the Council's decision should have approached Ndabazabantu in Manzini and from there to the King's Council at Ludzidzini. I suggest that the Applicant take this course of action.

[25] In the event, the application is hereby dismissed.

[26] I further order that each party pay its own costs.



For the Applicant : Mr. Z. Magagula

For the Respondent : Mr. Magongo