



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 2191/2016

In the matter between

SIPHOKAZI DLAMINI

APPLICANT

AND

VUSI THOMO N.O.

1ST RESPONDENT

MASTER OF THE HIGH COURT

2ND RESPONDENT

NEO DLAMINI

3RD RESPONDENT

BERNADETTE MCETYWA

4TH RESPONDENT

VUYANI DLAMINI

5TH RESPONDENT

ATTORNEY GENERAL

6TH RESPONDENT

Neutral citation: *Siphokazi Dlamini v Vusi Thomo N.O. and 5 Others*
(2191/2016) [2017] SZHC 206 (11 October 2017)

Coram: **MAMBA J**

Heard: **14 September 2017**

Delivered: **11 October 2017**

[1] The late Constance Nomusa Dlamini died in 2014. Before she died, she executed a Will. This Will was registered with the office of 2nd Respondent on 31 March 2014. The Applicant, 3rd, 4th and 5th Respondents are some of her children and beneficiaries in her estate.

[2] One of the hotly contested issues in her last Will and Testament is clause 3.3 wherein she stated as follows:

‘I will and direct that the residence that I presently occupy at Nkoyoyo, together with its contents shall upon my death, become a residence for my daughter Bernadette Mcetywa. The proceeds of the rental income generated by the outbuildings, shall be applied firstly, towards the maintenance of the main house at Nkoyoyo and subsequently, towards the outcome of the outbuildings, and if there is a residue, he can assist my grandson Vuyani Dlamini in case of need.’

[3] The home or residence referred to herein is situated on Swazi Nation Land under the Mpolonjeni Chiefdom, just on the outskirts of Mbabane. The Applicant avers that:

- ‘7.5 This home is the family home wherein all family members and extended family members are entitled, as of right, to use and enjoy anytime without restrictions by any of the beneficiaries of my deceased mother’s Will.
- 7.6 My mother purported to bequeath the family home, which is on Swazi Nation Land, to my sister Bernadette Mcetywa as it more fully appears in the attached Will and Testament in clause 3.3 thereof.
- 7.7 I humbly assert that it was unlawful, and unjust for the deceased to bequeath a family home to only one of her children to the total exclusion of the others, including myself.
- 7.8 I further assert that a testator is not empowered by law to bequeath a home that is on Swazi Nation Land to only one of her children and exclude other existing children who have equal rights to use and enjoy their family home. It is my birth right and also Swazi Customary legal right to occupy, use and enjoy the family home.
- 7.9 The testator was not entitled to infringe the above said right and I thus request the honourable court to nullify and or set aside the bequest relating to bequeathing the Nkoyoyo Swazi Nation Land and home to Bernadette Mcetywa and to declare that my siblings and I and the extended family members, including our children,

have a legally and constitutionally protected right not to be deprived of our right to occupy, use and enjoy the family home.

8.1 Furthermore, I humbly state that the Swazi Nation Land where the Nkoyoyo home is situated was allocated by Mpolonjeni Royal Kraal to my son Bongizipho Dlamini as it more fully appears in annexure SD2 hereto.

8.2 Therefore, strictly speaking, my mother had no right in terms of Swazi Customary Law and in Civil Law to bequeath the Swazi Nation Land and home to Bernadette Mcetywa without the express permission and consent of the lawful possessor of the home (Bongizipho Dlamini). Bongizipho did not give my mother any consent or permission to bequeath the Swazi Nation Land and home to Bernadette nor to anyone else moreso because the home has always been used by every family member as a family home.’

[4] Based on the above allegations, the Applicant has appealed to this court for the following orders:

‘1.1 That the purported Last Will and Testament of Constance Dlamini EH 187/2014 be and is hereby declared invalid, null void and of no legal force and effect.

1.2 Directing that the Estate of the Late Constance Nomusa Dlamini be distributed in terms of intestate succession laws of Swaziland.

2. Costs of this application.’

[5] As is evident from the above challenge in this application, the issues involved herein pertain to Swazi Law and Custom and the interpretation thereof. Both Counsel agreed that this was the case. In order to properly determine the issues, I thus deemed it necessary and proper that I should have the assistance of Assessors who are knowledgeable on the subject at hand. The Judicial Commissioner, Mr. Khumalo and Mr. Nxumalo acted as such Assessors and I am ever so grateful for their help and assistance in this regard. The court notes and records further that the parties were also invited to lead expert evidence on Swazi Law and Custom on the issues under consideration, if they so wished or were advised. They were, however, content to deal with the issues as stated in the pleadings; they did not lead any further evidence.

[6] Unlike title deed or freehold land, Swazi Nation land is not privately owned. It is owned by the Nation at large and is held by the King in trust

for the Swazi Nation. Whilst an individual member of the Swazi Nation is entitled to be allocated a piece of land for his exclusive use and enjoyment, he may not alienate or dispose of this land in any manner whatsoever. This inability to sell or dispose off the land in question plainly shows that the occupier does not own it but is a mere occupier. This occupancy is, it is common cause, subject to certain restrictions. His rights over it approximates to a lifelong usufruct.

[7] Following from the preceding paragraph and perhaps even the wording of the contentious clause in the Will, Constance Dlamini could only pass occupancy or use of her home to her daughter Bernadette. But, could she lawfully do so to the exclusion of her other children?

[8] It has to be noted that the deceased had some other properties, both movable and immovable. These properties are also dealt with in her Last Will and Testament. These properties are, however, not the subject of this application. Counsel for the Applicant, recognising this fact, was constrained to concede that the applicant's attack on the Will should be restricted to the home at Nkoyoyo – which is on Swazi Nation land. Thus the invalidity should be limited to the extent that it regulates or seeks to bequeath that property.

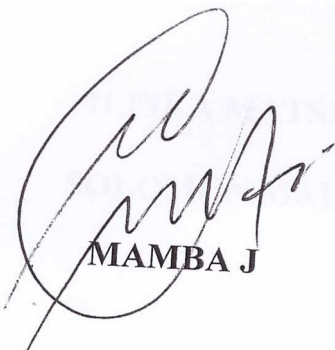
[9] Annexure SD2 is a letter from the Mpolonjeni Royal Residence. Nkoyoyo falls under this area. The letter is signed by the Chief of the area and his secretary. It is dated 28 April 2016 and is on the official letter heads of the said Royal Residence. In the letter the Chief's Kraal confirms that the Late Constance Nomusa Dlamini used her grandson Bongizipho Dlamini to have the home or land allocated to her. This was before the coming into force or effect of the Constitution. Bongizipho is the son of the Applicant and it is common cause, he is now an adult male and is resident in Mbabane. He, however, has not been cited in these proceedings.

[10] In terms of Swazi Law and Custom, because the deceased used Bongizipho to acquire the land in question or acquired it through him, the land was allocated to Bongizipho. The homestead belongs – in the limited sense described above – to him. Therefore, the deceased could not lawfully bequeath the use thereof to someone else at the exclusion of Bongizipho Dlamini.

[11] For the above reasons, to the extent that the Last Will and Testament of the Late Constance Nomusa Dlamini seeks to bequeath the home at Nkoyoyo to Bernadette Mcetywa, is invalid and it is so ordered.

[12] This is essentially a family dispute. None of the parties herein are the cause of that dispute. The dispute emanates from the bequest of the deceased. In the circumstances, I do not think that it would be proper to saddle any of the losing parties with an order for costs. In the exercise of my discretion, I order that each party be ordered to bear his or her own costs of these proceedings.

[13] The assessors agree with this decision.



MAMBA J

1ST APPLICANT
2ND APPLICANT

FOR THE APPLICANT:

MR. M. SIMELANE

FOR THE 4TH & 5TH RESPONDENTS:

MR. SITHOLE