

#### IN THE HIGH COURT OF ESWATINI

### **JUDGMENT**

Case No. 1022/16

In the matter between:

FLORENCE SIBONGILE BHEMBE

**PLAINTIFF** 

 $\mathbf{V}$ 

**MINAH SIMELANE** 

**DEFENDANT** 

Neutral citation: Florence Sibongile Bhembe [1022/16] [2019] SZHC 92 (4th

June, 2019)

**Coram:** FAKUDZE, J

**Heard:** 14<sup>th</sup> February, 2019

**Delivered:** 4<sup>th</sup> June, 2019

**Summary**: Property law – Dispute over ownership of Plot No. 51 of

*Msunduza Township – A mix up in the allocation of plots* 

took place – Held that Municipal Council of Mbabane, Office

of Surveyor General and the Deeds Registry corrects

anomaly – each party to bear its own costs.

## **BACKGROUND**

[1] On the 8<sup>th</sup> June, 2016, the Plaintiff filed summons against the Defendant.

The substance of the Plaintiff's claim is captured in the Particulars of claim as follows:

"4 Plaintiff is the owner of Lot No. 51 situate in the Msunduza

Township Extension No.2, Mbabane Urban Area, District of

Hhohho,

Swaziland, measuring 372 Square Metres. See Annexure

"A" being

the Deed of Transfer of the said property to the Plaintiff.

5. The Defendant has since 2004 erected a building on the

Plaintiff's property and to date she is staying in the said

building.

Using the Municipal Council's scale of valuation, as per

the 2012 valuation when it was last done, the value of the land

upon which the encroachment exists is the sum of E47,000.00

(Forty Seven Thousand Emalangeni). See Annexure "B" being the

Municipal Council of Mbabane Valuation report of the said property.

6. On learning that the Defendant has erected a building on her property, the Plaintiff requested the Defendant to vacate her as it belongs to her and she refused claiming that it is her property Plaintiff further reported the Defendant's encroachment property. to her property to the Municipal Council of Mbabane and to the Surveyor General's office. The Municipal Council, through Engineer, wrote a letter dated 28th July, 2004 the office of the City advising her against the illegal occupation of Plaintiff's property, and *further advising her to* vacate this property. Defendant did not from the Municipal Council. comply with this directive See "Annexure C" being the letter dated 26<sup>th</sup> July, 2004 from the City Engineer.

7. I wish to state that through the letter addressed to Anton S.

Simelane I am advised and further believe that the said Anton S.

Simelane is the biological father of the Defendant and used to own Plot

52 Msunduza Township Extension No. 2 Mbabane Area District of Hhohho, and he used to stay in this property before his demise. I

that in 2004 Anton S. Simelane was already

late.

am equally advised

8. Despite demand the Defendant refuses and/or fails to vacate Plot No. 5, Msunduza, Mbabane Urban Area, District of Hhohho.

Wherefore Plaintiff pray that an order hereby issue as against the Defendant in the following terms:-

- (a) Compelling the Defendant to vacate and/or remove the encroachment and make good the land upon which it stands within two (2) weeks of being served with the court order.
- (b) Costs of suit;
- (c) Further and/or alternative relief.
- [2] In its Plea, the Defendant is denying that the property in dispute belongs to the Plaintiff. The Defendant states that she has been in occupation of the disputed Plot since 1967 while Plot 51, the vacant plot, was first occupied by Richard Zeni Fakudze who sold it to Henry Macibelo Dlamini, who thereafter sold same to the Plaintiff.

#### **ORAL EVIDENCE**

- [3] Two witnesses were called by the Plaintiff. These are the Plaintiff, Florence Sibongile Bhembe and Mr. John Nxumalo, Assistant Surveyor General, Surveyor General's Office, Mbabane. Before the witnesses were called upon to give evidence, an inspection in loco was ordered by the court. The report of the inspection was prepared by Mr. John Nxumalo. Its findings were that (a) the boundary pegs were found and the property in question is lot 51, Msunduza Township Extension No. 2, Mbabane; (b) Property (Lot 51) never changed its number ever since 1955. S.G. 5153/1955 is the date the Survey of the Township was done.
- [4] Florence Bhembe's summary of evidence is that she bought the land in 1997 through an agent called Mr. Magagula. The property was then transferred to her name as per the Deed of Transfer which was handed in as "Exhibit1". She further alleges that she was taken to the site by the said Mr. Magagula. This witness further alleges that sometime in 2004, she noticed that clay

bricks were being molded on her property. She then requested Mr. Magagula to connect her to the seller of the property. They eventually met in town. They proceeded to Minah Simelane's place who was moulding the blocks on the contested property. Minah told them that the property belonged to her family. The plot numbers had been swapped. After the meeting,

Bhembe went to Mbabane City Council where she met the City Engineer. The Engineer informed her that Plot 51 belonged to her and she was even paying rates for that property. The Engineer advised that she should take up the matter with her lawyers. On cross examination it was put to this witness that Mgcibelo Dlamini the seller, had bought the property from Richard Zeni Fakudze. At the time it was bought, there was a structure on the plot made out of mud bricks. The structure later broke down. This is the plot that belongs to the Plaintiff. There was no re-examination and the witness was discharged.

The second witness that was called by the Plaintiff is John Nxumalo. Mr. [5] Nxumalo stated that he prepared a comprehensive report after the inspection in loco of 18th July, 2018. This witness further stated that after the inspection, he went to conduct a survey which entailed locating the beacons for extension 2, Mbabane. He came to the conclusion that there is no Plot 51, change of this plot. This has been the position since 1955. He further positional highlighted that Plot 51, 52, 53 and 54 are of the same size since they are in Plot 50 is smaller. Nothing much came out of the cross one area. The court then felt that the second inspection in loco should be examination. carried out.

### **SECOND INSPECTION IN LOCO**

[6] The court decided to do a second inspection in loco which entailed visiting not only the disputed Plot but also the plots next to it. These are plots 50 and 52. This inspection took place on the 15<sup>th</sup> March, 2019. The court ordered that the Surveyor General's office should also investigate the issuance of deeds to determine if they tally with the real occupation in this township. In carrying out this instruction, the Surveyor General's office together with the attorneys representing both parties went to the Deeds Office on a fact finding mission. The outcome, which was read into the court proceedings, were as

#### follows:

- (a) The general plan and the numbering of plots at Msunduza never changed since 1955 which is the year the survey of the Township was done.
- (b) The Title Deeds do not corresponds with the occupation. Plot number 50 belongs to Nxumalo Emely Lomakholwa and she currently occupies Plot No. 52. Plot No. 51 belongs to Bhembe Sibongile Florence. Plot No. 52 belongs to Simelane Sigananda Anthony who currently occupies Plot 51. Plot No. 53 belongs to Nkambule Sophie Nontombi who currently occupies Plot No. 54. Plot No.54 belongs to

Qwabe Lindiwe Cynthia who currently occupies Plot No. 55. Plot No. 55 belongs to Qwabe Themba Nathan who currently occupies Plot No. 56. Plot No. 56 belongs to Mbuli Sophia who currently occupies Plot No. 57.

(c) Based on the above information, plot No. 50 is vacant yet it belongs to Nxumalo Emely Lomakholwa who is occupying Plot No. 52. All the above mentioned Plots are equal in size (372 square metres) except for Plot No. 50 (325 square metres).

# **COURTS ANALYSIS AND CONCLUSION**

[7] There seems to be no dispute that the Plaintiff is the holder of the title to Plot 51. There is also no dispute that the General plan and the numbering of plots never changed since 1955 which is the year the survey of the Township was done. The only challenge is that the title deeds do not correspond with the occupation as already shown or demonstrated in paragraph 6 of this judgment.

The possibility in the wrong allocation of the plots to the occupants cannot be

ruled out. If the court were to order that the Defendant be evicted, this would have a negative effect not only on the defendant but also on occupants of Plot 52, 53, 54, 55, 56 and 57. This court's humble view is that this

problem can be rectified by the Municipal Council of Mbabane working together with the office of the Surveyor General and the Deeds Registry Office.

[8] I therefore order that the matter be referred to the Municipal Council of Mbabane to work on the matter together with the office of the Surveyor General and the Deeds Office. Each Party shall bear its own costs in as far as the present litigation is concerned.

FAKUDZE'Y.

JUDGE OF THE HIGH COURT

PLAINTIFF: P. DLAMINI

DEFENDANT: V. THOMO