



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 1022/16

Held at Mbabane

In the matter between:

FLORENCE SIBONGILE BHEMBE

PLAINTIFF

AND

MINAH SIMELANE

DEFENDANT

Neutral citation: *Florence Sibongile Bhembe vs Minah Simelane [1022/16]*

[2020] SZHC 227 (5 November 2020)

Coram: FAKUDZE, J.

Heard: 10/09/2020; 22/09/2020 and 22/10/2020

Delivered: 05/11/2020

Summary: *PROPERTY LAW – Dispute over ownership of Lot No. 51 of Msunduzi Township Extension 2. A mix up in the allocation of plots took place – Plaintiff entitled to*

occupation of Lot 51 –
pay costs thereof.

Defendant accordingly ejected and to

JUDGMENT

BACKGROUND

[1] On the 8th 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 Msunduzi 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 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 Emalangenis). 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 property as it belongs to her and she refused claiming that it is her property. The Plaintiff further reported the Defendant's encroachment to her property to the Municipal Council of Mbabane and the Surveyor General's Office. The Municipal Council, through the office of the City Engineer, wrote a letter dated 28th July, 2004 advising her

against the illegal occupation of the Plaintiff's property and further advising her to vacate this property. Defendant did not comply with this directive from the Municipal Council. See "Annexure C" being the letter dated 26th 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 Msunduzwa Township Extension No. 2 Mbabane Area District of Hhohho, and he used to stay in this property before his demise. I am equally advised that in 2004 Anton S. Simelane was already late.

8. Despite demand the Defendant refuses and/or fails to vacate Plot No. 51 Msunduzwa, 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 building stands within two (2) weeks of being served with the Court Order.

(b) Cost 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 Lot 51, the vacant Plot, was first occupied by Richard Zeni Fakudze who sold it to Henry Mgcibelo Dlamini who thereafter sold same to the Plaintiff.

ORAL EVIDENCE

Plaintiff

[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 this 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, Msunduzi Township Extension No. 2 Mbabane; (b) Property Lot 51 never changed its number 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 question in 1997 through an agent called Mr. Magagula. The property was transferred to her name as per the Deed of transfer which was handed in as "Exhibit 1." She further alleged that she was taken to the site by Mr. Magagula. 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. She met the seller in Town. She and the seller proceeded to Minah Simelane's place who was busy moulding the blocks on the contested property. Minah told them that the property belonged to her family. The plot numbers had been swapped. After that meeting, Bhembe went to Mbabane City Council where she met the City Engineer. The Engineer informed her that Lot 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.

[5] The second witness that was called by the Plaintiff was John Nxumalo. Mr. 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 Lot 51, extension 2, Mbabane. He came to the conclusion that there is no positional change in this plot. This has been that position since 1955. He further highlighted that Lots 51, 52, 53 and 54 are of the same size since they are in one area. Plot 50 is smaller. Nothing much came out of the cross examination. The court then felt that a second inspection in loco should be carried out.

[6] The second inspection entailed visiting not only the disputed Plot but also the plots next to it. These are Lots 50 and 52. It took place on the 15th March, 2019. The court ordered that the Surveyor General's Office should investigate the issuance of title deeds to determine if they tally with the real occupation. The outcome, which was read into the court record, were as follows:

- (a) The general plan and the numbering of plots at Msunduzi have never changed since 1955 which is the year the survey was done.
- (b) The Title Deeds do not correspond with the occupation. Plot number 50 belongs to Nxumalo Emely Lomakholwa and she currently occupies Lot. 52. Lot 51 belongs to Bhembe Sibongile Florence. Lot No. 52 belongs to Simelane Siganda Anthony who currently

occupies Lot 51. Lot 53 belongs to Nkambule Sophie Nontombi who currently occupies Lot 54.

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

[7] The Plaintiff closed its case.

Defendant

[8] In establishing its case the Defendant called four witnesses; Minah Simelane, Rose Fakudze, Mduduzi Dlodlu and Sandile Thwala.

[9] Minah Simelane (DW 1) stated that the plot which she has always known to her to be occupied by her father and presently her is Lot 52, Msunduza Township Extension 2. Her father acquired the plot in or around 1956, and that was even before Msunduza was planned as a Township. It was acquired from one Mr. Hlophe. In 1967 a title deed was prepared for his father and other occupants by the National Housing Board in conjunction with the Municipality of Mbabane. The witness occupied Lot 52 lawfully and the dispute between the Plaintiff and the Defendant was as a result of the wrong numbering of the plots.

[10] Rose Fakudze DW 2 stated that Minah Simelane is occupying Lot 52 and not Lot 51. She stated that Lot 51 was occupied by her father Zeni Fakudze and it is situated next to Lot 52 which has always been occupied by Minah

Simelane. DW 2 said that the plot next to the one occupied by Minah Simelane is the plot which has always been his father's plot.

[11] Mduduzi Dlodlu DW 3 stated that Minah Simelane occupies Lot 52 and not Lot 51. He stated that there was wrong numbering of plots including Lots 50, 51, 52, 53, 54, 55, 56 and 57. He further stated that the Mbabane Municipal Council owned up to the wrong numbering. A meeting was convened to try to correct this anomaly. Lots 51 and 52 could not benefit because the residents were told that the dispute pertaining to them was pending in court.

[12] Wandile Thwala DW 4 stated that he is employed by the Mbabane Municipal Council as the Chief Planning Officer. He confirmed that the Council was aware of the wrong numbering of the affected plots. A meeting was convened in July 2020 on this issue. There was an arrangement that the plots not affected by the pending court case would be re-numbered. The witness further stated that a similar problem had arisen at Evukuzenzele Township. The Municipal Council successfully re-numbered the plots there.

[13] The Defendant then closed its case.

THE PARTIES' SUBMISSIONS

Plaintiff

[14] The Plaintiff submits that the testimony of its witnesses clearly shows that the Defendant stays in Lot 51. Mr. John Nxumalo PW 2 scientifically established this fact. The Plaintiff also exhibited the title deed which shows that she is the rightful owner. She further established that she pays

municipal rates for this property. The Municipal Council of Mbabane is in support of the Plaintiff's contention to such an extent that even DW 4 stated that the Council is working on mechanisms to correct this anomaly. Sheila Fakudze and Mduduzi Dlodlu, both Defendants' witnesses, also bore testimony to the fact that Plot 51 was sold to the Plaintiff.

[15] Since there is no dispute that the Defendant is in occupation of Lot 51 and not Lot 52 where the Defendant is supposed to be, it follows that the Plaintiff has established its case and as such, a ruling in its favour is the only just and reasonable outcome of this matter. The Plaintiff finally submits that the Defendant became aware that she is occupying the Plaintiff's property immediately when she started to make mud-bricks in 2004. She continued with her unlawful act despite being advised by the Municipal Council and the Surveyor General's Office that she is occupying the wrong plot.

Defendant

[16] In terms of the evidence, which was not disputed, the year 1957 was when Sigananda Simelane, the father of the Defendant, acquired Lot 52 from Mr. Hlophe. The area was not yet planned, it was not numbered and was not classified as a Township. This is because the Town Planning Act was promulgated in 1961 and the office of the Surveyor General was established around that time. At that time Sigananda occupied the land but no titles to the land could be produced.

[17] The Defendant's submission is that since there was no numbering of plots at that time when Sigananda took occupation of the land which the Defendant currently occupies, the Plaintiff has not been deprived of its land. The

numbering of the plots, followed events of the occupation of the land informally. For encroachment or deprivation of the land to take place, it ought to have been proven that, Sigananda Simelane occupied intentionally Lot 51 and same is clearly defined on the map in 1957. This was proven. Deprivation or encroachment has not been established, but it becomes abundantly clear that, when town planning and mapping was done after the promulgation of the Town Planning Act, and the establishment of the Township was wrongly done moreso because the Surveyor General's office was newly established and the machinery used might have been sub-standard. Therefore the Plaintiff's case should be dismissed with costs.

COURT'S ANALYSIS AND CONCLUSION

[18] The Defendant has found herself in an unfortunate situation wherein the title deed to her plot does not correspondent with the occupation of the land. The mistake might have been caused by the numbering and allocating agent. The Municipal Council did acknowledge this mistake. There is no dispute that the Plaintiff is the holder of the title to Lot 51. This is evidenced by the title deed, the proof of payment of rates and the evidence of the Plaintiff as corroborated by that of the Surveyor General's representative, Mr. John Nxumalo.

[19] **Silberberg and Schoeman, The Law of Property, 2nd Edition**, at Page 291 states that:-

“An owner who has been deprived of his property against his will is as a general rule, entitled to vindicate it from any person.”

[20] Likewise, in **Stoney Nxumalo V Sarah Ngwenya 1987 to 1995 (2) SLR 189**,
Dunn A.C.J. stated as follows:-

“..... the defendant could not resist the plaintiff’s claim as the plaintiff had established his ownership of the property and that the defendant was in lawful occupation.”

[21] It is this court’s view that the Plaintiff has established its case.

[22] Considering all that has been said above, the following order is made:-

- (a) The Defendant is evicted from Lot 51, Extension 2 Msunduza Township; and
- (b) The Plaintiff is entitled to costs at an ordinary scale.

A handwritten signature in black ink, consisting of a large, stylized initial 'F' followed by a surname, written over a horizontal line.

FAKUDZE J.

JUDGE OF THE HIGH COURT

Plaintiff: Professor Dlamini

Defendant: Meluleki Ndlangamandla