

IN THE HIGH COURT OF ESWATINI
JUDGMENT

Case No. 2174/2023

HELD AT MBABANE

In the matter between:

STANLEY MXOLISI SANGWENI

Applicant

And

RODGERS MAMBA

1st Respondent

EKUTSIMULENI UMPHAKATSI

2nd Respondent

THE ATTORNEY GENERAL

3rd Respondent

Neutral Citation:

Stanley Mxolisi Sangweni vs Rodgers Mamba and Others
(2174/2023) [2023] SZHC 286 (12/10/2023)

Coram:

J. M. MAVUSO J

Heard:

22nd September, 2023.

Delivered:

12th October, 2023.

SUMMARY:

Civil law and procedure – Umphakatsi refusing permission to have a subject buried on the family grave yard, citing a resolution in the one hand and on the other “Luhleliso”, land settlement which took place many years ago, said to be some time in 1981 – Inspection in loco conducted by Court – Court showed an area designated for burials called eMncumaneni and another at Mbangamadze – This is apart from also having conducted an inspection at the Sangweni grave yard situated on the boundary of the homestead – Application granted each party to pay its costs.

JUDGMENT

J.M. MAVUSO – J

[1] Applicant approached this Court under a certificate of urgency seeking orders in the following terms:

“(1) That the above honourable Court dispenses with the time limits forms and provisions of service as are required in terms of the rules of this Honourable Court and that this matter be heard as one of urgency.

- (2) *Condoning Applicant's non-compliance with the Rule of the above Honourable Court.*
- (3) *That the 1st and 2nd Respondent or anyone who may desire to be interdicted and restrained from compelling and directing the children of the late Richard Velaphi Sangweni to bury him at the demarcated burial site being "etilahlweni" (KaDlamini homestead) as per letter from the 2nd Respondent dated the 13th September 2023 at eKutsimuleni, Luve, in the Manzini District.*
- (4) *That the 1st and 2nd Respondent or anyone who may desire to or acting under their behest be interdicted and restrained from (sic) interfering with the burial of Richard Velaphi Sangweni at his homestead at eKutsimuleni, Luve, in the Manzini District on the 16th September 2023.*
- (5) *Costs of suit in the event of unsuccessful opposition."*

[2] This application is opposed by the Respondents. Not only have they raised points of law but have also proceeded to file an answering affidavit on the merits. The points of law raised, are as follows:

“(i) 3.2 This matter falls within the ambit of Eswatini law and Custom. This matter emanates from land under Eswatini area as designated by the Eswatini Administration Act No. 79 of 1950.

3.3..... The matter before Court falls entirely within the traditional system. The honourable Court’s jurisdiction is ousted by the Constitution of the land in Section 151(3)(b).....

(ii) Another point of law raised is that the matter is prematurely before Court as the Applicant has not exhausted remedies within the traditional structures and that as such this Court has no jurisdiction to entertain their matter.”

[3] None of the points of law and argument relating thereto, persuades this Court not to hear the matter particularly because:

- (i) No rule or practice of SiSwati law and Custom has been cited in the papers before Court as the basis for Respondents' reason for refusing the late Richard Velaphi Sangweni ("the deceased") being buried at the Sangweni grave yard. On the contrary a siSwati Law and Custom rule pertaining to the burial of members of a clan is that they must be buried at the clan's or family grave yard. Put in vernacular "*umuntfu ufihlwa kubakubo*".
- (ii) Having been advised to bury the deceased "*etilahlweni letakhetfwa sigodzi*" a grave yard situated below the homestead of Johannes Silibane Dlamini, Applicants were given an option to bury the deceased at another grave yard situated at eMncumaneni.
- (iii) On alleged discrimination in the burial of deceased persons, with some being allowed to bury their loved ones at their family grave yard and others directed to bury their loved ones at the designated community grave yards, in 2022 the Court was told that the late Mdweshu Cornelius Dlamini, a resident of eKutsimuleni was successfully buried at his home. In other words at the family grave yard.

[4] In order to better understand the practical dynamics of this matter, with a view to doing justice in the circumstances, the Court travelled to ekutsimuleni to conduct an inspection in loco.

¶

- (i) The first place to be visited was the Sangweni homestead where the Court noted the presence of three recent graves. The Court was told that the graves dated back to about the year 2019. It was further told that the deceased's wife and son who predeceased, him were buried there. The graves were well taken care of and situated on the boundary of the homestead's yard. When asked if there was any intention of having the three graves and the deceased therein exhumed, Respondents' response was negative.
- (ii) From the homestead the Court was led to a place called eMncumani where it was showed a vast expanse of land, and told that the land had been reserved for burials. In other words it was designated a grave yard. On this land were two or so graves said to belong to a Nkosi family. 1st Respondent explained that the designation of this land as a graveyard followed a resettlement programme ("*luhleliso*") which is said to have taken place sometime on or about 1981. When asked why there were

few graves there over such a long period of time, the Court was informed that the community of eKutsimuleni had not heeded to the call to bury their loved ones there and that the defiance to use the land as a graveyard was exacerbated by the area not having a Chief for a long period of time. The current Chief is said to have only been installed in October 2022. The Court finds it hard to believe this theory because the "*Libandla*" led by the Indvuna has always been there to maintain order in the community.

- (iii) At this grave site, the Court was told that each family was provided a plot of land on which to bury its members. When asked to point out the plot allocated to the Sangwenis' for burial, 1st Respondent told the Court that the Sangweni family did not come to them, in order for them to be showed the burial spot. 1st Respondent was asked to show the Court the plot reserved for the burial of members of his clan, he was unable to do so.
- (iv) From eMncumane, the Court went to a place called Phalala under Mbangamadze area, at eKutsimuleni. This is the other alternative area on which the Sangwenis' were afforded to bury "*the deceased*" if unhappy with burying him at eMncumane. This graveyard is said to be

on Johane Silibane Dlamini's land. There is controversy over the use of this land as a graveyard.

(a) In relation to this area, at paragraph 6.7 of the founding affidavit, Applicant alleges that in 2009, when the 1st Respondent had directed a burial on this site, one of the late Johane Silibane's sons, Daniel Dlamini obtained an order from this Court interdicting the burial of Mantombazana Ginindza who was scheduled to be buried on this portion of land. The matter appeared before Annandale J as he then was under High Court Civil Case No. 2043/2009 in the matter between Daniel Dlamini vs Mqilikelwa Dlamini and Another. The order was obtained on the basis that the land belonged to the Dlaminis'.

(b) At paragraph 7 of the 1st Respondent's answering affidavit, after stating that Applicant was allowed to bury his father at Emncumane the deponent goes on to state that:

"They were then given another option of burying the deceased below Daniel Dlamini's fields and they also did not show up as the people who were sent by the Indvuna overseer Marko

*Nkambule of the area waited from 8:00 a.m. until 11:00 a.m.
to no avail."*

Regard being had to the order in case 2043/2009, Applicant may have been justifiably loath to take this offer. The Court noted a dispute on the rendezvous, when it came to the pointing out of the burial site between the parties.

[5] If the resettlement programme, set aside eMncumaneni as a community graveyard, the Court wonders how and by what authority the grave site below Johane Silibane's homestead was designated a community grave site. When the Court inspected this site, it noted the presence of two (2) fresh graves. When it returned to its seat in Mbabane and listened to the parties' submission, it was informed that there were other graves below the ones it was showed, at which the deceased could be buried. When asked why same had not been showed to the Court when the inspection was conducted, oversight was pleaded by the Respondents.

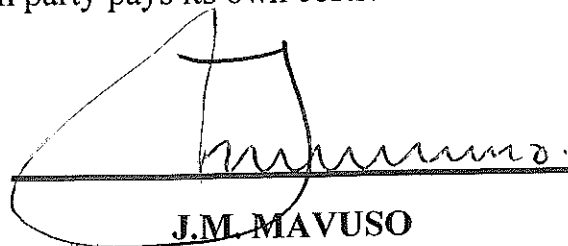
[6] (i) On the facts, law and inspection in loco, the Court finds that the best

place at which to bury the late Richard Velaphi Sangweni is at the Sangweni family graveyard.

- (ii) On the issue of costs, the Court is mindful of the fact that it is important to the family of the late Richard Velaphi Sangweni, has a cordial relationship which includes respect, as the family will continue living in the area and need the services of the Umphakatsi. In a spirit of "*Buntfu*" the Court will order that, each party pays its own costs.

[7] Accordingly, the Court orders as follows:

- (i) That the late Richard Velaphi Sangweni be buried at the Sangweni grave yard situated at his homestead at eKutsimuleni, Luve, in the Manzini District.
- (ii) That each party pays its own costs.

A handwritten signature in black ink, appearing to read 'J.M. MAVUSO', is written over a horizontal line. The signature is stylized with a large, sweeping initial 'J' and a series of connected loops for the rest of the name.

J.M. MAVUSO
JUDGE OF THE HIGH COURT OF
THE KINGDOM OF ESWATINI