

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CIVIL CASE NO: 83/2022

In the matter between:

NATHANIEL MANDLA GULE (N.O.)

1st Appellant

BONGANI GULE (N.O)

2nd Appellant

And

BETHUSILE GULE (N.O)

1st Respondent

MASTER OF THE HIGH COURT

2nd Respondent

ATTORNEY GENERAL

3rd Respondent

Neutral Citation: *Nathaniel Mandla Gule (N.O) and Bongani Gule (N.O) vs Bethusile Gule (N.O) and two others (83/2022) [2023] SZSC 19 (14 June, 2023)*

CORAM:

S.P. DLAMINI JA

S.J. MATSEBULA JA

M.J. MANZINI AJA

DATE HEARD: 03 April, 2023

DATE DELIVERD: 14 June, 2023

Summary: *Civil law; whether there was a misdirection on the part of the High Court to grant an eviction order in the face of a counter – claim for the stay of the application for eviction pending the outcome of the action proceedings seeking to assert the ownership of the property in question- Held that there was no misdirection on the part of High Court hence there is no basis for this court to interfere with the findings and conclusion of the High Court- Held that the appeal is dismissed and Held that this being a family matter the parties are to shoulder their respective costs.*

JUDGMENT

S. P. DLAMINI – JA

INTRODUCTION

[1] This is an appeal against a judgment delivered by the High Court on 07 November, 2022. In terms of the said judgment, inter alia, the court ordered that the appellants be evicted from immovable property namely Lot 203 situated in Pigg's Peak in the Hhohho region, that rentals accruing from the flats to be paid to the Master of the High Court and for the latter to include the property in the distribution account in the estate of Wilson Skomu Gule (Skomu).

- [2] The High Court granted the eviction order, the other related relief sought in the face of a counter-claim by way of trial proceedings seeking to assert ownership over the property in question and the stay of the application for eviction pending the outcome of the trial proceedings.

PARTIES

- [3] The appellants are grandsons of the late Wilson Skomu Gule and the co-executors of the estate of their late father Hermon Gule (Hermon) who was one of the sons of Skomu. The appellants were respondents in the court *a quo*. They will be referred to as appellants throughout the judgment.

- [4] The first respondent is one of the daughters of Skomu and the executrix of Skomu's estate. The first respondent was the applicant in the court *a quo*. She will be referred to as first respondent throughout the judgment.

ISSUES

- [5] The issues falling for consideration by this court is whether the High Court misdirected itself in the eviction order and related relief in the face of the counter-claim proceedings seeking to assert the ownership of Lot 203 and

the stay of the eviction proceedings pending the outcome of the counter-claim proceedings.

BACKGROUND AND FACTS

- [6] The protagonists and antagonists in the matter are family members. The disputes giving rise to the matter involves three generations of the family.
- [7] Those who feature prominently are the late Skomu (the polygamous family patriarchy) who married four wives and sired 16 children out of the marriages and 2 children out of wedlock, first wife Gladys Gule (nee Dlamini), Ora Gule (nee Dlamini) one of the wives of Skomu and a niece to Gladys, the appellants who are grandsons of Skomu and sons of Hermon Gule, and the first respondent who is one of the daughters of Skomu and her mother was Thandeka Gule (nee Mthethwa).
- [8] The matter started with family squabbles here and there and then escalated to court proceedings rooted on eviction, the ownership of Lot 230, marital status whether civil or customary regime apply and inheritance. Before the

matter came before this court, some or all the aforesaid issues have been subject to court proceedings.

HIGH COURT PROCEEDINGS

[9] First, it is High Court case of **Wilson Skomu Gule vs Ora Gule (nee Dlamini, The Master of the High Court and Hermon Sambo Gule civ. 735/1991** (Skomu 1), in that matter, Skomu successfully challenged the appointment of Ora as the executrix of the estate late Gladys Gule, her aunt and co-wife, who died in 1990. Skomu had also prayed for the court to eject Ora and her son Hermon from Lot 230. The court did not definitely decide on this prayer but directed that the matter raised required oral evidence regarding the marriage regime between Skomu and Gladys and whether the master of the High Court was vested with jurisdiction to deal with the estate of late Gladys (per His Lordship Hull CJ as he then was).

[10] Second, the matter of **Wilson Skomu Gule vs Ora Gule (nee Dlamini, The Master of the High Court and Hermon Sambo Gule civ. 735/1991** (Skomu 2). This matter was a further hearing of the issues that were not resolved in Skomu 1. The court after hearing the matter ordered the ejectment of Ora and Hermon from the shop operating from Lot 230.

However, the court referred the question of the ejectment of Ora and Hermon from the house they were occupying on Lot 230 to oral evidence on a date to be allocated by the registrar (per His Lordship Hull CJ).

[11] Third, the matter of **Wilson Skomu Gule vs Ora Gule (nee Dlamini, The Master of the High Court and Hermon Sambo Gule civ. 735/1991** (Skomu 3). This was a determination of the matter that were not resolved in Skomu 2 namely the ejectment of Ora and Hermon from the house they were occupying on Lot 230. The court concluded that the matter sought to determine the dissolution of the marriage between Skomu and Ora and that Skomu could not eject his wife without alternative accommodation. In the result, the court directed that the matter ought to be determined “without the customary jurisdiction” (per His Lordship Hull CJ).

[12] Fourth, the matter launched by **Hopson Duma Gule, one of the sons of Skomu, in Hopson Duma Gule and Nathaniel Mandla Gule (N.O.), Bongani Gule, The Master of the High Court and The Attorney General case no: 2026/21**. This matter is of no sufficient sense and was nipped in the bud apparently because it was prematurely launched (per His Lordship Mlangeni J).

[13] Fifth, the matter of **Bethusile Gule (N.O.) and Nathaniel Mandla Gule (N.O), Bongani Gule (N.O), The Master of the High Court and The Attorney General case no 1372/22** (per His Lordship B. Magagula J). In this matter the relief the 1st respondent sought on the one hand before the High Court that is summarized succinctly by the court at paragraph 3 of the judgment as follows;

“[3] In essence, the executor is desirous of the following orders from the court.

3.1 Declaring the estate of late Hermon Sambo Gule as a lawful owner of Lot 230 situated at Pigg’s Peak.

3.2 Ordering the 1st and 2nd defendants to register the title of the property to the name of the Estate Late Sambo Gule on the condition that the estate pays an amount equivalent to ½ share to the estate late Gladys Tobhiya Gule (nee Dlamini).

3.3 Directing the Master of the High Court to include the property in question in the liquidation and distribution account of the estate of the late Wilson Skomu Gule”.

On the other hand, the appellants in resisting the relief sought, launched a counter-claim seeking to stay the eviction proceedings pending the outcome of trial proceedings they instituted. In terms of the particulars of

claim attached to the combined summons dated 8 August 2022, High Court case 1509/22, the appellants seek against the very same respondents herein the following relief;

“(a) Declaring the Estate Late Hermon Sambo Gule as a lawful owner of Lot 230 situated at Pigg’s Peak Township in the Hhohho region.

(b) Ordering the 1st and 2nd defendants to register the title of the property as aforesaid to the name of Estate Late Hermon Sambo Gule on condition that the above estate pays an amount equivalent to ½ share of the value of the property to the Estate Late Gladys Tobhiya Gule (nee Dlamini).

(c) Any further and/or alternative relief.

(d) Costs of suit”.

The High Court after consideration of the matter per His Lordship B. Magagula J, made the following order;

“1. Evicting the 1st and 2nd Respondents or anyone acting under their instruction forthwith from occupying Lot 230, Pigg’s Peak Township measuring 1549 (one thousand five hundred and forty nine) square meters held under deed of transfer no. 34/1975.

2. That pending finalization and winding up of the estate of the late Wilson Skomu Gule estate no. EP8/2010 rentals collected from the property be deposited in to the 3rd Respondent account.

3. Directing the 3rd Respondent to include the property in the liquidation and distribution account in the estate of late Wilson Skomu Gule EP8/2010.

4. Cost of suit to be borne by the 1st and 2nd Respondents”.

The appellants were dissatisfied with the judgment of the High Court and launched the appeal before this Court.

PROCEEDINGS BEFORE THIS COURT.

[14] The appellants by Notice of Appeal dated 14 November 2022 sought the following relief;

“1. The learned judge a quo erred in fact and in law not to find that at the commencement of the application and during the lifetime of both deceased persons, the property, Lot 203 at Pigg’s Peak, was in the possession of Hermon Gule as a requirement of rei vindication.

2. The learned judge a quo erred in fact to find that the 1st and 2nd respondents launch of the action proceedings, ten days later was purposefully launched to manufacture and engineer disputes of facts or to frustrate the expeditions determination of the current eviction proceedings.(sic).

3. The learned judge misdirected himself to find that the merits of the action proceedings do not have a bearing that they would bring no harm to the eviction order if sustained thereby committing misdirection in 2 folds;

3.1 It is an error in law not to consider that the existence and non-existence of the civil rites marriage between Gladys Tobhiya Dlamini and Wilson Skomu Gule, which is in dispute, would have legal consequences on the manner the estate of Wilson is wind up and distributed.

3.2 It is an error in law not to consider whether or not an agreement existed between Wilson Skomu Gule and Hermon Sambo Gule that would bestow lawful possession of Lot 230 of Pigg's Peak, if proven and that would have legal consequences on the liability of the estates to each other.

4. The court a quo erred in fact and in law that the appellants 'intention to have their father's estates right of ownership and the rights of their grandmother vindicated, is a ploy to obstruct or interfere with lawful order of eviction.

5. The court a quo erred in fact and in law to find that a previous pronouncement made by orbiter the High Court of Swaziland that Lot 230 Pigg's Peak does not belong to the estate Gladys Gule exhausted the contentious issue of the Civil rites marriage that is alleged by the appellants, and the legal consequences of the said marriage ownership of the property.

The interpretation of the previous judgment is wrong in the following manner:-

5.1 The court erred in fact and in law to ignore that the High Court of Swaziland referred the matter of the existence or non-existence of the civil rites marriage between Wilson Skomu Gule and Gladys Tobhiya Gule on trial and that it was never concluded.

6. The court a quo misdirected itself to hold that there were no disputes of facts in the matter that justified a stay of proceedings and that the estate late Wilson Skomu Gule should be wind up therefore disregarding the disputes of fact regarding the following:-

6.1 The existence or non- existence of the civil rites marriage between Wilson Skomu Gule and Gladys Tobhiya Gule which would create a partnership to the property, if proven.

6.2 The existence or non- existence of the agreement to own and possesses the property between Wilson Skomu Gule and Hermon Sambo Gule with its legal consequences.

7. The court a quo misdirected itself in finding that the estate late Gladys Tobhiya Gule or Hermon Sambo Gule has any other recourse in law that may afford them redress, after the estate late Wilson Skomu Gule has been wind up, proceeds distributed and the executor relieved of her responsibilities according to law”.

[15] The Appeal is opposed by the First Respondent and both parties have filed Heads of Arguments and Bundles of Authorities.

APPELLANTS' CASE

[16] It was contended for the Appellants that;

- (a) They have a right of possession of Lot 230 which was passed from their father to them through succession.
- (b) They have launched action proceeding to address the question of ownership of the property and that pending the outcome of the action proceedings their right of possession cannot legitimately be interfered with as the High Court did.
- (c) The issue of the marital status of some of the wives of Skomu is still alive and may have consequences over the estate when finally decided.
- (d) There are various disputes of fact that could not be disposed of by way of motion proceedings.
- (e) The High Court misdirected itself to conclude that the impugned judgment did affect the action proceedings.

FIRST RESPONDENT'S CASE

[17] It was contended for the First Respondent that;

- (a) The Appellants are not entitled to rely on the *rei vindicatio* as the High Court correctly found that the property belonged to Skomus as it was registered in his name.
- (b) The action proceedings were mischievously launched by Appellants for the obfuscation. The disputes were known to the Appellants in 2010. They had plenty of opportunity to launch the proceedings than to wait and do so in 2022 in the face of the eviction proceedings.
- (c) The Appellants continue to collect rentals as proceeds of Lot 230 to the detriment of possible beneficiaries of Estate Late Skomu.
- (d) There are no material disputes of facts including the marital regime of Skomu and Gladys.
- (e) There was no transaction between Skomu and Hermon in line with the Transfer Duties Act No.8 of 1902 justifying a claim by Hermon or the Appellants' that Hermon owns Lot 230.

ANALYSIS AND CONCLUSION

[18] The Court in Skomu 1 removed Ora from being an executrix of the estate of late Gladys Gule and replaced her with Skomu as the surviving spouse in some ways watered down Appellant's arguments in so far as they sought to rely on elevated matrimonial status of Ora.

[19] Further, the court in Skomu 2 evicted Ora and Hermon from the business / shop section of the property. The eviction was neither heeded nor enforced. However, the fact of the matter is that the eviction was as a result of a court order. The order was never appealed or rescinded or varied hence it remains of full legal force and effect. The Court accepted the validity of the deed and proof of ownership of Lot 230 by Skomu. On this basis alone it is legally appropriate and necessary to include Lot 230 in the distribution account of the estate of late Skomu and to enforce the eviction of any occupants and/or demand rentals with regard to the shop/business side of Lot 230.

[20] In Skomu 3, the court referred the question of the eviction of Ora and Hermon from the residence / house part of Lot 230 to be dealt with in laws

of eSwatini law and custom. This judgment was neither appealed nor followed through until the eviction proceedings were launched before the High Court.

In addition to their opposition to the eviction proceeding by the first respondent, the appellants as already stated above caused to be issued the Combined Summons dated 8 August 2022.

[21] The salient conclusions of the High Court are set out in paragraphs 64, 65 and 66 of the impugned judgment;

21.1 In paragraph 64 the court noted that;

“64. The Applicant as the Executor of the estate of the late Wilson Skomu Gule is entitled to invoke the rei vindicatio. She has satisfied all the requirements. She has been able to demonstrate that the estate owns the immovable property at Pigg’s Peak, by so doing she has asserted the right to possession of the property. Yet on the other hand, the Respondents insist on retaining physical possession of the property. They argue that sometime in the future, they will seek a declaratory order on the basis that the estate of their father is the owner of the said immovable property. At the moment, they are currently benefiting financially through the collections of the rentals. At the same time they have not tendered that the rentals be collected by the Executor or The Master of the High Court. Therefore, it is my observation

that if the stay can be allowed as proposed, prejudice will occur, as the Respondents will continue to collect the rentals to the detriment of the estate.”

In paragraph 65 the Court stated further that;

“65. Due to the foregoing reasons it is my finding that 1st and 2nd Respondents have been unable to resist the executor’s claim under the rei vindicatio. The opposition by the Respondent to the eviction application is brazen and uncompromising. They seek to advance some form of entitlement to the property on the basis of evidence that they are yet to produce in the uncertain future. Partly being a meeting that occurred sometime during the lifetime of the deceased where the (sic) he apparently gave ownership of the property to Hermon Gule (the Respondents father). I have already stated that this assertion even without the evidence, is against the provisions of the Transfer Duty Act.”

In paragraph 66, the Court further stated that;

“66. In my view, the claims of the 1st and 2nd Respondents herein amounts to nothing more than a shameless attempt to protract the duties of an executor which are sanctioned by the Administration of Estate Act. Their defense to the eviction application is thus manifestly groundless and in bad faith. In the circumstances, I conclude that it will be just and equitable to evict the 1st and 2nd Respondents and anyone in occupation thereof. That being so, this court is inclined to grant an order for the eviction of the Respondents from the Pigg’s Peak property”.

[22] I agree with the conclusions of the High Court that nothing that has transpired so far dissipate any action that the appellants have or may take regarding a *rei vindicatio* with regard to Lot 230.

[23] I also agree with the High Court that it was appropriate in the circumstances to order the eviction of the appellants from Lot 230 and for Lot 230 to be included in the distribution account of the estate late Skomu.

[24] The claim by appellants that the effect of the impugned judgment could close the door against their claim particularly as set out in the Combined Summons is legally not correct. The appellants or any other litigant at every step of the liquidation until it is finally wound up retains the right to lodge a claim against an estate.

[25] It is trite in our law that even though a Deed of Transfer is *prima facie* proof of the ownership. Therefore, Lot 230 by virtue of the fact is registered in the name of Skomu he is the owner. This was accepted and endorsed in Skomu 2 and Skomu 3 judgments.

(See Amler's **PRECEDENTS OF PLEADINGS** 5th edition; **TENDAI SAVANHU V HWANGE COLLIERY COMPANY SUPREME COURT OF ZIMBABWE CIVIL APPEAL NO. SC 473/13; RONEL NOLEEN SMIT V CALVIN KLEIHANS (CASE NO.917/2020) [2021] ZASCA (147) (18 OCTOBER 2021); AND NANGHAMA V TRAUGOTT N.O. AND THREE OTHERS (I1845/2014) [2021] 433 (28 SEPTEMBER 2021)**)

[26] The potential prejudice to all the beneficiaries of estate late Skomu in the absence of the eviction order and the inclusion of Lot 230 in the distribution account of estate late Skomu is extremely high and they may be remediless if it later transpired that no actual rights in favour of the appellants exist.

[27] Accordingly, it is my view that the appeal is without merit and there is no legitimate basis for this Court to interfere with the judgment of the High Court. Therefore, the Judgment of the High Court must stand and the appeal dismissed.

COST

[28] One of the well-established legal principles governing costs is that costs follow the cause. However, this being a family dispute and the courts are generally reluctant to award costs in such cases. Therefore, I am inclined not to award costs.

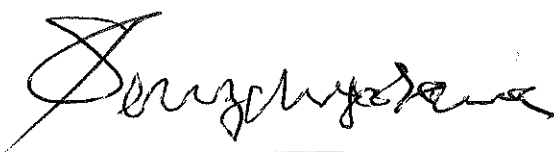
In this regard see the case of **MICHAEL THEMBA NSIBANDZE AND ANOTHER V IDA COSHIWE NSIBANDZE (NEE KUNENE)** (28/2020) [2020] SZSC 36 (06 OCTOBER 2021) where this Court stated the following at paragraph 40 of the judgment;

“This being an issue connected with an estate of a deceased person, I am inclined to depart from the normal legal posture that costs follow the cause”.

COURT ORDER

[29] In view of the foregoing, the Court orders that;

1. The appeal be and is hereby dismissed.
2. The parties are to bear their respective costs.



S.P. DLAMINI JA

I agree


S.J.K. MATSEBULA JA

I also agree


M.J. MANZINI AJA

FOR THE APPELLANTS: **M.C. SIMELANE**
 MC SIMELANE ATTORNEYS

FOR THE RESPONDENT: **W. MASEKO**
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