



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1576/2004

In the matter between:

MARIA NTOMBI SIMELANE (born Mabuza)	First	Plaintiff
SWAZILAND NATIONAL HOUSING	Second	Plaintiff

and

NOMPUMELELO PRUDENCE DLAMINI (born Magagula)	First	Defendant
THE REGISTRAR OF DEEDS	Second	Defendant
THE ATTORNEY GENERAL	Third	Defendant

Neutral citation: *Maria Ntombi Simelane (born Mabuza) v Nompumelelo Prudence Dlamini (born Magagula) &3 Others (1576/2004) [2015] SZHC 116 (30th June, 2015)*

Coram: M. Dlamini J.

Heard: 16th February 2015

Delivered: 30th June, 2015

Summary: The first plaintiff and defendant are contesting for Lot 129 situate at Mathendele Township, Extension No.2 district of Shiselweni, Swaziland. First plaintiff seeks for an ejection order.

Parties Pleadings

[1] The first plaintiff's prays that the defendant should be ejected for the reason that she holds title to the immovable. The defendant on the other hand states that first plaintiff's title was fraudulently obtained.

Preliminary

[2] Following the principle of our law that a title deed is a *ex facie* evidence of lawful ownership, it was agreed that the defendant should set the ball rolling as he alleged that the title deed was obtained through fraud.

Viva voce evidence

[3] Defendant called Mr. Nkululeko Peter Hlophe, DW1, who on oath, testified that he has been residing at Nhlangano for the past thirty three years. Defendant was his niece. Defendant's mother was his cousin and was one Joyce Gangile Hlophe. She had married a Magagula before her demise. Mr. Magagula was also deceased.

[4] His cousin Joyce resided at Two Sticks Nhlangano, room 85 which falls under Plot 129. Joyce moved to room 85 in 1984. Before then the first plaintiff was residing at room 85 and could have left around 1984 and this witness arrived at Two Sticks in 1981. However, when his cousin moved into room 85, the house had been vacant. Joyce who was living in

kaDlovunga, her parental home, requested DW1's father to find her a place which was closer to town. His father spoke to Mr. Dlamini who was employed by second plaintiff. It is then that DW1's cousin was allocated room 85 for rentals to second plaintiff.

[5] In 1996 a meeting was arranged by second plaintiff where Mr. Vulindlela Msibi was present. They informed all residents of Two Sticks that the houses would be sold. They invited anyone who had interest to purchase. They informed them that those in occupation would be given first option to buy. At that time Joyce and her husband were residing in house number 85. She applied. She was awarded plot 129 room 85. At that time, the first plaintiff was residing at Makhwelela. This witness identified first plaintiff in court who was seated in the gallery.

[6] DW1 informed the court that when his cousin occupied the house, she had to clear the yard. There was a one room structure with a wall dividing the kitchen. His cousin extended the structure by adding two rooms. These improvements were made after Mr. Vulindlela's meeting.

[7] Under cross examination, it was disputed that in 1984, 1985 (during Cyclone Dominia) first plaintiff had vacated the plot. It was put to this witness that plaintiff also received a letter from second plaintiff awarding her the said plot and that Mr. Vulindlela would tell the court who the rightful owner of the plot was. This witness wondered at this and responded that his cousin Joyce also had an award from second plaintiff. It was also put that the improvements happened before the sale of the property. He denied this. Further, it was suggested to DW1 that residents were told not to do improvements before they acquired the properties. He stated that he did not remember such a meeting.

[8] The second witness was defendant. She took oath. She told this court that her maiden surname was Magagula and identified her mother as Joyce Gangile Hlophe – Magagula. She had since substituted defendant who initially in the summons was her mother. She is the executor in her mother's estate.

[9] She informed the court that she has in her possession, documents relating to plot 129. At her infant age, she resided at kaDlovunga. She then resided with her mother at Two Sticks or Mathendele Township room 85 when she was nine (9) years old until her mother met her demise in 2005. In 2005 deceased was still residing at room 85. She confirmed that her father Timothy also passed on.

[10] She handed to court exhibit 1 as a letter offering her mother plot 129 room 85. She also handed an acceptance letter as exhibit 2 together with receipt reflecting payment of the said plot and was marked exhibit 3.

[11] It was her evidence that the sales manager was Mr. Vulindlela Msibi. Her mother paid a deposit of E3000 and the balance was E5,900. It was her evidence that when she was fifteen years old, her mother sent her to pay the balance of E5,900. She proceeded to second plaintiff's offices in Mbabane. When she attempted to pay, second plaintiff rejected the balance saying that it will not accept it. Thereafter, they received documents for ejectment. Her mother instructed an attorney.

[12] It was her evidence that there was no document from plaintiff purporting to cancel the offer or agreement. It was her further evidence that it drew a plan to extend the structure at Plot 129 after they had accepted the offer. It was taken to Town Council Nhlanguano and was approved. They then

fenced the area, installed burglar doors and electricity and constructed a veranda with two rooms added. They also constructed a new toilet. She did value the structure and she submitted a valuation report. The market value in 2014 was said to be E186,000. The court provisionally marked the report as exhibit 4. She submitted a receipt in respect of the report, and it was marked exhibit 5. She pleaded with the court to cancel the title deed in plaintiff's name and uphold the agreement between her mother and second plaintiff.

[13] Her cross examination was centered around the exhibits tendered. It was further pointed out to her that exhibit 1 was withdrawn and her mother awarded room 12. She stated that she was not aware of all that. Defendant closed her case.

[14] The plaintiff called her first witness Mr. Sihle Nicholas Dlamini. On oath he testified that he was the employee of second plaintiff based at the headquarters, Mbabane.

[15] Government took a decision to sell properties at Two Sticks. A committee consisting of residents of Two Sticks was formed. An allocation criteria was devised. Thereafter several meetings followed with the residents of Two Sticks. In July 1995 first plaintiff's husband was allocated a plot. He then handed to court a letter reflecting allocation. Upon this allocation defendant's mother came contesting the allocation. The two were invited to a meeting. This witness produced minutes of the meeting. In that meeting defendant's mother complained that she had made improvements. All this evidence was sourced from the records in second plaintiff's possession as he became marketing and sales officer in 1998. On 26th February 1996 a letter was authored, allocating defendant's mother another plot under room

12. In the first meeting it had been decided that defendant's mother would be allocated room 85 while first plaintiff room 12. Both parties were given letters to that effect. First plaintiff's husband appealed to the committee on the basis that he had already started making payments towards room 85. In the meantime on 7th November 1996 defendant's mother accepted the offer (of room 85 Plot 129) as per exhibit 2.

[16] On 8th April, 1998 a letter was written to defendant's mother saying she failed to appear in a meeting and this was exhibit J. On 12th April, 1999 a letter was personally handed to defendant and this was exhibit K. On 23rd September 1999 defendant's mother received a letter informing her to direct payments towards room 12 and this was exhibit L. Another correspondence which was registered through posts was dispatched to defendant's mother and was marked as exhibit K₁.

[17] Defendant's mother did pay a sum of E3,000 on 28th April, 1998. Another letter was sent to her advising her to vacate room 85, that is extension 3. First plaintiff's husband then wrote correspondence to second plaintiff advising it that first plaintiff was his wife and directing that title deed be in her name. This was exhibit M. In February 2003 first plaintiff received title over room 85 plot 129 and this was admitted as exhibit N. Second plaintiff produced deed of transfer.

[18] Defendant came to him saying she had come to pay for plot 129 room 85. He rejected payment following that the offer to her mother was withdrawn. She came again in 2014 and was advised that second plaintiff had not changed its position. She was advised further that payment would be accepted for plot 12.

[19] He identified Mr. Vulindlela Msibi who was employed by second plaintiff as the Chair of the Committee. I will refer to PW1's cross examination under adjudication.

[20] PW2 was David Vulindlela Msibi. He testified under oath. He identified second plaintiff as a parastatal under the Ministry of Housing and Development. He stated that there were three townships in Swaziland, that is Manzini, Siteki and Nhlanguano where residents were renting. Eventually government could not afford to maintain them. Government therefore decided to sell them. A committee was established by the then Minister Carmichael. A criteria was identified in terms of exhibit A which could identify who was eligible to buy. Tenants were, however, given priority. In plot 129 defendant's mother was occupying it while first plaintiff was, on record a tenant. Later, even defendant's mother was on record although it was not clear how she came to occupy it. It was his further evidence that defendant's mother did make improvements without the approval of local authority.

[21] They considered the matter and requested for valuation in order to compensate defendant's mother. However, first plaintiff due to age and poverty could not raise money to compensate defendant's mother. They wrote to defendant's mother after reversing their original decision. Defendant's mother was not easy to find. They searched for her after writing a number of correspondences about the changes.

[22] Eventually transfers were made to first plaintiff. He identified exhibit E as having been authored by him. There was never any appeal to the Minister even though an aggrieved party had to do so. Defendant's mother never attended meetings where the decision was reversed.

[23] This witness was cross examined. There is no need to highlight his cross examination as it is the subject of adjudication.

Issue

[24] The court is called upon to determine who, between the first plaintiff and defendant, is the rightful owner of Plot 129 room 85.

Legal principle

The law of contract is characterized by offer and acceptance.

Determination

[25] From the totality of the evidence, the evidence on behalf of plaintiff by PW1 and PW2 shed some light on the events which led to Plot 129 being offered to first plaintiff and defendant's mother.

[26] PW1 retrieved from the records of second plaintiff all the correspondences and minutes of meetings on the said plot. PW2 confirmed the same as he was actively involved in the meetings and was a signatory to the correspondences thereto. The answer to the question on who is the rightful owner of Plot 129 is to be found from the records of second plaintiff as attested by PW1 and PW2.

[27] PW1 attested that the committee established by the former Minister for Housing and Development produced an allocation criteria. First preference was to be given to occupants. PW2 testified:

“In plot 129 there was Magagula (defendant’s mother) who had stayed there and it was not clear how she had come to occupy that house. While Simelane (plaintiff) was on record as a tenant of that house.”

PW2 quickly added:

“Subsequently even Magagula was on record but it was not clear how she had come to occupy the rooms.”

PW2 also testified:

“When we looked at the facts before us we saw that Magagula had made improvements. We asked for valuation in order to compensate Magagula for the improvements. However, Simelane, due to age and poverty didn’t raise money in order to compensate Magagula.”

[28] From the above evidence, it appears that the committee ignored its allocation criteria and authored a correspondence to Magagula which reads:

*“Mr/Mrs. Joyce Magagula
.....
.....”*

Dear Sir/Madam

RE: NHLANGANO TWO STICKS PROJECT

Further to our meeting held at Nhlangano Two Sticks on 24/10/96, we are pleased to confirm the provisional allocation of plot ...12...to yourself.

The price of the property is E6 439, you are encouraged to start paying; SNHB account number 001071013541, Standard Chartered Bank, Mbabane Branch. Postal or money orders may be sent to us direct at the address above.

For loan facilities please contact SBGT at 44705.

You are requested to have paid at least 25% of the price by 31/3/96 so that you can be issued out with a Deed of Sale after which you will be expected to settle the balance within 2 years from 26/2/96.

This is a golden opportunity for you to own a piece of land, you must not miss.

Assuring you of best service always.

Yours sincerely

V. D. MSIBI

SALES & MARKETING MANAGER”

[29] The committee held a meeting on 11th October 1996 and documented as follows:

“3.2 The Chairman said he remembers clearly that after the meeting he met Simelane and called him to the side and explained to him that what was said in the meeting did not apply to him because his dispute with Magagula had not been resolved, pending the valuation of the property with respect of the improvements. However proactive payments were welcomed as this reduced the level of financial obligation on the part of Simelane, the money will be considered as payment towards the plot to be eventually offered to Mr. Simelane.

3.3 Mr. Simelane was then given a chance to say whether he was accepting the offer of compensating Magagula or to be given a vacant plot. Simelane however refused both options and said that he wanted plot 129 without having to compensate Magagula as the latter had extended the house illegally (without consent from Government).

3.4 The Chairman after a lengthy discussion then closed the dispute meeting by ruling that both parties will receive letters of offer for plot 12 for Simelane and plot 129 for Magagula against which they (the parties) must accept within 30 days from the date of the offer.”

Following its decision it then authored:

“Mr/Mrs. Joyce Magagula

P. O. Box 78

Nhlangano

Dear Sir/Madam

RE: OFFER OF ALLOCATION OF PLOT NO.129 NHLANGANO TWO STICKS TO YOURSELF.

Further to our meeting which was held at the Nhlangano Town Council offices on the 11/10/96 we are pleased to allocate to you, plot No.129 measuring 506m at a price of E8 900.

We withdraw the offer of allocation of plot No.12 to yourself.

Kindly accept the offer in writing within 30 days from the date of this letter. If you do not do so, we will make the offer to somebody else.”

[30] On the very same day the committee also wrote to first plaintiff's husband as follows:

*“Swaziland National Housing Board
Box 78 – Mbabane
15/10/1996.*

*Mr. Thomas Simelane
P. O. Box 340
NHLANGANO*

*RE: OFFER OF ALLOCATION OF PLOT NO. 12 NHLANGANO
TWO STICKS TO YOURSELF*

Further to our meeting which was held at the Nhlangano Town Council offices on the 11/10/1996 we are pleased to allocate to you, plot No.12 measuring 369 m² at a price of E6 439-00

We withdraw the offer of allocation (dated 15/11/1995) of plot No.129 to Simelane as you said you cannot afford the total package of E22 900 stemming from E8 900 (plot price) and E14 000) being the valuation of the improvement.

The payment of E2 000 you have already made towards plot 129 will be transferred to the new plot (No.12)

Kindly accept the offer in writing within 30 days from the date of this letter. If you do not do so, we will make the offer to somebody else.

V. D. MSIBI

SALES & MARKETING MANAGER”

[31] Following receipt of these correspondences, defendant’s mother wrote:

“07 November 1996

*The Sales & Marketing Manager
Swaziland National Housing Board
P. O. Box 798
NHLANGANO.*

FOR THE ATTENTION OF MR. V. D. MSIBI

Dear Sir,

OFFER OF ALLOCATION OF PLOT 129 NHLANGANO TWO STICKS

Thank you for your letter on the above mentioned dated 15th October 1996 and I am to advise that I have accepted your offer and price quoted of E8 900.00.

Please advise as to where I should make payment. If I recall correctly you had given me an account number for Plot 12 and I am wondering if I should continue making payment to this same account.”

[32] She then paid a sum of E3000 as reflected in exhibit 3 which was accepted. On the other hand Simelane lodged an appeal to the same committee, insisting on Plot 129 and declining to pay for any improvements thereto. He wrote:

“15 October 1996

*Managing Director
Swaziland Housing Board
P.O. Box 798,
MBABANE.*

Dear Sir,

RE: APPEALS LETTER – NHLANGANO TWO STICKS

I am writing to complain about the decision taken at a meeting held on 11/10/96 at the City Council Nhlangano.

I was told that Plot 129 (which is mine) but is occupied by Mr. Magagula will be taken and given to him if I fail to pay E14 000.

I strongly protest because I have paid towards this plot in the form of rent since the creation of Two Sticks – Nhlangano. I paid rent fully despite the promise made that I could occupy the plot when I paid the rent but Mr. Magagula has stayed there instead.

Furthermore, I fail to accept the decision taken to give Magagula (two claims D. C. gave him the land) my land because he did not present evidence in a letter tojustifying his building and occupying my plot and that he was given the plot by D.C.

I want to know also what time frame I will be given to pay Mr. Magagula (E14 000) if I am able to pay, since Housing Board had given me 2 years to pay E8 900 toward the same plot (lot 129) and I have paid E2000 already towards it.

I trust that you will be of assistance.

Yours faithfully

MR. THOMAS SIMELANE”

[33] From the exhibits presented before court, it is not clear whether the committee did reverse its earlier decision. However on 8th April 1998, the committee wrote: Insert exhibit J.

“We have noted with concern that you did not attend a meeting which was held on the 11/07/97 whereby your dispute with Mr. Simelane was to be finalized. The meeting resolved that since you were allocated your own plot, you should occupy it so as to make way for Mr. Simelane to occupy his plot.

On the 10th January 1998 all residence were invited for the plot peg showing exercise where you were supposed to be shown your pegs for plot 12 officially but you did not turn up.

Since Mr. Simelane cannot afford to pay for the improvements, we hereby revert back to your suggestion that you demolish your improvements because you cannot get reimbursement from him (Mr. Simelane)."

[34] On 23rd April 1998, defendant's mother went to second plaintiff and tendered payment for plot 129. This payment was accepted as evidenced by receipt from second plaintiff. On 23rd September 1999 the committee then advised defendant's mother as follows: Exhibit L

"We would like to once again state that your rightful plot is Lot 12, but not 129 as it appears you are still making payments towards the latter (Plot 129). We kindly advise you to direct all your payments to your rightful plot.

Kindly sign the attached Deed of Sale as an agreement of sale since you have already made payments for the plot so that the property can be transferred into your name. Please initial and sign where applicable as shown by the pencil marks on the Deed of Sale."

[35] She neither vacated nor signed the said Deed of Transfer. As corroborated by PW1, she insisted on paying for plot 129 but was unsuccessful as second plaintiff declined to accept payment from her in respect of plot 129.

[36] From the totality of the above, it is evident that the committee initially offered defendant's mother plot No.12. This plot was accepted by defendant's mother upon certain conditions fulfilled. The condition was that first plaintiff reimburse her for the extended structure at plot 129. However, first plaintiff refused to do so. The committee met to deliberate on the issue and took a decision that defendant's mother be offered plot 129 while first plaintiff who was failing to compensate defendant's mother for the extension be offered plot 12.

[37] It is common cause that defendant's mother accepted this offer while first plaintiff rejected it. Once the offer was accepted by defendant's mother, a contract between defendant's mother and second plaintiff was established. It was not open to second plaintiff to *resile* from the contract.

[38] Further, second plaintiff's committee took a decision according to the minutes after deliberating on the matter. Once they communicated their decision as they did by correspondences of offer, the committee became *functus officio*. They were no longer seized with the matter. They could not revisit it in the absence of any allegation that the decision was made in error or obtained through fraud or other related elements. If first plaintiff was aggrieved by the committee's decision, she ought to have appealed it not to the same committee but as per PW2's evidence, the honourable Minister.

[39] For the above, it was grossly irregular for the committee to revisit the matter which they had fully deliberated upon and communicated its decision to the parties.

[40] I therefore enter the following orders:

1. Plaintiff's cause of action is dismissed.
2. First defendant's claim succeed.
3. The third plaintiff is hereby ordered to expunge from its records the title deed in favour of first plaintiff with regards plot 129.
4. The third plaintiff is ordered to give title to defendant upon proof of payment of the full purchase price.

M. DLAMINI
JUDGE

For Plaintiffs : **W.Maseko of Waring Attorneys**
For 1stDefendant : **S. K. Dlamini of Magagula Hlophe Attorneys**
For 2nd&3rdDefendants : **Attorney General's Chambers**

[..] **Innes J in I. Pieters and Co. v Solomon 1911 AD 121 at 137 stated:**

“When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him bona fide in that sense, then there is a concluded contract.”

[...] **Trollip J.A. in Firestone South Africa (Pty) Ltd v Genticuro A.G. 1977 (4) SA 298** at 306 stated:

“The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased.”

[...] **Levinson J in First National Bank of South Africa Ltd v Jurgens and Others 1993 (1) SA 245** at 246:

*“The proposition at common law is simply that once a Court has risen it has no power to vary the judgment for it is functus officio. **Firestone South Africa (Pty)Ltd v Genticuro AG 1977(4) SA 298 (A)**. A principal judgment could be supplemented if an accessory had been inadvertently omitted, provided that the Court was approached within a reasonable time.”*