REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A 172/2014

In the matter between:

ERASTUS MOSES NAANGO	**FIRST APPLICANT**
REINHOLD VERNERVA	**SECOND APPLICANT**
REINHOLD ASHEELA	**THIRD APPLICANT**

And

PETRUS KALEKELA	**FIRST RESPONDENT**
BEATA KALEKELA	**SECOND RESPONDENT**
ONDONGA TRADITIONAL AUTHORITY	**THIRD RESPONDENT**
OSHIKOTO COMMUNAL LAND BOARD N.O.	**FOURTH RESPONDENT**

Neutral citation: *Naango v Kalekela* (A 172/2014) [2016] NAHCMD 383 (06 December 2016).

Coram: Ueitele, J
Heard: 01 September 2015
Delivered: 06 December 2016

Flynote: *Statute* Communal Land Reform Act, 2002 – Application to interdict and restrain respondents' from unlawfully evicting the applicants from an area of

communal land.

Statute Communal Land Reform Act, 2002 -Rights that may be allocated in respect of communal land under the Communal Land Reform Act, 2002 - are divided into customary land rights and rights of leasehold – Section 18 of the Communal Land Reform Act, 2002 prohibiting erection of fence without approval under that Act.

Summary During July 2014 the applicants, by way of a notice of motion, commenced proceedings in this Court in which they sought the following orders: (a) Interdicting and restraining the first and second respondents from unlawfully evicting the applicants from an area of communal land which the respondents have fenced off and which is approximately 3600 hectares in extent (that area is known as Oshana shEtemba); (b) Interdicting and restraining the respondents from interfering in any way with applicants' grazing and residential rights on the communal land known as Oshana shEtemba; and (c) Directing the respondents to restore to the applicants undisturbed possession of the communal grazing area and access to the watering points outside of the area of Oshana shEtemba. The respondents opposed the applicants' application and simultaneously filed a counter application. In the opposing affidavit the respondents raised a point *in limine*, namely that the applicants failed to join Mr Andreas Nangolo as party to the proceedings.

Held that it is true that the failure to join an interested party in proceeding is fatal to the claim, the failure to cite Mr Andreas Nangolo as a party to these proceedings cannot, in the court's view, be fatal. The Court found that Ms Kalekela, in her answering affidavit, states that Nangolo was a relative of her husband who was asked by her husband to assist with the fencing off of the area and the rehabilitation of the 'farming area.' It thus follow that Mr Nangolo was in the area not in pursuance of his own interests but that of the respondents. The point *in limine* raised by the respondents accordingly fails.

Held furthermore that in order to succeed in obtaining an interdict, the applicants do not have to prove that they will in fact be evicted or that they have been evicted

from the area that they occupy. All that they need to satisfy the court of, is that they have a right and that they hold a reasonable apprehension that the respondents may interfere with that right.

Held further that the denial by Ms Kalekela that she threatened to evict the applicants from the area is far-fetched and the court rejects it. The applicants have been threatened with eviction from the Oshana shEtemba and are entitled to interdict the threatened eviction provided that they can prove that they have a clear right to reside at Oshana shEtemba.

Held further that the applicants aver that they were allocated the right to reside and graze their cattle in the area in dispute by the late 'Elenga' Mr Toteya Willibard Mwandingi. This is an averment which the respondents cannot genuinely dispute because only the traditional councillor Mr Toteya Willibard Mwandingi can deny that he has granted the applicants customary land rights.

Held further that the Ondonga Traditional Authority was served with the application and affidavits in this matter and has chosen not to file any pleadings. The court found that the applicants are in terms of s 28(1) entitled to enjoy the customary land rights in respect of Oshana shEtemba.

Held furthermore that the Act makes it clear that no right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land. It thus follows that the document by the Ondonga Traditional Authority in so far as it purports to confer ownership of Oshana shEtemba to the respondents is invalid.

Held further that the Act does not recognize any right to a 'farming area'. The Act only recognizes a right to a residential unit and a right to a farming unit and the right to lease hold, the size of a farming unit is furthermore limited to 50 hectares only. The argument by Mr Kamanja that, the area (Oshana shEtemba) in dispute is not part of a commonage but a farming area, is therefore a fallacy.

Held furthermore that the respondents have therefore failed to prove that they

have the right, to the exclusion of other members of the Ondonga traditional community, to reside and utilize (for grazing purpose) Oshana shEtemba.

Held that the respondents have not alleged that they have obtained permission to erect a fence as contemplated in s 18 (1). Neither have the respondents indicated that they intend to pursue an application under s28 read with s18. It therefore follows that the erection of the fence in a communal land (in this case in Oshana shEtemba) is unlawful and that the court cannot condone the illegal fencing off of communal land because such actions or activities are inimical to rule of law which is at the very heart of the constitutional dispensation in this country.

Held further that by admitting to having fenced off large tracks of communal land the denial by the respondents that they have interfered with the applicants' rights does not create a *bona fide* dispute of fact. The act of fencing off land is clear interference with the free movement of both humans and animals. The court is therefore satisfied that the applicants have succeeded in proving that the respondents have interfered with their rights to beneficially exploit their residency of Oshana shEtemba.

Held furthermore that applicants are entitled to an order interdicting the respondents from in any way interfering with the applicants' grazing and residential rights on the communal land area known as Oshana shEtemba.

Held furthermore that that the appropriate remedy is an order directing the respondents to remove the fence that they have erected around Oshana shEtemba for if that fence is removed the applicants will have free and undisturbed access to the grazing area and water points in and around Oshana shEtemba.

ORDER

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1. The first and second respondents are interdicted and restrained from unlawfully evicting the applicants from an area of communal land which the respondents have fenced off and which is approximately 3600 hectares in extent known as Oshana shEtemba situated in the Oshikoto Region of Namibia.

2. The first and second respondents are interdicted and restrained from in any way interfering with applicants' grazing and residential rights in the communal land area known as Oshana shEtemba situated in the Oshikoto Region of Namibia.

3. The first and second respondents are directed to, not later than three months, from the date of this judgment remove the fence which they have erected around the area of the communal land area known as Oshana shEtemba situated in the Oshikoto Region of Namibia.

4. The respondents counter application is dismissed.

5 I make no order as to costs.

JUDGMENT

UEITELE, J

Introduction

[1] In a country like ours plagued by a landless majority, the interest of the individual and the interests of a large members of the community, in respect of land utilization, are set to collide at one point or another. This case brings to the forth the collision of the individual interest and the community interest in respect of land utilization.

[2] At independence in 1990, the Government of Namibia inherited two agricultural sub sectors comprising of communal and commercial land, which, divided Namibia in terms of land utilization. There was usually private ownership of land in the freehold system in commercial farming areas, while communal land holders did not and still do not have any title to their land. The areas that constitute communal land are described in s 15 of the Communal Land Reform Act, 2002.[1] (I will in this judgment refer to this Act simply as 'the Act').

[3] The three applicants in this matter are members of the Aandonga traditional community and they reside in a communal area called Omunyankwe which is situated in one of the fourteen political regions of Namibia namely the Oshikoto Region and which falls under the jurisdiction of the Ondonga Traditional Authority.

[4] The first and second respondents who are married to each other are also members of the Aandonga traditional community and they reside in a communal area called Ompugulu. Ompugulu is also situated in the Oshikoto Region and also falls under the jurisdiction of the Ondonga Traditional Authority. The third respondent is the traditional authority that has jurisdiction over the Aandonga traditional community. The fourth respondent is the Oshikoto Communal Land Board which has jurisdiction in respect of all communal land which is situated within the Oshikoto Region. The third and fourth respondents have not participated in these proceedings, where I thus refer to the respondents in this judgment that reference will be to the first and second respondents only.

[5] During July 2014 the three applicants, by notice of motion, commenced proceedings in this Court in which they sought an order:

(a) Interdicting and restraining the first and second respondents from unlawfully evicting the applicants from an area of communal land which the respondents have fenced off and which is approximately 3600

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1 Act No. 5 of 2002.

hectares in extent. The respondents refer to this area as farming area by the name of Oshana shEtemba (I will for ease of reference refer to the area interchangeably as the area or Oshana shEtemba);

(b) Interdicting and restraining the respondents from interfering in any way with applicants' grazing and residential rights on the communal land are known as Oshana shEtemba; and

(c) Directing the respondents to restore to the applicants undisturbed possession of the communal grazing area and access to the watering points outside of the area also known as Oshana shEtemba.

[6] The respondents opposed the applicants' application and simultaneously filed a counter application. In the counter application the respondents amongst other reliefs they sought the following orders:

(a) a declaration that the 'communal farm' Oshana shEtemba was lawfully allocated to the respondents in terms of the applicable customary laws;

(b) a declaration that the applicants are unlawfully occupying the 'communal farm' Oshana shEtemba;

(c) ejecting the applicants and whomsoever occupies or utilizes (by grazing their animals) the 'communal farm' Oshana shEtemba.

With this short introduction I will now proceed to deal with the factual background that has led the applicants to institute this application.

The factual background.

The applicants' version of events.

[7] In this part of the judgment I will first set out the factual averments made by the applicants in their founding affidavits and thereafter factual averments set out by the respondents in their answering affidavits.

[8] The main founding affidavit of the applicants was deposed to by the first applicant Mr Erastus Moses Naango, the second and third applicants confirmed the allegations made by the first applicant in the founding affidavit. Mr Naango states that during 1992 he was granted (by the late headman of the area a certain Willibard Mwandingi), customary rights to occupy, and graze his cattle and goats in the communal area known as Oshana shEtemba. By virtue of the customary rights granted to him, he has since 1992 occupied and grazed his cattle and goats in that communal area, he also stated that he is aware that the other two applicants and other members of the Omunyankwe village have also occupied the area since 1992.

[9] The applicants further allege that during the year 2005 the respondents arrived in the area and erected an iron sheet house on the commonage and then they went away. They further allege that the house remained vacant and the respondents did not have any livestock (cattle or goats) in the area. It was only during November 2013 that the respondents returned to the area and started to erect a fence; fencing off an area of approximately 3 600 hectares. The applicants further allege that they were concerned with the fencing off of the area and as a result the third applicant, Mr Asheela, on 17 February 2014, sought audience with the King of the Aandonga people King Immanuel Kauluma Elifas. The third respondent's effort to see the King were, however, thwarted by one of the Ondonga Traditional Councillors a certain Mr Joseph Ashino, who also acts as the secretary to the King.

[10] During February 2014 the respondents sent letters to the people who reside around Oshana shEtemba (the applicants allege that they received the letters) telling them to leave that area. The respondents completed the fencing off of the area during April 2014, thus enclosing some of the villages and excluding others. The water points were outside the fenced off area. The respondents also installed gates at some points of the fence. The fence caused movement

problems for the applicants' cattle as the cattle did not have access to the water points which were outside the fenced off area.

[11] The cattle that were fenced in would not have access to the water points that were situated outside the fenced off area, the cattle would thus crowd at the gate. An employee of the respondents, a certain Andreas Nangolo, would then arrive at the gate open the gate chase out the cattle and lock the gate again. The cattle that were chased out of the fenced in area will then not be able to return to the kraals which were within the fenced in area, and those cattle would go astray.

[12] The applicants also allege, in their affidavit, that the fence erected by the respondents caused them other problems as well in that it became difficult for applicants to move in and out of the fenced off area to access water points, to collect fire wood and other resources, including looking after their cattle which were cordoned off outside the fenced off area.

[13] When the hardships caused by the fencing off of the area became intolerable to the applicants they (the applicants) sought legal assistance from the Legal Assistance Centre (the LAC). The LAC, during March 2014, addressed a letter of demand which was delivered personally to the respondents and their employee, Andreas Nangolo, demanding that the respondents remove their illegal fence and restore the applicants' unhindered access to the water points. When the respondents did not heed the demand the applicants, during July 2014 instituted these proceedings.

The respondents' version of events.

[14] I have indicated above that the respondents opposed the application and also filed a counter application. The opposing affidavit was deposed to by Ms Kalekela the wife of the first respondent. The first respondent was allegedly unable to depose the opposing affidavit because of a failing health. .According to Ms Kalekela, her husband is a headman of the ward Ompugulu in the district of Oniiwe in the Onayena Constituency in the Oshikoto Region and that is also where they reside.

[15] Ms Kalekela in her affidavit started off by narrating the setup of the Aandonga people and how a person acquires customary land rights in the Oshindonga customary practice. She stated that the Aandonga people are governed by the Ondonga Traditional Authority and the head of the Authority is '*Omukwaniilwa'*, *Tatekulu* Kauluma Immanuel Elifas (the title Omukwaniilwa is in Oshindonga language and is similar to "King"). She continued and stated that Ondonga, where most of Aandonga reside and originate is a communal area as defined by Communal Land Reform Act, 2002 as amended.

[16] Under customary law, the Ondonga area, is divided into districts as an example of districts she mentioned the Uukwanambwa, Oniimwandi, Epale, Amuteya, Oniiwe, and Onalusheshete. The head of a district is appointed by *Omukwaniilwa* and is titled as *'Elenga'* (a senior councillor) (plural: Omalenga). The council of *Omalenga* are the principal advisers of *Omukwaniilwa*. The districts are in turn divided into wards which have at times been referred to as villages. The ward is headed by a headman appointed by the *Elenga*. Clusters of wards are headed by a senior headmen, who is titled as a junior *Elenga*.

[17] According to Ms Kalekela land is allocated in the following manner: The residential areas are contained in wards. Homesteads and '*mahangu*' cultivation plots are within the wards. A headman is responsible for allocating these (that is, residential and *mahangu* cultivation plots) to the residents. A headman has no authority to allocate a livestock farming area. She states that customarily the farming areas are situated away from the wards and were for livestock farming only. Farming areas are allocated by the relevant *Elenga*. Due to expansion of residences and population, new wards have been established in areas that were customarily reserved as livestock farming areas.

[18] Ms Kalekela states that the farming area in question is situated in the Onalusheshete district which is largely a livestock farming area. This district was previously part of a larger district known as Amuteya and was previously headed by an *Elenga,* a certain, *Tatekulu* Toteya Willibard Mwandingi, and after he

passed away, the district is now headed by *Elenga*, *Tatekulu* Eino Shondili Amutenya.

[19] She alleges that, during 1986 her husband the first respondent, accompanied the late headman Mr Toteya Willibard Mwandingi to Amuteya and upon his return, he; informed her that he was allocated a 'farming area' in Amuteya (now Onalusheshete District). This farming area is now known as Oshana shEtemba in the Omunyankwe area. She alleges that the allocation of the farming area was confirmed by the secretary to the Ondonga Traditional Authority and she attached a document which was marked as 'Annexure BK 1.'

[20] Ms Kalekela contends that a farming area is not part of the commonage. She continues to state that the farming area in this dispute is an allocated piece of land and is not an area for the common grazing of all residents. She furthermore states that during the period 1990 to 2005 or so, her husband, the first respondent, was not very active in livestock farming and seldom visited the area, but had never abandoned his farming area, Oshana shEtemba. He had placed a fence around the demarcated area.

[21] She continued to state that during the period 1990 to 2005 the applicants and many other people, encroached and invaded parts of the respondents' farming area, Oshana shEtemba. She alleges that some merely grazed there and moved on, whilst others would remain for extended periods of time and later moved on. She proceeded and stated that she and her husband did not know many of these people, and that none of them have ever approached the *Elenga* for allocation of farming areas.

[22] Ms Kalekela alleges that during the middle of last decade, her husband started to invite his nephews and relatives to assist him to repair the farming area, one of the relatives so invited is Andreas Nangolo, who is not an employee, but a nephew of her husband and his responsibility is to repair the fences around the farming area and make sure the land recovers itself to be suited for livestock farming. Ms Kalekela admits that the fencing repairs were started during 2005.

[23] Ms Kalekela denies that they have fenced off any villages but admit that an area of approximately 3 600 hectares has been fenced off and refers to the area as a farming area. She also denied that, Mr Andreas Nangolo was an employee of theirs and that he carried an AK 47 or hand guns. She, however, admitted that he is in possession of a shotgun when he is at the farming area because this is a place full of wild animals. She alleges that the firearm he carries is not for assault of anyone but for personal protection.

[24] The respondents accordingly prayed that the applicants' application be dismissed with costs and that their counterclaim succeed. Before I evaluate the merits of the applicants and respondents' competing claims I will briefly set out the legislative framework regulating occupation and utilization of communal land.

The legislative framework

[25] Section 15 of the Act states which areas of Namibia form part of the communal land.[2] Under section 16, with the approval of the National Assembly, the President may by proclamation: declare any defined State land to be communal land, add any State land to an existing communal land area, or withdraw a defined area from communal land. Section 17 of the Act makes it very clear that all communal land areas belong to the State, which must keep the land in trust for the benefit of the traditional communities living in those areas. The State is enjoined to put systems in place to make sure that communal lands are administered and managed in the interests of those living in those areas. The Act also makes it clear that communal land cannot be sold as freehold land to any person.

[26] The Act takes a strong position against the erection of fences on communal lands. Section 18 prohibits the erection of new fences without proper authorization obtained in accordance with the Act.[3] Similarly, that section provides

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2 The areas which make up communal land are set out in Schedule 1 to the Act.

3 Section 18 of the Act reads as follows:

'18 **Prohibition against fences**

Subject to such exemptions as may be prescribed, no fence of any nature-

that fences that existed at the time when the Act came into operation have to be removed, except where, the people who erected these fences applied for and were granted permission to keep the fences on communal land.[4] This means that from 1 March 2003 no new fences may be erected in a communal area and fences may only be retained if authorization is sought and granted under the Act.

[27] Section 19 stipulates that the rights that may be allocated in respect of communal land under the Act are divided into- (a) customary land rights and rights of leasehold. While s 21 sets out the customary land rights that may be allocated in respect of communal land as (a) a right to a farming unit; (b) a right to a residential unit; and (c) a right to any other form of customary tenure that may be recognised and described by the Minister by notice in the *Gazette* for the purposes of this Act.

[28] Section 20 identifies the person in whom the power to allocate or cancel customary land rights is vested. The primary power to allocate and cancel customary land rights is vested in the Chief of a traditional community, or if the Chief so decides, in the Traditional Authority of the particular traditional community. This means that the Chief or Traditional Authority first must decide whether or not to grant an application for a customary land right. Only once this decision has been made will the matter be referred to the Communal Land Board for ratification of the decision by the Chief or Traditional Authority.

[29] Section 22 of the Act sets out the procedures that must be followed when applying for a land right in respect of a communal land. It provides that an application for the allocation of a customary land right in respect of communal land must be made in writing in the prescribed form; and be submitted to the Chief

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(a) shall, after the commencement of this Act, be erected or caused to be erected by any person on any portion of land situated within a communal land area; or

(b) which, upon the commencement of this Act, exists on any portion of such land, by whomsoever erected, shall after such date as may be notified by the Minister by notice in the Gazette, be retained on such land,

unless authorisation for such erection or retention has been granted in accordance with the provisions of this Act.'

4 For the purposes of section 18, the Act came into operation on 1 March 2003. (See Government Notice 34 of 2003).

of the traditional community within whose communal area the land in question is situated. The section further provides that an applicant for a land right in respect of a communal land must, in his or her application for the land right, furnish such information and submit such documents as the Chief or the Traditional Authority may require for purpose of consideration of the application. The section furthermore provides that when considering an application for a customary land right in respect of communal land a Chief or Traditional Authority may-

(a) make investigations and consult persons in connection with the application; and

(b) if any member of the traditional community objects to the allocation of the right, conduct a hearing to afford the applicant and such objector the opportunity to make representations in connection with the application, and may refuse or, grant the application.

[30] Section 23 of the Act limits the size (the current limit is 20 hectares for a residential land right and 50 hectares for a farming unit)[5] of land which may be allocated and acquired as a customary land right. If the land applied for exceeds the limit set by the Act, the Minister responsible for Land Reform must approve the allocation in writing. The Minister[6] may prescribe the maximum area after consultations with the Minister responsible for agricultural affairs as stated in the Act.

[31] Section 28 recognises existing customary land rights, it provides that any person who immediately before the commencement of the Act held a right in respect of the occupation or use of communal land, being a right of a nature referred to in s 21, and which was granted to or acquired by such person in terms of any law or otherwise, shall continue to hold that right. Section 28(1), (2) and (3) provide as follows:

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5 See Regulation 3 of the Regulations in respect of the Communal Land Reform Act, 2005 published under Government Notice No. 37of 2003 in Government *Gazette* No. 2926 of 1 March 2003.

6 The Minister responsible for land reform.

‘(1) Subject to subsection (2), any person who immediately before the commencement of this Act held a right in respect of the occupation or use of communal land, being a right of a nature referred to in section 21, and which was granted to or acquired by such person in terms of any law or otherwise, shall continue to hold that right, unless-

(a) such person's claim to the right to such land is rejected upon an application contemplated in subsection (2); or

(b) such land reverts to the State by virtue of the provisions of subsection (13).

(2) With effect from a date to be publicly notified by the Minister, either generally or with respect to an area specified in the notice, every person who claims to hold a right referred to in subsection (1) in respect of land situated in the area to which the notice relates, shall be required, subject to subsection (3), to apply in the prescribed form and manner to the relevant board-

(a) for the recognition and registration of such right under this Act; and

(b) where applicable, for authorisation for the retention of any fence or fences existing on the land, if the applicant wishes to retain such fence or fences.

(3) Subject to section 37, an application in terms of subsection (2) must be made within a period of three years of the date notified under that subsection, but the Minister may by public notification extend that period by such further period or periods as the Minister may determine.’

[32] Section 29 deals with grazing rights. That section amongst other things provides that the commonage in the communal area of a traditional community is available for use by the lawful residents of such area for the grazing of their stock, but the right is subject to such conditions as may be prescribed or as the Chief or Traditional Authority concerned may impose. The conditions that may be imposed include conditions relating:

(a) to the kinds and number of stock that may be grazed;

(b) to the section or sections of the commonage where stock may be grazed and the grazing in rotation on different sections;

(c) to the right of the Chief or Traditional Authority or the relevant board to utilise any portion of the commonage which is required for the allocation of a right under this Act; and

(d) to the right of the President under section 16(1)(c) to withdraw and reserve any portion of the commonage for any purpose in the public interest.

The point *in limine* raised by the respondents.

[33] Mr Kamanja raised a point *in limine* namely that the applicants failed to cite Mr Andreas Nangolo as a necessary party to these proceedings. He argued that the first, second and third applicants averred that Mr Andreas Nangolo is an employee of the respondents but they make out no averments or proof of vicarious liability against the aforesaid Andreas Nangolo. It can thus not be established on the papers of the applicants that the aforesaid Andreas Nangolo was acting in furtherance of the interests or in the scope of the employment of the respondents, argued Mar Kamanja.

[34] Mr Kamanja continued and argued that more importantly the respondents have disputed the averments that that the aforesaid Andreas Nangolo is their employee. He continued to argue that Mr Nangolo deposed to a confirmatory affidavit in which he has not in any manner admitted to being employed by the first and second respondent. The averments made by the applicants against Andreas Nangolo are serious and suggest that the alleged acts of spoliation committed were allegedly committed through the instrument of Andreas Nangolo. Yet the aforesaid Andreas Nangolo is not cited in the applicants' papers in order to answer to the allegations. It is trite law that the failure to join an interested party in proceeding is fatal to the claim.

[35] While it is true that the failure to join an interested party in proceeding is fatal to the claim, the failure to cite Mr Andreas Nangolo as a party to these proceedings cannot, in my view, be fatal. I say so for the following reason. The status of Mr Nangolo's presence at the area (i.e. Oshana shEtemba) was not within the personal knowledge of the applicants but was within the personal knowledge of the respondents. Ms Kalekela in her answering affidavit states that Nangolo was a relative of her husband who was asked by her husband to assist with the fencing off of the area and the rehabilitation of the 'farming area.' It thus follows that Mr Nangolo was in the area not in pursuance of his own interests but that of the respondents. This point *in limine* accordingly fails.

Have the respondents interfered with the appellants' enjoyment of the communal area?

[36] The Applicants seek certain interdictory reliefs against the respondents. In essence the applicants seek their relief on the basis of the common law remedy of *mandamenten van spolie.* The respondents oppose the applicants' claims on the basis that the remedy of *mandamenten von spolie* does not obtain within the customary laws of the Ondonga Traditional Authority. In view of the conclusion I have arrived at in this matter I find it unnecessary to decide the question whether or not the remedy of *mandamenten van spolie* is applicable within the customary laws of the Ondonga Traditional Authority.

[37] The first relief that the applicants seek from this court is an order interdicting the respondents from evicting the applicants from the Oshana shEtemba. Mr Kamanja argued that the use of the term "eviction" presupposes that the applicants have been removed from occupation of a residence or a premises. He continued and argued that the applicants have nowhere in their affidavits made averments of being removed by the respondents from any particular place of occupation or premises.

[38] Mr Kamanja continued and argued that it, actually is unclear from the averments by the applicants whether they reside within the area which has been depicted by the respondents in 'annexure BK 2' or not. And even if the applicants

where to reside within the said depicted area, the applicants did not make any averments as to where and when they were evicted and to where they have been removed to. He argued that, unlike in the *Uvhungu-Vhungu Development CC v Minister of Agriculture, Water and Forestry*[7] matter, the occupancy (possession) by the applicant was not in dispute, the Court could move on and analyse the aspect of peaceful and undisturbed possession.

[39] In this matter the applicants have not bothered to provide proof that they occupied a premises or were in peaceful and undisturbed possession of a certain premises from which the respondents came to unlawfully evict them. The applicants have not been evicted by the respondents from anywhere and therefore cannot be returned to occupation. If anything they level allegations against Andreas Nangolo, yet even these allegations fall short of averring that the aforesaid had evicted them. Where there was no eviction (dispossession), there can be no claim for restoration of occupancy, argued Mr Kamanja.

[40] The requisites for a final interdict are well known. They are set out in the in the case of, *Setlogelo v Setlogelo*[8], in this case Innes J, is reported as saying:

> 'The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.'

[41] The nature of the injury that is apprehended was clarified by Williamson J in the matter of *Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co Ltd and Another*[9] in the following words:

> 'A reasonable apprehension of injury in my view is one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict has not got to establish that, on a balance or preponderance of probabilities flowing from the undisputed facts, injury will follow. If that is what a Court would have to find as established it would mean of course that the Court must find that injury will

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7 2009 (10 NR 89 (HC).

8 1914 AD 221. At p. 227.

9 1961 (2) SA 505 (W) at p 518.

> in fact result; it is on the application of that very test that a Court in a civil case makes findings of fact. And as I said above, it seems to me that if INNES, C.J., meant to hold that the *onus* on an applicant was to establish facts on which the Court could find on a balance of probabilities that injury would result, he would have said so. He found that the applicant only had to show that it was reasonable to apprehend that injury would result.' (Underlined for emphasis)

[42] Mr Kamanja, has in my view misunderstood the requirements to obtain an interdict. The applicants do not have to prove that they will in fact be evicted or that they have been evicted from the area that they occupy. All that they need to satisfy the court is that they have a right and that they hold a reasonable apprehension that the respondents may interfere with that right. In the present matter the applicants alleged that the respondents fenced off an area constituting approximately 3600 hectares and that they have been fenced in, in that area. The respondents do not dispute this fact.

[43] The applicants further alleged (this allegation is contained in paragraph 25 of Mr Naango's affidavit) that, during February 2014 they received letters informing them that they must vacate the area. In paragraph 33.17 in response to that allegation Ms Kalekela only states that 'This averment is denied and I refer to what I have stated before.' Yet in paragraph 35.3 Ms Kalekela states that she applies 'that the Sheriff or her deputy together with the Namibia Police be authorised to assist in the eviction process of anyone so ordered to be evicted.' The denial by Ms Kalekela that she threatened to evict the applicants from the area is therefore far-fetched and I reject it. The applicants have been threatened with eviction from the Oshana shEtemba and are entitled to interdict the threatened eviction provided that they can prove that they have a clear right to reside at Oshana shEtemba.

[44] The question that needs to be resolved is therefore the issue of whether the applicants have proven that they have a right worthy of protection by the law. The applicants allege that they belong to the Aandonga traditional community and are subjects of the Ondonga Traditional Authority, they further allege that they have resided in the area (i.e. Oshana shEtemba) since 1992, this is prior to the Act, coming into operation. Ms Kalekela appears to admit to the fact that the

applicants have been occupying the area since 1992. In her opposing affidavit she said:

> '[26] During the period of 1990 to 2005 or so, my husband, the first respondent, was not very active in livestock farming. However he had never abandoned his farming area Oshana shEtemba. He had placed a fence around the demarcated area and seldom visited the area. He was also preoccupied with other duties and was often sickly;
>
> [27] It was during this time [1990 to 2005] that many people, including the aforesaid Hilde Nakashole, would encroach and invade parts of our farming land, Oshana shEtemba. Some merely grazed there and moved on, whilst other would remain for extended periods of time and later move on. We did not know many of these people, however none of them have ever approached the Elenga for allocation of farming areas.'

[45] I have indicated above that s 28(1) of the Act provides that any person who immediately before the commencement of the Act held a right in respect of the occupation or use of communal land, being a right of a nature referred to in s 21 (that is customary land rights), and which was granted to, or acquired by such person in terms of any law or otherwise, shall continue to hold that right. What is clear, is that the term 'otherwise' would in my view mean that the right need not only have been acquired or granted in terms of a law but also in another way such as in terms of custom or customary law. It is not disputed that under customary practice members of traditional communities could be allocated customary land rights by the traditional authority under whose area of jurisdiction they resided.

[46] The applicants aver that they were allocated the right to reside and graze their cattle in the area in dispute by the late *Elenga* Mr Toteya Willibard Mwandingi. This is an averment which the respondents cannot genuinely dispute. I say they cannot dispute it because only the traditional councillor Mr Toteya Willibard Mwandingi can deny that he has granted the applicants customary land rights. Secondly the Ondonga Traditional Authority was served with the application and affidavits in this matter and has chosen not to file any pleadings. I therefore find that the applicants are in terms of s 28(1) entitled to enjoy the

customary land rights in respect of Oshana shEtemba.

[47] Ms Kalekela alleges that, and I quote verbatim from her answering affidavit:

> 'I can remember that during or about 1986, my husband, the first respondent, accompanied Tatekulu Toteya Wilbard Mwandingi to Amuteya and upon his return he informed me that he was allocated a farming area in Amuteya (now Onalusheshete). The farming area is known as Oshana shEtemba in an area called Omunyankwe. These facts can be verified and confirmed with or by the third respondent…
>
> … the farming area is not part of the commonage as the applicants would want this Honourable Court to believe. A commonage is well defined within the Communal Land Reform Act, 2002 and this distinction will be argued at the hearing hereof. The farming area in this dispute is an allocated piece of land and is not an area for the common grazing of all residents'

[48] The first part of the above quotation is clear inadmissible hearsay evidence. The second part of the answering affidavit, of Ms Kalekela, demonstrates her mis-understanding of the Communal Land Reform Act, 2002. As I indicated above the Act, in s19 sets out the rights that may be allocated in respect of communal land under the Act and they are (a) customary land rights and rights of leasehold. Customary land rights that may be allocated in respect of communal land are; a right to a farming unit; a right to a residential unit; and (c) a right to any other form of customary tenure that may be recognised and described by the Minister by notice in the *Gazette*.

[49] Mr. Kamanja referred me to 'annexure BK 1' attached to Ms Kalekela's answering affidavit which is a document emanating from Ondonga Community Traditional Authority. That documents stipulates that:

> '…the Ondangwa Community Traditional Authority gave permission to Mr Petrus A Kalekela on/during 1986 to own the Farm known as Oshana shEtemba. The chief of the Ondonga Community Traditional Authority and his council approved the ownership of this land by the abovementioned person.'

Mr Kamanja thus argued that Oshana shEtemba is not part of the commonage but is a farming area allocated to respondents.

[50] First the Act in s 17 makes it clear that all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities. The Act furthermore makes it clear that no right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land. It thus follows that the document by the Ondonga Traditional Authority in so far as it purports to confer ownership of Oshana shEtemba to the respondents is invalid.

[51] Secondly the Act does not recognize any right to a 'farming area'. The Act only recognizes, a right to a residential unit, a farming unit and the right to lease hold. The size of a farming unit is furthermore limited to 50 hectares only. The argument by Mr. Kamanja that, the area (Oshana shEtemba) in dispute is not part of a commonage but a farming area, is therefore a fallacy. The respondents have therefore failed to prove that they have the right, to the exclusion of other members of the Ondonga traditional community, to reside and utilize (for grazing purpose) Oshana shEtemba.

[52] The respondents admitted that they started fencing off the area during the year 2005. It will be remember that s18 (1) of the Act, prohibits the erection of any fence on any portion of land situated within a communal land area after the Act came into operation except where authorisation for the erection of the fence has been granted in accordance with the provisions of the Act. The respondents have not alleged that they have obtained permission to erect a fence as contemplated in s18 (1). Neither have the respondents indicated that they intend to pursue an application under s28 read with s18. It therefore follows that the erection of the fence by the respondents, in a communal land (in this case in Oshana shEtemba), is unlawful. I therefore pause here and point out that the court cannot condone

the illegal fencing off of communal land because such actions or activities are inimical to rule of law which is at the very heart of the constitutional dispensation in this country.

[53] The applicants further allege that the fencing off of such large tracks of land has interfered with the free movement of their animals and with their exercise and beneficial use of the communal in that it became difficult for applicants to move in and out of the fenced off area, to access water points, to collect fire wood and other resources, and also to look after their cattle. In my view, by admitting having fenced off large tracks of communal land the denial by the respondents that they have not interfered with the applicants right does not create a *bona fide* dispute of fact. The act of fencing off land is a clear interference with the free movement of both humans and animals. I am therefore satisfied that the applicants have succeeded in proving that the respondents have interfered with their rights to beneficially exploit their residency of Oshana shEtemba.

[54] It would further follow that the applicants are entitled to an order interdicting the respondents from in any way interfering with the applicants' grazing and residential rights on the communal land area known as Oshana shEtemba. The third relief sought by the applicants is an order directing the respondents to restore to the applicants undisturbed possession of the communal grazing area and access to the watering points outside of the area known as Oshana shEtemba. I have approached this dispute exclusively in terms of the rights and obligations conferred by the Communal Land Reform Act, 2002. I am thus of the view that the appropriate remedy is an order directing the respondents to remove the fence that they have erected around Oshana shEtemba for if that fence is removed the applicants will have free and undisturbed access to the grazing and water points in and around Oshana shEtemba.

[55] As regards the costs of this application I am of the view that the general rule namely that costs follow the cause will apply. The applicants have, however, not asked for costs in this matter. I accordingly make the following order:

1 The first and second respondents are interdicted and restrained from unlawfully evicting the applicants from an area of communal land which the respondents have fenced off and which is approximately 3600 hectares in extent known as Oshana shEtemba situated in the Oshikoto Region of Namibia.

2 The first and second respondents are interdicted and restrained from in any way interfering with applicants' grazing and residential rights in the communal land area known as Oshana shEtemba situated in the Oshikoto Region of Namibia; and

3 The first and second respondents are directed to, not later than three months, from the date of this judgment remove the fence which they have erected around the area of the communal land area known as Oshana shEtemba situated in the Oshikoto Region of Namibia.

4 The respondents counter application is dismissed.

5 I make no order as to costs.

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UEITELE S F I
Judge

1ST 2ND & 3RD APPLICANTS:	**MS MYNHAARDT.** **Of The Legal Assistance Centre**
1ST & 2ND RESPONDENTS:	**MR E. A KAMANJA** **Amupanda Kamanja Inc**
3rd & 4th RESPONDENTS:	**NO APPEARANCE**