

# Customary land rights guaranteed, says Supreme Court (New Era)

WINDHOEK - Namibian High Court Judge President and Deputy Chief Justice Petrus Damaseb said on Friday that Schedule 5 (3) of the Namibian Constitution creates a unique right in favour of holders of communal land rights, succeeded by the government of Namibia, and such right continues to exist even when transferred to a local authority.

Schedule 5 (3) states that all land in Namibia, exclusive of privately-owned land, shall be transferred to government subject to any existing right upon it.

Judge Damaseb, in agreement with Acting Judges of Appeal Fred Chomba and Yvonne Mokgoro, said this in an appeal launched by Agnes Kahimbi Kashela against a High Court order that the Katima Mulilo Town Council do not owe her anything for her communal land they expropriated.

Kashela issued summons against the town council and seven other respondents after the town council rented out portions of land occupied by Kashela and later offered it for sale.

Kashela's late father, Andreas, was allocated a piece of land in 1985 in the then Caprivi Region and she became the heir apparent, according to customary law, when her father died in 2001, she claimed in papers filed with the court.

However, the government, as owners of the land by Certificate of State, after independence transferred a surveyed portion of the land to the Katima Mulilo Town Council, who in turn rented it out to four individuals: Caprivi Cabins, a certain Mr Ndimi, Paulo Coimbra and JL Taljaard.

They are cited in the application as the fourth to the eighth respondents with the town council, its CEO Charles Nawa and the government as the first three respondents. Only the town council and the CEO opposed the court case.

Kashela argued that by unlawfully renting out the land in dispute, the town council was unjustly enriching itself to her prejudice. She also claims that by selling the land, the town council is unlawfully "expropriating" her land without just compensation at market value as guaranteed in the constitution.

The town council hit back by saying the land in question ceased to be communal land upon independence and upon the transfer of the land to the town council. The High Court agreed with the arguments and dismissed her claim with costs.

It also found that she has no claim against the town council and if she had any right to compensation it is against the government of Namibia only and that in any event, such a claim has prescribed.

Not satisfied, Kashela appealed the whole judgment in the Supreme Court. According to the appeal judges, the matter of compensation was not put forward by the parties in their stated

case and should not have decided as well as that prescription was not pleaded by the respondents and could likewise not be decided by the court.

What was important to determine, the appeal judges said, was what right an occupier of communal land has when the land which he/she occupies under customary land tenure is transferred by the government to a local authority.

The question to answer in this instance is whether or not the right that Kashela inherited from her late father survived the transfer of the land to the town council and imposed an obligation to it to compensate Kashela for any loss suffered as a result of interference with the right.

According to Judge Damaseb, Namibia's beleaguered past poses a difficult scenario for people like Kashela and others in the same situation. However, he said, it cannot be correct that the State's succession to communal land areas at independence extinguished the communal land tenure rights that subsisted.

"When the government took ownership of communal land areas as successor-in-title by virtue of Schedule 5(3), it assumed an obligation, at a bare minimum, to look after the interests of the people who lived on it", Judge Damaseb said.

He went on to say that the intent was clearly to impose an obligation on the State to respect the interests held by the affected communities in communal land, for most of whom it was and remains the only means of livelihood and survival.

According to the Deputy Chief Justice, as successor-in-title to communal land areas, the government of Namibia assumed the obligations attached to the land, an obligation which involves recognition and respect for the rights of the members of the community to live on the land, work it and sustain themselves.