CIV/A/25/79

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MATSELISO MBAGAMTHI Appellant

v

BUTA PHALATSI Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr.Justice T.S. Cotran on the 16th day of March, 1982

This is an appeal from the Judgment of the Judicial Commissioner who dismissed the appellant's appeal from the Judgment of Matsieng Central Court which dismissed the appellant's appeal from the Judgment of Maseru Local Court which ruled in favour of the respondent ordering the appellant to evict a portion of a developed plot registered in the Deeds Registry Office in the respondent's name.

The respondent(and original plaintiff) was Buta Phalatsi: he sued two persons Ashton Mbagamthi (original 1st defendant) and Matseliso Mbagamthi(original 2nd defendant and now sole appellant) alleging that a site in Motimposo originally owned by Ashton's father Jabavu, was bought after Jabavu's death from Ashton(who it was common cause was the heir to Jabavu) with the appellant's consent. It was not common cause that the appellant was Jabavu's wife either under the civil law or under Sotho Law and Custom.

I think it is clear that the purchase price was paid over a period of time probably between May 1977 and July 1977. The respondent testifies that whilst he was paying the purchase price of the site Ashton and the appellant were staying in the house on the site "as husband and wife". He allowed them the use of the house for a while. He then asked them to vacate but they pleaded for time on the ground that they wished to dispose of some of their

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own property, which consisted of a borehole pump and a wheeled trailer, which the respondent claimed had already been sold to him, i.e. that this particular property was part and parcel of the purchase of the site. The trouble started from that moment. Ashton and the appellant hampered his workers and used abusive language and were allegedly negotiating to sell the site again to a third party.

According to Phoofolo Lechesa (PW1) a member of the land allocation committee of the area, the committee met on the 13th August 1977 to consider this sale. At that time there were two structures on the plot, one a complete flat roofed house (polata) and the other a grey bricked shell without a roof. He adds that Ashton informed the committee that he had the agreement of the family to dispose of the site, in fact a portion of a larger site as we shall see. The committee proceeded to inspect the site using Ashton's own vehicle and both parties, in situ, agreed on the boundaries of the site sold, which was paced and measured using a tape. A Form C was issued to the respondent in accordance with this agreement. This is the form on the strength of which the respondent was able to obtain title deeds.

Aaron Letsoha(PW2) confirms the evidence of Phoofolo. He gives more details of what had actually happened from which it will be seen (and this is abundantly proved) that the original site was divided into two parts, Ashton retained the eastern part. Both Ashton and the respondent were given Forms C demarcating their respective boundaries. Chieftainess Mamajara(PW3) testifies to the same effect. Indeed, she says, Ashton came to the committee meeting after a number of earlier discussions on the proposed sale, with the site plans which were later physically confirmed by an inspection. On the relationship between Jabavu and the appellant her evidence was to the effect that the lady was Jabavu's mistress and was never introduced to her as a wife. After Jabavu's death she could "see" that she and Ashton were living together. On this aspect of the matter the appellant asked a few questions in cross-examination. From the respondent the appellant elicited the information that there was some discussion about erecting a "mourning hand" for Jabavu by B. Buta. The only question asked by the appellant from the chieftainess on this subject was that she presented to her Ashton as the heir.

Ashton's testimony (in effect) was that at that committee

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meeting the original site was divided into three parts, one portion for himself, one portion for the appellant and one portion for the respondent for which Forms C were issued. The appellant however has no Form C from the committee as Ashton maintains.

The appellant testifies that a portion was given to her by Jabavu in his lifetime in 1975 when she married him by Sotho Law and Cusom. He gave another portion to respondent. She had no Form C as they did not exist in those days. That of course is incorrect because Form C existed since 1965, certainly 1967 (see Land(Advisory Boards Procedure) Regulations 15 of 1965 Vol. X Laws of Lesotho p. 536 and the Land (Procedure) Act 1967 Vol. XII Laws of Lesotho p. 156). She produced a witness called Semekolo Mgathatsane who said that he knew the appellant to be Jabavu's wife and the late Jabavu told him he had given her the site on which the house is built.

The President of the Local Court outlined the cases of Ashton, the appellant, and the respondent. He came to the conclusion that the respondent was the holder of a title deed supported by a Form C both indicating the boundaries and held that only the High Court has jurisdiction to alter or change the register. He ordered eviction. He did not make any findings on credibility of the witnesses.

Ashton did not appeal. In truth he had no leg to stand on. The evidence against him was overwhelming, viz, that he sold the site with the measurements as indicated in the title deed which included the house where the appellant and himself were living.

The Central Court dealt with the appeal by way of rehearing of the appellant and respondent. The President did give his opinion on credibility which was not favourable to the appellant.

In a further appeal to the Judicial Commissioner, where the parties were represented, the main argument, I think, revolved on whether Ashton, as heir of Jabavu, had powers, to dispose of a house occupied by the widow of his father, assuming that is, she was a real widow properly married whether by custon or by civil rites. The short answer to this question, in my opinion, is that he can, if the widow, if she was a widow, consented to the transaction expressly or by implication. In dismissing the appeal, the learned Judicial Commissioner's ratio decidendi was that in the absence of clear cut evidence that a portion of Jabavu's site was set aside for the appellant the Court must take it that it was just one site for

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Jabavu's first house and that the heir of that house Ashton was empowered to make gifts (i.e. dispose of it) provided they were approved by the chief.

In the appeal before me the point was taken by Mr. Sello that there is a High Court decision to the effect that a Subordinate Court can adjudicate on ownership of sites even where one or the other of the parties held a title deed (Maseela v. Maseela - CIV/A/10/69 dated 26th January 1970). The then learned Chief Justice wrote as follows :-

> "I may just add that in reading through the papers originally I was not quite sure whether the magistrate had jurisdiction to try this case in view of section 7 of the Deeds Registry Act 1967 which provides that a registered deed of grant or certificate of title can only be cancelled by the Registrar of Deeds upon an order of the High Court. The thought struck me at the time whether the effect of the magistrate's judgment does not perhaps render the above provisions nugatory. I find however that the point is probably covered by the decision in the case of Tushini and Others v. Mzobe and Another 1949(3) S.A. 623(A) where, in spite of a very similar provision in the South African Deeds Registries Act, the Appellate Division held that a Native Commissioner's Court had jurisdiction in an action in which the transfer of immovable property which had erroneously been registered in the name of one of the parties was claimed and that the granting of an order to pass transfer is not an order for the cancellation of such deed of grant or deed of transfer. In terms of section 16(1)(c) of the Subordinate Courts Proclamation a magistrate's Court has jurisdiction in actions of ejectment in respect of land or premises within the district and in terms of section 22(3) the court's jurisdiction is not ousted merely because the court, in order to arrive at a decision has to give a finding upon a matter beyond its jurisdiction. In my view therefore the magistrate had jurisdiction to hear the case and to give a finding on the question of ownership of the property in question".

Mr. Sello's argument proceeds that the President of the Maseru Local Court had erred in basing his Judgment on lack of jurisdiction, that he made no findings on the credibility of witnesses, that the Central Court President who reheard the parties, came to a conclusion on credibility unjustified on the evidence he heard, that the Judicial Commissioner remarks on the appellant's alleged doubtful marriage were not based on his own personal observation since he did not see or hear the parties or their witnesses, that there was prima facie evidence from the appellant

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and her witness that Jabavu had made an allocation to her, and finally that the Judicial Commissioner erred in holding that Ashton was entitled to sell the site without the widow's consent.

In my opinion the appeal must be dismissed with costs for the following reasons :

1. There is a presumption that the holder of a title deed to registered property in an urban area as defined in the Deeds Registry Act 1967 had legally acquired the same and is therefore the prima facie owner.

2. This presumption is rebuttable but the onus of proving that the title deed was acquired by fraud, misrepresentation, or other unlawful means lies on the party who alleges it: in this case Ashton and the appellant irrespective of who had to "begin".

3. That in the instant case the respondent has produced more than sufficient evidence, aliunde the title deed itself, that his acquisition of the site was lawful, because

   (a) the evidence on record does not support Ashton's testimony that at the meeting of the 13th August 1977 his father's original site(apparently a large one by Lesotho Urban standards which the authorities were thinking of subdividing at the end of December 1974 - see Exhibit 1 produced by the appellant) was subdivided into three portions: for one would expect to see a Form C from the appellant or Ashton.

   (b) if the "widow's" portion was to be excluded it is remarkable that Ashton did not insist on Form C for his "mother" whilst he got one for himself which enabled him to proceed to registration in the Deeds Registry. Ashton's evidence at the trial could not therefore have been truthful, and as a corollary,

   (c) if Ashton wanted to "ditch" the widow, if she was a widow, i.e. if he misrepresented to the committee that he had her consent when in fact he had not there was no need for him to make out a story of a three way partition.

4. The appellant proceeded to rebut this by saying she was married to Jabavu by Sotho Law and Custom in 1975 and he had allocated to her the house site in his lifetime and did not consent to the sale. Since Sotho Law and Custom requires no registration of marriages it follows that there

> must be something more than her mere words, for any woman can say that, and a fortiori, where such assertion,belated as it is, entails a most solemn act of rectification of the register. If allocation there was in Jabavu's lifetime as she maintains (apart from a Form C) one would expect to have heard of expressions of intent by Jabavu to a person or persons in official position in the customary law hierarchy or something in writing in terms of Part I Laws of Lerotholi s.14. We have none except orally from a man who did not disclose his credentials that Jabavu(who of course is dead) told him that the appellant was his wife, and her own protestations (after Jabavu's death) to administrative authorities, remote from the place where she lives, who have no power since 1967 to change anything (letters Exhibits 2, 3 and 4). The appellant's own evidence at the Central Court was that she saw the respondent and Ashton at the site with the committee but she had no idea what they were doing there. The respondent's evidence throughout was that both the appellant and Ashton agreed to the sale of the site and its area and both assisted him to get Form C. He says he allowed them to stay in the house whilst he was preparing bricks for a building. The appellant protested only when she was required to vacate.

Now the appellant and the respondent and Ashton were by no means strangers to each other. Indeed they seem to have been friends for the sale of the portion appeared to have been agreed to cover loans made to Ashton and the appellant (whether she was a wife or a mistress) for his father's funeral, erection of a rest stone for the dead, and other favours to Ashton. The respondent's assertion that he allowed the appellant to stay in the house whilst he himself made preparation for additional premises is consistent with the formerly friendly relations between the parties.

Finally I think it must be recognised that in Local and Central Courts where no legal representation is allowed the parties may not succeed in articulating their respective cases properly. By and large though these courts perform their duties reasonably

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well. The respondent's attitude throughout was that to him it mattered not whether the appellant was a wife or a mistress of Jabavu, but that she was fully aware of the sale.

The Judicial Commissioner's "very grave doubts" about the appellant's marriage were made obiter probably after having read, as he must have, all the evidence including that of the first trial court which did not consider credibility. The fact of the matter however is that he had the Central Court's findings on credibility, and combined with the evidence led at the trial in which Ashton's ruse was exposed should not effect the outcome. The Judicial Commissioner needlessly brought in the word "donation". I am confident in my own mind that she had not been able to discharge the onus of proof placed upon her to justify a decision that would allow the register to be disturbed.

Incidentally the President of the trial Court in declining jurisdiction and ordering eviction, with all respect to a former Chief Justice, was not unsound. One would hope that in future where an action (or a defence to an action) involves alteration or rectification of the register that once issues are joined, (or if in Central and Local Courts it is recognised by the parties or judicial officer presiding) the High Court ought to be the proper or superior forum.

As I said the appeal should be dismissed with costs.

CHIEF JUSTICE
16th March, 1982

For Appellant : Mr. Sello
For Respondent: Mr. Masoabi