CIV/A/3/83

IN THE HIGH COURT OF LESOTHO

In the appeal of :

'MOTA MATSOSO Appellant

v

BENEDICT KHASOANE Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 16th day of December, 1983.

On 8th December, 1977, the appellant sued the Respondent for a certain arable land situated at Ha 'Mants'ebo in the district of Maseru. The trial was before the Local Court of Matsieng which granted what amounted to an absolution from the instance.

The Appellant was dissatisfied with the decision and appealed to the Central Court of Matsieng which gave judgment in his favour. The respondent was unhappy with the judgment and approached the Maseru Magistrate to review it. On review, the magistrate set aside the decision of Matsieng Central Court and re-instated that of the Local Court. It is against the decision of the magistrate that the appellant has now appealed to the High Court on the following grounds :-

"1. The learned magistrate erred in setting aside the Central Court's judgment in CC 136/82 although it was clearly correct because·

(a) Appellant had been in possession of the land in question when it was allocated to respondent.

(b) Appellant had never been validly deprived of the said land when it was allocated to respondent.

2/ 2. The learned .....

2. The learned magistrate erred in faulting the Central Court in granting leave to appeal out of time when the appeal had merit and there were good grounds for the delay in appealing.

3. In the absence of procedural irregularity that brought about a failure of justice, the learned magistrate had no grounds of power of review.

4. The learned magistrate erred in reviewing proceedings on what he considered a technicality with dealing with the merits in order to determine whether or not there was a failure of justice.

5. The magistrate further erred in telling appellant (even he had appellant) that he had varied the Central Court judgment, and thereafter telling appellant to address him."

In support of his case before the Local Court of Matsieng, the appellant corroborated by one of his witnesses, Sello Lesikara, testified that the land, the subject matter of this dispute, originally belonged to his parents after whose death he was confirmed on it by the then Chief of the area, the late Chief Ntai Tholloane. Another of appellant's witnesses, Thabang Koleile, however, told the court that appellant was confirmed on the land not by Ntai Tholloane but Suoane Koleile, a representative of Chieftainess 'Mants'ebo (presumably the late Paramount Chieftainess of Basutoland as Lesotho was formaly known).

The evidence for the appellant further disclosed that he had been out of Lesotho for a long period and during his absence, the land was, on his authority, used by his paternal aunt 'Maliengoane and Thabang Koleile. In C.R. 208/75, Thabang Koleile was, on the initiative of the Chieftainship, criminally charged before the Matsieng Local Court for unlawfully using the land. He testified on behalf of the accused and told the court that the land belonged to him and it was on his permission that Thabang Koleile was using it. On that evidence, the court acquitted Thabang Koleile and directed that the chieftainship should

3/ first resolve the .....

first resolve the question of ownership over the land as between the appellant and 'Maliengoane. The Chieftainship never complied with the directive of the court and appellant's contention was, therefore, that the land still belonged to him.

Appellant further testified that in 1976, while he was out of the country, the Chieftainship and the Development Committee deprived him of the land and re-allocated it to the respondent. The respondent had since been using it. The action of the chieftainship and the Development Committee was, however, illegal in as much as the derogation was made without his knowledge and consent. Hence the present action in which he prays for an order of the court to eject the respondent from the land.

The respondent's case was that, in 1970 he moved to and settled at Ha 'Mants'ebo. He subsequently applied for and was allocated arable land, the subject matter of the present dispute, on 3rd August, 1976 by Chieftainess 'Matikoe Griffith and her Development Committee in accordance with the provisions of the Land Act No. 20 of 1973. It was a fallow land. By reason of its being lawfully allocated to him, the land belonged to him and he had since been lawfully using it. Wherefor respondent prayed that appellant's claim be dismissed.

Three witnesses, namely, Chieftainess 'Matikoe Griffith, Sekautu Lethe and Maime 'Mathe testified in support of Respondent's case. The evidence of Chieftainess 'Matikoe was that the land was used by 'Maliengoane who later left the area of Ha 'Mants'ebo to join her son, Mohanoe, in the Republic of South Africa where she subsequently died. Following the death of his mother Mohanoe requested the Chieftainship that the land be reserved for him. Her evidence was confirmed by Sekautu Lethe who said he had been living at Ha 'Mants'ebo since 1940.

4/ According to .....

According to Chieftainess 'Matikoe, the Chieftainship waited for Mohanoe to return home but he never did. In the mean time one Thabang Koleile started using the land without the authority of the chieftainship. She (Chieftainess 'Matikoe) had to take him to court when he was criminally charged in C.R. 208/75 before the Matsieng Local Court. Appellant then testified on behalf of the accused and told the Court that the land belonged to him and it was on his permission that the accused was using it.

On the evidence, the Court found that it was not clear whether the land belonged to the appellant or 'Maliengoane. The chieftainess should, therefore, first resolve the issue of ownership over the land as between 'Maliengoane and the appellant before she could initiate a charge against the accused for its unlawful use. The accused was for that reason given the benefit of doubt and acquitted.

Chieftainess 'Matikoe was, however, unable to confront the appellant with either the late 'Maliengoane or Mohanoe who lived in the Republic of South Africa and never returned to Lesotho. The question of ownership over the land was, therefore, never resolved as directed by the Local Court of Matsieng and in 1976 she and her Development Committee allocated the land to the Respondent in accordance with the Land Act 1973.

In as far as it was material, the evidence of 'Matikoe was also corroborated by that of Maime Mathe who was at the time of allocation, a member of the Development Committee at Ha 'Mants'ebo.

The Court of first instance considered the evidence and came to the conclusion that as chieftainess 'Matikoe had not been able to decide, pursuant to the directive of Matsieng Local Court in C.R. 208/75, whether the land belonged to 'Maliengoane or the appellant, the question of its ownership remained unresolved.

5/ Whether or not she ...

Whether or not she had properly allocated the land to the respondent was a matter for determination by Chieftainess 'Matikoe's senior chiefs before it could be brought to a competent court of law which was the Central Court and not the Local Court. The courts of law had, therefore, no jurisdiction on the matter before it had first been exhausted by the chieftainship in accordance with the Land Act 1973.

On appeal, the Central Court of Matsieng took the view that as there was evidence that the land was an old mealie land, had been used by the appellant who had not been notified before he was deprived of his rights and no record of the proceedings of the meeting of the Development Committee had been produced in evidence in chief, the appeal ought to succeed. The appeal was accordingly decided in favour of the appellant.

I must say I have had the opportunity to read through the original record of the proceedings which were recorded in the Sesotho Language before the Matsieng Local Court and was unable to find the use of the term "Mealie land". What the respondent said was that when it was allocated to him, the land was "Mohola" which according to Sesotho/English Dictionary by Mabile at p. 228 is interpreted as meaning "field left unploughed for many years". The view taken by the Central Court of Matsieng that the land was a mealie land had, therefore, no evidential support.

In his own testimony, the appellant told the court that he had been out of the country for a long time and the land was used by 'Maliengoane and Thabang Koleile. Again , there was no evidential basis for the Central Court's view that the land had been used by the appellant.

Appellant's claim that 'Maliengoane was using the land with his permission was equally unconvincing.

6/ It was clear from .....

It was clear from the evidence that 'Maliengoane had lived in the area of Ha 'Mants'ebo for a long period. If it were borne in mind that in the olden times arable land was plentiful and sufficient for everybody, the salient question is why 'Maliengoane could not be allocated arable land in her own right and had had to use appellant's land.

I think it is significant to note that in his grounds of appeal to the Central Court of Matsieng, the appellant stated, inter alia :

> "2. 'Maliengoane is the daughter-in-law of Matsoso. I am the heir in his family.
>
> 3. There is no reason or reasons why this field, even if it belonged to the deceased could have been allocated to other people without the conclusion made by the family of Matsoso or could have been informed that it is going to be deprived of."

It is clear from the above cited portion of the grounds of appeal that it is appellant's reasoning that after her death, 'Maliengoane's land revolved to the heir of the family in which she was married. The appellant is the heir of the family in which 'Maliengoane was married. He is, therefore, entitled to the land by virtue of his being the heir in the family in which 'Maliengoane was married. That, in my view, is a total misconception of the custom that governs land allocation in this country. The true customary position of what happens to arable land after the death of the allottee is stated in S. 7(5) (a) of Part II of the Laws of Lerotholi which, in part, reads as follows :

> "(a) On the death of the father or mother, whoever dies last, all arable land allocated to them shall be regarded as land that has become vacant and shall revert to the chief or headman for re-allocation. ....."

If on the evidence, it was not clear that the land belonged to him or 'Maliengoane, Appellant could not, in my view, be heard to say he had rights over the land and should, therefore, have been notified in terms of the Land Act 1973 before allocation was made to

respondent. It follows, therefore, that I find no support for the decision of the Central Court of Matsieng allowing the appeal on the basis that appellant had not been notified before he was deprived of his rights (over the land).

The contention of the Central Court that became no record of the proceedings of the meeting of the Development Committee had been produced in evidence in chief, the appeal should, therefore, succeed was equally void of substance. The evidence clearly pointed out that the land was allocated to respondent by the chieftainship and the Development Committee in accordance with the provisions of the Land Act 1973. If the allocation was made in terms of the Act, it must be deemed that the provisions of Sections 6 and 12(4) and (5) thereof were observed. That granted, there can be no justification in the Central Court allowing the appeal on the ground that no record of proceedings of the Development Committee was produced in evidence in chief.

In Thaisi v. Latane 1981(1) L.L.R. 219, this Court has had the occasion to deal with the position where a person is agrrieved by the decision of the chieftainship and the Development Committee in allocating land and indicated that the remedies of the aggrieved person lied primarily in the appeal to the senior chiefs in terms of the provisions of sections 7 and 8 of the Land Act 1973. That is, the remedies provided by sections 7 and 8 of the Act should first be exhausted before the courts of law are approached.

In the present case, it is clear that the appellant felt aggrieved by the decision of Chieftainess 'Matikoe and her Development Committee allocating the land, the subject matter of this dispute, to the respondent. In terms of sections 7 and 8 of the Land Act 1973, he should have appealed to the senior chiefs. Instead he had approached the courts of law. There is nothing to pursuate me that I should now deviate from

8/ the view .....

the view I took in Thaisi v Latene, supra, namely, that the appellant should have first exhausted the remedies provided under the provisions of sections 7 and 8 of the Land Act 1973 before approaching the Courts of law and his failure to do so rendered his case premature. That alone should be enough to dispose of this appeal.

In the light of all that has been said above, it is clear that I find nothing unreasonable in the decision of the magistrate setting aside, on review, the judgment of the Central Court and re-instating that of the Local Court of Matsieng.

The appeal is dismissed with costs.

B.K. MOLAI
JUDGE
16th December, 1983.

For the Appellant :Mr. Maqutu,
For the Respondent :Mr. Matsau