Hon. Motjoka J.

CIV/A/8/82

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

THABO MAKEBE — Appellant

v

NAPO PEAEANE — Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai on the 3rd day of June, 1983.

In 1979, the appellant sued the Respondent before 'Mamathe Local Court for a poplar tree plantation (hereinafter referred to simply as "tree plantation") at a place called Thana in the district of Berea. The Court decided the case in favour of the Respondent and the Appellant appealed against the decision to Motjoka Central Court which dismissed the appeal. A further appeal was lodged by the Appellant to the Judicial Commissioner's Court which again dismissed his appeal. He has now appealed to this Court against the judgment of the Judicial Commissioner on the grounds that :

"1. The learned Judicial Commissioner, by disregarding the abscence of appellant when inspection in loco was conducted by the trial court, erred in law for failing to take cognisance of Appellant's right to be heard.

2/ 2. .....

2. The learned Judicial Commissioner erred in law when he confirmed a trial court's decision in CC. 127/57 that confused a right of servitude over appellant's land with a right of ownership over Appellant's undisputed immovable property which dispute, in the summons, was not included as a cause of action.

3. The learned Judicial Commissioner erred in law when he held that the legal effect of the CC.127/57 twenty two years old judgment was change of ownership of Appellant's immovable property in favour of Respondent for during the whole period, in respect of his real right over that land Appellant owed Respondent and the world over no duty whatsoever."

It is necessary to set out the facts of this case in clear perspective. In his verbal pleadings before the trial court, Appellant stated that the tree plantation had been planted by his late mother, one 'Manapo Makebe, in 1935. He had therefore inherited the plantation from his mother. The Respondent was, however, wrongfully cutting trees from the tree plantation hence the institution of this suit against him.

To this Respondent replied that the tree plantation belonged to his family and was never planted by Appellant's late mother. He said he had already disputed the same tree plantation, firstly, with Appellant's late mother before the administrative courts and, secondly, with the Appellant himself before the courts of law. The decisions were in his favour and against both the Appellant and his mother.

Since appellant had raised the issue that the tree plantation belonged to him, one would have expected him to bear the onus of proof and accordingly be afforded the opportunity to start by leading his evidence before that of the Respondent. However, the trial court found, in terms of sec. 37(1) of Government Notice No. 21 of 1961, the burden of proof to lie upon the Respondent and the opportunity to start was afforded him. This was presumably because the

3/ Respondent had ...

Respndent had pleaded that the despute over the tree plantation had already been settled by the courts of law and was, therefore, res judicata.

In as far as it is relevant, the evidence adduced by the Respondent and, indeed, admitted by the Appellant himself was that, in a certain civil case CC 127/57, he and the Appellant disputed the tree plantation. The trial was before 'Mamathe Local Court. The tree plantation claimed by the Appellant in CC.127/57 consisted of the trees that had encroached into a field which Appellant said belonged to his late mother.

During the hearing of CC.127/57, the trial court went for an inspection in loco to afford the litigants the opportunity to point out clearly the tree plantation over which they were disputing. At the inspection in loco, the Appellant pointed out the boundaries of the trees he claimed to be his. The boundaries did not enclose the piece of land on which the tree plantation was growing. The respondent also pointed out the boundaries of the trees he claimed to be his. His boundaries enclosed both the trees which had encroached into the field claimed by the appellant and the area on which the tree plantation was growing. Appellant did not then dispute the inclusion of the area on which the tree plantation was growing within the boundaries pointed out by the Respondent as demarcating his tree plantation. All that he disputed was the trees that had encroached into the field that appellant claimed to be the property of his late mother.

As it turned out, Respondent proved to the satisfaction of both the trial court and the Appellant himself that the field had, in fact, only been loaned and did not belong to Appellant's late mother.

The trial court in CC 127/57 (whose judgment was handed in as exhibit "A" in the present dispute) found as a fact that appellant did not own any trees in the area

4/ of Thana .....

of Thana and the disputed tree plantation as demarcated by the boundaries pointed out by the Respondent was the property of the Respondent.

The Appellant appealed to Motjoka Central Court against the findings of the trial court but his appeal was dismissed. He did not appeal against the decision of Motjoka Central Court and the Respondent enjoyed the fruits of that decision from 1957 until 1979 when the appellant resuscitated the despute before 'Mamathe Local Court. This, in the contention of the Respondent, the Appellant could not be allowed to do. If he were aggrieved by the decision of Motjoka Central Court, the Appellant should have appealed to the Judicial Commissioner's court instead of waiting for almost twenty two years and then start the same dispute afresh before the local courts.

The Appellant called, in support of his case, P.W.1, Tseliso Makebe who testified that he had only heard from Appellant's late mother that she had been allocated a piece of land on which she planted trees in 1935 and did not therefore have a personal knowledge of it.

Another witness called by the Appellant was P.W.4, Lehloba Moshoeshoe, who told the court that the disputed tree plantation in fact belonged to his own mother and not to any of the litigants. Both the Appellant and the Respondent were, therefore, disputing over what did not belong to either of them. He specifically told the Court that he did not know of any trees belonging to Appellant's family in the area of Thana.

The evidence of P.W.2, Ntlomokoane Leqola, was that a boundary had been made for the disputed tree plantation but that was in his absence so that he too could not claim any personal knowledge on the matter.

5/ Appellant's own ...

Appellant's own evidence was that the piece of land on which his mother had planted the tree plantation had been allocated to her through a chief's messenger, one 'Mou Flakha (PW.3). He attempted to describe the boundaries of that plantation.

It may be mentioned at this juncture that it is common cause that even in the present case, CC. 127/79, the trial court arranged for an inspection in loco again to afford the litigants the opportunity to point out clearly the boundaries of the tree plantation that they claimed to be their property.

When on 7th July, 1979 the Court conducted the inspection in loco, Respondent was in attendance and pointed out the same boundaries as he had done in 1957 i.e. the boundaries which enclosed both the trees that had encroached into the field erroneously claimed by appellant as belonging to his family and the area on which the tree plantation was growing. Appellant did not attend the inspection in loco, and the court had to wait for him from 8.00 a.m. until 11.00 a.m. when it returned to its seat. There could be no doubt, therefore, that the Appellant was afforded the opportunity to attend the inspection in loco. However, for no given reason he did not attend. In my view, where a litigant is afforded the opportunity to attend an inspect in loco but for no given reason does not attend, it cannot be in his mouth to say he was denied his right to be heard.

There is, therefore, no merit in Appellant's ground of appeal that because he was not present at the inspect in loco his right to be heard was disregarded. To hold the contrary would imply that the Appellant could hold the trial court at ransom and prevent it from carrying out its work by refusing to attend the inspection, in loco, which he knew

6/ very well that ....

very well that he had to attend. That, in my view, would be totally unacceptable. In any event, one of Appellant's witnesses, P.W.2, did attend the inspection *in loco* and conceded that Respondent had correctly pointed out the boundaries demarcating the tree plantation that, to his knowledge, Respondent had been using since the judgment in CC 127/57.

Although Appellant had attempted to describe the boundaries of the area which in 1935 P.W.4 had allocated to his late mother for planting trees, P.W.4 himself testified and told the Court that he did not demarcate the boundaries of that area. One wonders what sort of allocation it was and how the Appellant, who had admittedly not been present at the time of allocation in 1935, could possibly be able to describe the boundaries of that area in 1979.

Be that as it may, in his own testimony, the Appellant conceded that the chieftainship had removed from his custody the tree plantation after he had unsuccessfully sued Respondent for the trees that had encroached into the field that he erroneously believed to be the property of his late mother. The reason for this was that chieftainess 'Mantolo, who was apparently a relative of the Respondent, had said because Appellant had admittedly given away her cattle and four (4) horses to one 'Mamathe, she and the Respondent had been left destitute.

From what has been stated above, it seems clear to me that the dispute in CC 127/57 was over the trees that had encroached into a field. Appellant's claim on the trees was based on his mistaken belief that the field into which the trees had encroached belonged to his late mother. Appellant having failed to satisfy the trial court that the field belonged to his mother, the court dismissed, and rightly so in my opinion, his claim over the trees.

7/ However, the ....

However, the difficulty was that the boundaries which Respondent pointed out as demarcating the extent of the trees that he claimed as his property enclosed the area on which the tree plantation was growing. The Appellant, who was present at the time of the pointing, was aware of it but kept silent and did not dispute it until 1979. Appellant's explanation for his silence was that as the dispute was over the trees that had encroached into the field, it was not necessary for him to say anything when the boundaries as pointed out by the Respondent enclosed the area (outside the field) on which the tree plantation was growing.

The trial court found it incredible that, even if the tree plantation was not in dispute, Appellant could have kept silent when he clearly saw that the Respondent was enclosing it within the boundaries of the trees that he claimed to be his property. If at all Appellant believed that he had any legitimate claim over the tree plantation, a natural reaction for him would have been to object to its inclusion within the boundaries pointed out by the Respondent as demarcating the extent of his trees. He did not object and, in the circumstances, the trial court concluded that Appellant's silence amounted to an approval of the boundaries demarcating the extent of the trees claimed by the Respondent. With this conclusion both the Central Court and the Judicial Commissioner's court agreed, and rightly so in my opinion.

As has been pointed out earlier, the appellant conceded that, after he had unsuccessfully sued the Respondent for the trees that had encroached into the field he mistakenly believed to be the property of his late mother, the tree plantation was removed from his custody and given to the Respondent by the chieftainship. In his own testimony, therefore, Appellant told the court that by the decision of the chieftainship, the tree plantation did not belong to him.

8/ I need not .....

I need not express an opinion on the correctness of the decision taken by the chieftainship as that was not an issue on which the Court was invited to deliberate. Nevertheless, assuming that he was correct in saying that the tree plantation had been removed from his custody by the decision of the chieftainship, there is no suggestion that the appellant had successfully challenged the decision. In my view, until it is successfully challenged, that decision stands good and it must be accepted that the tree plantantion belongs to the Respondent. That granted, there can be no substance in the 2nd and 3rd grounds of appeal.

Section 42 of Government Notice No. 21 of 1961 provides, inter alia,

> "A Basotho court may, subject to any provision of these Rules relating to judgments by default or consent, as the result of the trial of a civil action grant -
>
> (a) judgment for Plaintiff (or Applicant) in respect of his claim in so far as he has proved the same."

The evidence adduced in support of Applicant's case was full of so many uncertainties about his ownership over the tree plantation that it would have been unreasonable for the trial court, properly advising itself, to have concluded that it had proved his claim and therefore, awarded him judgment.

On the other hand there was ample evidence proving, on a balance of probabilities, that the tree plantation belonged to the Respondent. On the evidence the Respondent had, therefore, satisfactorily discharged the onus of proof that had been vested upon him and the trial court was perfectly entitled to grant, as it did, judgment in his favour. I can find no fault with the decisions of both the Central Court and the Judicial Commissioner's court upholding that judgment.

9/ In view of .....

In view of all what has been said, it is clear that I take the view that this appeal ought not to succeed and I accordingly dismiss it with costs.

B.K. MOLAI
JUDGE.

3rd June, 1983.

For Appellant : Mr. Kolisang.
For Respondent : In person.