C. of A. (CIV) No.9 of 1983

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

'NEANG MOABI Appellant

and

CHABANA MOSALALIJA Respondent

HELD AT MASERU

Coram :

MAISELS, P.
VAN WINSEN, J.A.
SCHREINER, A.J.A.

J U D G M E N T

Schreiner A.J.A.

This matter has been through many Courts. It started in the Motjoka Local Court where evidence was led on behalf of both parties. The defendant, the present appellant, was successful there. However the Motjoka Central Court reversed the decision of the Local Court and in the Court of the Judicial Commissioner and in the High Court the position remained unchanged. The appeal to this Court is competent only on a point of law.

The dispute concerns the right to the use of certain fenced piece of land which is within the area of a larger piece of land demarcated largely by an aloe hedge. The plaintiff, the present respondent, is the grandson of one Mokapu Mosalalija who had been given the use of the larger piece of land. The plaintiff's father, so it is contended, inherited the right to use the land. His one

/wife

wife was Mamapatle. It is alleged that on the death of Mamapatle the plaintiff inherited the land.

In 1955 or 1957 a grant of the right to use the smaller piece of fenced land was made to the defendant. Evidence was given of how the chief delegated to certain persons the task of allotting the use of a piece of land for growing fruit trees to the defendant. It seems that thereafter and until the present proceedings were commenced the defendant remained in undisturbed possession of the fenced area. However, after his mother's death, the plaintiff claimed rights in that area and the present proceedings were commenced. There are no formal pleadings but it is clear that the claim is at least for a declaration that he is entitled to the land lying within the fence.

The issue of fact which seems to have been the centre of the dispute in the lower Courts was whether, at the time of the allocation to the defendant, the plaintiff's father had abandoned the area surrounded by the aloes and whether it was competent for the chief then to have allocated the fenced area to the defendant. The factual basis of this matter cannot be debated before this Court because it is only concerned with points of law.

The defendant does raise a question of law. He contends that the plaintiff did not establish that he had the right to use the land at the stage when the allocation was made in 1955 or 1957. He says that, on the facts which were established, the plaintiff's father, though in law entitled to inherit the right to use the land, could only do so as long as he or his dependants continued to "dwell" on it and relies in this regard upon Section 7(7) of Part 1

/of the

of the Laws of Lerotholi which purports to be a Declaration of Basuto Law and Custom.

It is no doubt unwise to approach the interpretation of this part of the Laws of Lerotholi as if it were a statute, but even if this were done, I think that the phrase "dwell thereon" could not have been intended to bear a narrow meaning. Sub-section (7) deals with land allotted not only for residential purposes but also for growing vegetables or tobacco or planting fruit or other trees. To expect an heir to "dwell" upon in the literal sense of "reside" upon vegetable gardens or orchards in order to retain his right to the inherited land does not seem to be a possible interpretation of the sub-section. No doubt what was intended was that the heir should not abandon the land but should actively use it. If he does not use it his rights fall away.

It does not seem that the attention of the lower Courts was directed directly to the position of the plaintiff and his father in relation to sub-section (7) of section 7 of the Laws of Lerotholi. The question seems to have been whether, at the time of the grant, the land was derelict and therefore capable of being allocated anew by the chief on this ground. This seems to involve substantially the same issue of fact and the Court of the Judicial Commissioner found that the land was not "vacant" at the relevant time. The Commissioner said:-

> "I think there is abundant evidence that an allocation was made to the appellant but it does not seem to me that the place was vacant even if the owners were away for a while. The chief could only have taken the site for a specific public purpose. We only have to

/look

> look at the first finding of fact by the trial Court to satisfy ourselves that the allocation was made where there is no removal".

The "first finding of fact" is, I think, a reference to the activities on the site and the fact that the yard is said to be Mamapatle's, the senior wife of Lekhotla son of Mokapu. The finding of the Commissioner was quoted with approval in the High Court.

This Court is not concerned with whether or not the finding was right. It is not open to argument that, on the facts which have been found by the Courts a quo, there has been an error of law. In order to raise the matter of law there would have had to be a finding that as at 1955 or 1957 neither the plaintiff's father nor his dependants dwelt upon the land in question. Section 7(7) of Part 1 of the Laws of Lerotholi could then have been invoked. As things stand, however, it cannot.

The law relating to inheritance and the use and allocation of land is not straightforward and it is important in matters such as these that there should be a full appreciation of the legal issues which were involved and detailed evidence directed to laying a foundation of fact upon which such issues can be decided.

The appeal is dismissed with costs.

/Signed:

Signed: .W.H.R..Schreiner.
W.H.R. SCHREINER
Acting Judge of Appeal

I agree Signed: I.A. Maisels
.....
I.A. MAISELS
President

I agree Signed: L. de V. Van Winsen
.....
L. DE V. VAN WINSEN
Judge of Appeal

Delivered on this 27th day of April 1984 at MASERU.

For Appellant : Mr. Maqutu

For Respondent : Mr. Kolisang