

IN THE HIGH COURT OF LESOTHO

In the Appeal of

LIRA CHAKA

Appellant

v

MOHLALEFI CHAKA

Respondent

J U D G M E N T

Delivered by the Hon Mr Justice J.L. Kheola
on the 24th day of March, 1986

The Appellant sued the Respondent at Matala Local Court claiming R245-00 as compensation for cutting down his trees and damaging his fence. The court of first instance gave judgment in favour of the Appellant on the ground that the Respondent's father had removed from Qoaling (where the tree plantation is located) to Likotsi. The Matsieng Central Court President upheld the appeal on the ground that the representative of the Appellant at the trial appointed in terms of section 20 of Proclamation No 62 of 1938 committed a gross irregularity by giving evidence after he had been inside the court-room and conducting the Appellant's case. The Central Court President misdirected himself on a point of law. In all civil cases the plaintiff and the defendant always remain in court when the witnesses are giving evidence and yet it has never been said that because the defendant was in court when plaintiff's witnesses gave their evidence, he has no right to give his evidence. The representation of the Appellant had a right to give evidence in the same way as the Appellant would have had the right to give evidence.

The appeal to the Judicial Commissioner's Court was unsuccessful on the ground that the Respondent had never abandoned his right to the trees because he had been actively using them and the garden despite the fact that

/he was ...

he was living in a different village under a different chief.

The Appellant is now appealing to this Court on the following grounds -

- "(a) The learned Judicial Commissioner erred in law in not holding that Respondent's father when he moved to Likotsi was a Remover
- (b) the learned Judicial Commissioner erred in law in holding that the father of the Respondent who had removed from one Headman to another could still have rights over treesplantation at the place of the Headman from whom he had removed
- (c) that the brother of the Respondent who is the subject of the Headman where his father had removed could inherit property, tree plantations, situated under the Headman where his father had removed and therefore passed to his younger brother.
- (d) the learned Judicial Commissioner erred in not holding that the tree plantations in dispute belonged to Goodman, the only member of the Chaka family who remained at Qoaling where his brothers had removed, and therefore the Appellant was the heir of the property left by Goodman being his Grandson "

It is common cause that the parties in this case are the grandsons of Chaka and that the tree plantation in question belongs to Chaka's family. Chaka had three sons, namely, Sepota, Moramang and Goodman. Sepota's son is 'Mota. 'Mota had two sons, namely, Chaka 'Mota and the Respondent. Moramang's son is Mpho. Goodman had two sons, namely, Mafa and Mafanyane. Mafanyane is the father of the Appellant. 'Maselina is the wife of Mafa.

The issue in this case is whether 'Mota and Moramang removed from Qoaling to Likotsi. It is common cause that when the chief of Qoaling placed his son at Likotsi to be the chief of that area, certain of his subjects including 'Mota and Moramang went to Likotsi with the new chief. They became the subjects of the new chief and paid allegiance to him and not to the chief of Qoaling. The Respondent was wrong to say that 'Mota and Moramang went to live at Likotsi on temporary basis (motebo-ntloana)

/The term.... ..

The term "motebontloana" means an entirely different thing. It covers a situation whereby a man goes to the cattle post and takes his family with him. He lives with his entire family at the cattlepost but continues to pay allegiance to his chief. He continues to plough his land and usually sees to it that his houses are properly cared for by some members of his family. At the cattlepost the man does not pay allegiance to any new chief, he remains the subject of his chief and pays his basic tax under the name of his chief.

There is overwhelming evidence that 'Mota and Moramang removed from Qoaling and went to live at Likotsi which was to be the area of a new chief. In his evidence Respondent's witness Chaka 'Mota says (at page 8 line 10 of the record)

"Leponesa on going out to be placed went with Moramang and 'Mota the son of Sepota".

In his own evidence the Respondent says at page 3 lines 29-31)

"My father 'Mota went to Likotsi whilst I was at Mokhotlong. I was informed by my father that he went to Likotsi with Morena Lepolesa".

Again the evidence of Chaka Maraka at page 11 lines 20-24 where he says

'When Morena Matsoso placed his son Lepolesa at Likotsi they removed to Likotsi. They removed with their families and children. Grandfather Goodman remained at Qoaling"

'Maselina Chaka also confirmed at page 14 line 17 that "'Mota Chaka died at Likotsi where he had removed.'

In the face of this formidable evidence the Respondent cannot be heard to say that Moramang and 'Mota went to live at Likotsi on

/temporary basis.

temporary basis. In my view they were removers in the true sense of that word. It is immaterial that the area of Likotsi falls under the jurisdiction of the chief of Qoaling. What is important is that the people of Likotsi pay allegiance to their own chief and not to the chief of Qoaling. The mere fact that the chief of Likotsi is subordinate to the chief of Qoaling does not mean that his subjects must pay allegiance to two chiefs.

The next question is whether according to our law the dependants of a person who has removed can inherit the tree plantations and gardens situated at the place from which their father has removed. The answer to this question is to be found in section 7 (7) of Part I of the Laws of Lerotholi regarding the inheritability of residential sites, gardens and tree plantations. It reads as follows:

"On the death of a person who has been allocated the use of land for the growing of vegetables or tobacco, or for the purpose of planting fruit or other trees, or for residential purposes, the heir, or in the absence of the heir dependants of such deceased person shall be entitled to the use of such land as long as he or they continue to deal thereon."

The learned Judicial Commissioner held that there was evidence that 'Mota Chaka had been using the trees even though he lived at Likotsi and that there was further evidence that Chaka 'Mota (his son) had been using the fields as well and he eventually wrote a letter Exhibit I dated the 1st May, 1980 asking the chief of Qoaling to bless his passing them to his younger brother (the Respondent). He held that Chaka 'Mota had not abandoned the use of the lands but had been actively using them. With respect, this finding does not seem to be supported by the evidence in the record. The learned Judicial Commissioner seems to have relied heavily on the letter written by Chaka 'Mota in 1980 in which he asked the chief of Qoaling to transfer the tree plantation in question and some fields to the Respondent. This letter is not evidence that Chaka 'Mota had been actively using the lands.

/It is.. .

It is quite probable that when he wrote that letter he was already contemplating to institute these proceedings and was trying to create the impression that he had been using the lands in question. In any case there is no evidence that the chief of Qoaling paid any attention to that letter which was written by a person who was not directly his subject. The question one may ask is why has the Respondent not called the chief of Qoaling as his witness to come and confirm that he did comply with the request in Exhibit B and transferred the rights in the tree plantation to him? Without the evidence of the chief of Qoaling the Respondent completely failed to prove the re-allocation of the tree plantation to him.

The evidence of Chaka 'Mota himself on page 9 of the record does not support the finding that he had been actively using the trees. He says that at his age of discretion the yard was being used by Mafa and that he (Mafa) used to cut firewood and plant young aloes in the place of old ones. He further states that after Mafa's death it was at times ploughed by his widow 'Maselina. She used to plant maize and she cut firewood from it, and that the Respondent always asks for firewood from 'Maselina. This evidence is confirmed by the Appellant's witness Chaka Maraka - whose evidence was not even challenged - that after the death of Mafa the yard has remained in the use of 'Maselina. She uses it with the Appellant and there has been no complaint from anybody. 'Maselina confirmed that after the death of Mafa she started using the yard and that the Respondent always asked for permission from her whenever he wanted to cut some trees. At page 9 of the record Chaka 'Mota says that "Respondent (Plaintiff) always asks for firewood from 'Maselina. If the Respondent had been the caretaker of the tree plantation on behalf of Chaka 'Mota, why did he have to ask for permission from 'Maselina whenever he wanted some firewood? The answer to this question is that the Respondent knew very well that the yard belonged to 'Maselina who inherited it after the death of her husband, Mafa.

/Although.. ..

Although the Appellant did not give evidence at the trial, it is clear from the record that his defence was that he had been sent by 'Maselina to cut some firewood for her. In her evidence 'Maselina confirmed this. The question which immediately arises is whether the Respondent has sued the right person. It has not been shown that the Appellant is the heir to the estate of the late Mafa. He is the son of Mafanyane.

It has been submitted on behalf of the Respondent by Mr. Monyako who appeared for him in this Court that the Appellant failed to show how he acquired the rights he is now claiming, whether it was through the family resolution or the chief who had the right of re-allocation or confirmation of the resolution of the family. The first thing is that the Appellant has never said that the trees are his property. He uses them only when instructed by 'Maselina Chaka. Secondly, it can be safely assumed by this Court that the chief of Qoaling did re-allocate the yard by conduct because as soon as 'Mota and Moramang removed to Likotsi, Goodman their younger brother remained in the yard and used the trees. The chief raised no objection. When Goodman died his son Mafa inherited the yard and the trees, still the chief raised no objection. When Mafa died his widow 'Maselina used the yard and the trees, the chief still raised no objection.

The appeal is allowed and the Respondent is ordered to pay costs.

J.L. KHEOLA
J U D G E .

24th March, 1986.

For Appellant - Mr. Pheko
For Respondent - Mr. Monyako.