CIV/A/18/88

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MOLEFI PHAFA Appellant

V

...HASISA MORASENYANE Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 9th day of August, 1989.

The appellant was the defendant and the respondent the plaintiff in the court of first instance. I propose to refer to parties in terms of their original designations in that court.

The court of first instance found for the plaintiff. The defendant appealed to the Central Court which found for him and reversed the decision of the Local Court. The plaintiff appealed to the Judicial Commissioner's Court which upheld his appeal. The defendant being dissatisfied with that decision has appealed now to this Court on the grounds that :-

1. The learned Judicial Commissioner erred in reversing the judgment of the court below, although Respondent who was plaintiff did not know when the plantation in question was planted.
2. The learned Judicial Commissioner erred in reinstating the judgment of the Court of first instance although it is based on the evidence of P.W.1 Lebohang Sematla who is only 35 years old just because he claimed he was once given wood from this plantation by Respondent's father who was also his maternal grandfather.

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3. The learned Judicial Commissioner ignored the facts that P.W.1 Lebohang Senatla's mother is the sister of Respondent who was Plaintiff in the Court of first instance.
4. The Court ignored the fact that the evidence of P.W.2 Tlelima Mohasisa was entirely hearsay.
5. The learned Judicial Commissioner disregarded the evidence of 5 witnesses for appellant although it could not be faulted.
6. The court of first instance and the Judicial Commissioner's court erred in finding for Respondent although the boundaries of the plantation he claims have not been described.

According to the plaintiff's evidence on the page preceding the 2nd page 02 the suit against the defendant is based on the fact that the latter had cut

> "my trees situated at the valley I inherited it (sic) after the death of my father ..... when questioning respondents as to why they cut my trees, they said that I should go to them, but I didn't since I was afraid of them. They cut it on the eastern side of the boundary. There are two rocks in the forest, one is on the east while another is on the northern side of the forest, commonly known as "Lefika Le Motopo."".

Under cross-examination on 2nd page 02 in answer to the 2nd question 4 the plaintiff said

> "There is a boundary that devides our forests."

If the evidence in chief as to the position and locality of this boundary was sketchy and lacking in necessary information, the answer elicited by cross-examination attempting to establish the actual boundary was even less informative.

The plaintiff's witness Lebohang Senatla confined himself to stating that the plaintiff's father had shown him the boundary between the plaintiff's and the defendant's forests. He did not say where the boundary lay. With fairness to him under cross-examination his answer to question five merely approximates what was required of him. He said, perhaps meaning the forest

/"Yours

"Yours is on the west side of the rock whilst the plaintiff's is on the south of it."

Bearing in mind that a rock merely constitutes not an entire boundary but only a physical point in a boundary, confining oneself to describing the rock does not throw any light on the other points which necessarily must constitute a line or lines making up the boundary. All that I can make out from this witness's evidence is that the boundary is a rock in the forest. This does not describe the boundary.

I have noted that the defendant's evidence in chief was not recorded in the court of first instance. However reference to it is made in the judgment at page 9. I can only say that this constitutes an irregularity which no doubt prejudices the defendant.

In the inspection of the disputed boundary the findings of the Court were different from the plaintiff's own evidence in court. A totally new story emerged based on totally new physical features. For the first time it emerged that a donga running from the west to the place where it reaches an aloe tree constitutes his boundary. Mr. Maqutu for defendant was charitable enough to concede that the emergence of another physical feature called Lefika-le-motsopho alleged to constitute part of the boundary by plaintiff at the inspection may well pass for Fika-le-motopo referred to earlier. There is in this inspection mention of Qoeaneng stream which was not referred to in the plaintiff's evidence in chief.

These appear to be such outstanding physical features that if plaintiff knew them to constitute the boundary he should have mentioned them to the court in his evidence and not refer to them for the first time only when the inspection of the property was being conducted.

The onus was on the plaintiff to adduce evidence

/which

which serves to indicate the boundary. I find that he has not discharged that onus.

Lastly, although proof has been furnished before me that plaintiff's attorneys were notified of the hearing date of this appeal neither he nor the said attorneys appeared in court. The appellant's name was called three times outside court and there was no response. Regard being had to the fact that withdrawal from litigation requires no ritual, it would not be wrong to proceed on the basis that the plaintiff had withdrawn from this litigation. But the matter was nonetheless argued as if it was opposed. It was during the course of that argument that it emerged that the Court of first instance had erred by not giving due weight to the importance of the discharge of the onus by the party upon whose shoulders it rested.

In summary, I wish to observe that the inspection in loco merely helped confound the already existing confusion.

R vs Sewpaul 1949(4) SA 978 at 979 is authority for the view that

> "purpose of an inspection in loco is to enable the court to follow and apply evidence."

In the instant case it seems that the unintelligible evidence of the plaintiff was rendered even more confused by the conduct and results of the inspection of the forests. This runs counter to the dictum of the authority just cited.

Mr. Maqutu submitted that the inspection in loco was held in the presence of plaintiff's witnesses who later confirmed the fresh points of the boundary described at inspection by the plaintiff. Indeed such corroboration of a party's evidence leads to a failure of justice.

/Buckingham

Buckingham vs Daily News Ltd (1956) ALL.E.R. 90 disapproves of the type of an inspection in loco the effect of which is to afford a party an opportunity not only to give fresh but also to produce real and direct evidence.

An irregularity seems to have been committed by the court of first instance in that whereas nowhere did the defendant (appellant) claim the stream to be the boundary yet that court at page 9 lines 15 to 17 says he claimed it to be.

On the basis of Dlhumayo vs Rex 1948(2) SA 677 this court felt obliged to interfere in this appeal because as indicated in the judgment of the court of first instance at page 9 the narration of the facts by the court does not correspond with the record of plaintiff's evidence at the inspection in loco as borne out at pages 4 and 5 of the record.

For the above reasons the appeal was upheld with costs in all courts.

J U D G E.
9th August, 1989.

For Appellant : Mr. Maqutu.
For Respondent : In Person.