CIV/APN/314/87

IN THE HIGH COURT OF LESOTHO

In the Application of:

THABANG NYEOE .... 1st Applicant
MOSIUOA 'MOTA............ 2nd Applicant

and

LESOTHO BANK .... 1st Respondent
ALBERT S. MOHALE .... 2nd Respondent
WILLIAM LEMENA (Deputy Sheriff)................. 3rd Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice B.K. Molai
on the 15th day of August,
1990.

The applicants herein have obtained, against the Respondents, a rule nisi framed in the following terms:

"1 (a) Directing that the proposed sale by public auction of a certain site No. 41A Europa, situate in the Maseru Reserve in the Maseru district property of 2nd Respondent on 3rd October, 1987 by 3rd Respondent in execution of a default judgment of the High Court dated 3rd June, 1987 in favour of 1st Respondent and against 2nd Respondent is hereby stayed.

2. That the requirements of the rules of court regarding applications are hereby dispensed with.

3. That Order 1(a) above operates with immediate effect as interim interdict and;

4. That the three Respondents are called upon to show cause if any on the 16th day of October, 1987 why Order 1(a) should not be made final and the rule herein issued confirmed.

5. That the costs of this application be paid by any one or combination of the Respondents in the event only of their opposing the application.

6. That further and/or alternative relief may be granted to the Applicants in this matter."

Only the first Respondent has intimated intention to oppose confirmation of the rule. Although duly served with the rule, second and third Respondents have not filed notice of intention to oppose its confirmation. It may, therefore, be safely assumed that they are prepared to abide by whatever decision the court will arrive at.

Affidavits are duly filed by the parties. In as far as it is relevant it appears from the affidavits that prior to 8th February, 1972 the second Respondent was the owner of a certain site Number 41A Old Europa, Maseru Urban Area in the district of Maseru. On 8th February, 1972 he registered the property in terms of the Deed Registry Act, 1967 and obtained a Title Deed therefor.

3/ Thereafter,.....

Thereafter, the second and the first Respondents apparently entered into a certain agreement. As an assurance of performance of his part of the agreement the second Respondent mortgaged site 41A in favour of the first Respondent under the Deed of Hypothecation No. 15039 dated 6th June, 1979. However, the second Respondent subsequently failed to perform his part of the agreement and the first Respondent sued him under CIV/T/172/87. The case was decided in favour of first Respondent on 3rd June, 1987. The decision declared, inter alia, that every right and interest in the land, buildings and other improvements erected on site 41A Europa were especially executable at the instance of the first Respondent in terms of the Deed of Hypothecation NO. 15039.

Pursuant to the aforementioned decision in CIV/T/172/87 the first Respondent caused a writ of execution to be issued against the second Respondent. On the basis of the writ of execution the third Respondent proceeded to attach site 41A and publicise a notice of its sale in execution, which notice appeared in the issue of 20th August, 1987 of "Lesotho Today" newspaper.

The applicants then instituted the present proceedings in which they moved the court for relief as mentioned in the rule nisi. In their founding and replying affidavits which were deposed to by the first applicant, the applicants averred, inter alia, that

in 1984 they and the second Respondent concluded Deeds of sale whereby the latter divided site 41A Europa into two portions which he sold to them (Applicants). The applicants duly paid the price money to the second Respondent who processed transfer of the two portions of site 41A to them. They contended, therefore, that the site belonged to them and no longer to the second Respondent. Accordingly the thrid Respondent could not lawfully attach and sell site 41A by public aution to satisfy the judgment in CIV/T/172/87 which the first Respondent had admittedly obtained against the second Respondent.

It is to be borne in mind that following the registration of site 41A in terms of the Deeds Registry Act, 1967 on 8th February, 1972 the second Respondent mortgaged the site in favour of the first Respondent under the Deed of Hypothecation No. 15039 dated 6th December, 1979. That being so, it stands to reason that when in 1984 the second Respondent divided the site into the two portions which he sold to the applicants the site was already mortgaged in favour of the first Respondent. The second Respondent could not, in my opinion, have lawfully sold, to the applicants, the site which he had, in terms of the Deed of Hypothecation 15039, already mortgaged to the first Respondent. The second Respondent's purported sale of site 41A to the applicants was for that reason, null and void.

The applicants further contended, however, that at the time of mortgaging it, site 41A was undeveloped and had no immovable property of any sort, save an old dilapidated chicken coop and some barbed wire fencing around it. The purported mortgage was, therefore, in respect of land. As land in Lesotho belonged to the Basotho nation and not individuals, the second Respondent could not have lawfully mortgaged site 41A which was in law, not his property. The applicants contended that, for the same reason, the judgment in CIV/T/172/87 which declared inter alia, that site 41A Europa was executable at the instance of the first Respondent in terms of the Deed of Hypothecation 15039 was null and void and of no legal force.

I am unable to agree with these contentions. Assuming for the safe of argument, that the applicants are correct in their averment that the second Respondent could not have mortgaged site 41A because it was land belonging to Basotho nation and not him. They have, in their own words, averred that they had lawfully bought the same site from the second Respondent. It seems to me that, by the same token, the second Respondent could not have lawfully sold to them the site which belonged to the Basotho nation and not to him.

As it has already been pointed out earlier, the first respondent obtained, against the second Respondent a judgment under CIV/T/172/87. The judgment declared, inter alia, that every right and interest in the land, buildings and other improvements erected on site 41A Europa

were especially executable at the instance of the first Respondent in terms of the Deed of Hypothecation No. 15039. That judgment has not been set aside by the Court of Appeal and, in my opinion, still stands good. The applicants cannot, therefore, be heard to say the judgment in CIV/T/172/87 is null and void and of no legal force.

In the result, I come to the conclusion that this application ought not to succeed. The rule nisi is accordingly discharged with costs.

B.K. MOLAI

JUDGE

15th August, 1990.

For Applicants : Mr. Addy

For Respondents : Mr. Moiloa.