CIV\APN\195\87

IN THE HIGH COURT OF LESOTHO

In the matter between:-

CHIEFTAINESS 'MAPOLO NKUEBE Applicant

and

CHIEF MAKHOBALO MOSHOESHOE Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola on the 9th day of December, 1991

The applicant is the widow of the late Chief Qefate Nkuebe who died on the 4th July, 1986. It appears from the records of the Court that on the 14th January, 1984 the present respondent obtained a default judgment against the applicant's late husband. The effect of that judgment was that the decision of the Minister of Interior in so far as it purported to place certain five headmen of Tele, who had all along been under the jurisdiction of the present respondent, under the jurisdiction of the applicant's late husband, was declared null and void; the applicant's late husband was permanently interdicted from intefering in any manner

whatsoever except by due process of law, with respondent's use of the said area of Tele; the headmen mentioned were declared to fall under the present respondent.

The applicant is now applying for the rescission of that default judgment on a number of grounds. She is also applying for the condonation of the late filing of the application for rescission of the default judgment and leave to oppose the said application CIV\APN\244\84.

The applicant avers that her late husband was never served with the Court Order in CIV\APN\244\84. It is common cause that this was never done because there is no return of service showing service of the order upon the late Chief Qefate Nkuebe. The order is still in the file but there is no indication that it was ever uplifted for service.

The applicant's next contention is that her late husband was never even served with the Notice of Motion in the said CIV\APN\244\84 despite what the deputy sheriff claims in his return of service. She avers that by the 30th November, 1984 when the

deputy sheriff allegedly served her late husband, the latter was by then so mentally disordered that he could not have understood the said process nor could he have known what to do. She has annexed to her founding affidavit a supporting affidavit by Dr. T. Letsie who avers that he knew the late Chief Qefate Nkuebe in his lifetime as he personally treated him for severe psychotic disorder. He formed the opinion that in November, 1986 the deceased had reached such an advanced state of his illness that he was incapable of handling his own affairs or understanding anything at all let alone knowing what to do.

The affidavit by Dr. Letsie is not relevant to these proceedings because it refers to an entirely different period. He refers to November, 1986 while the service of the process was done on the 30th November, 1984, i.e. two years before he treated the deceased. He again refers to a report he made on the 27th May, 1987. That report is also not relevant to these proceedings.

There is no evidence that in November, 1984 the deceased was so mentally disordered that he could no longer perform the functions and duties of

his office as a chief and that some other person was already acting in his place. I do not believe that the Government of Lesotho through its Ministry of Interior and Chieftainship Affairs can allow a chief who is completely mentally disordered to remain in office. I am convinced that in November, 1984 the deceased was in good health mentally. He did not only received the Notice of Motion but even affixed his signature to it. (See page 3 of the Notice of Motion). The applicant has not denied that the signature in question is not that of her late husband.

On the face of it the return of service appears to be regular except that it does not appear as if the person who did the service complied with the provisions of Rule 4 (5) of the High Court Rules 1980 which provides that 'if the service is effected by the sheriff, it is his duty to explain the nature and contents of the process or documents served to the person upon whom service is effected and to state in his return that he has done so'. It seems to me that the form used by the deputy sheriff is wrongly drafted because it does not provide for the words "the nature and exigency thereof were explained to him at the same time as

the service." The form which was used by the deputy sheriff of Maseru in the same case differs very substantially from the one used by the deputy sheriff in Quthing.

I think the Registrar of the High Court as the sheriff of the High Court must make sure that the return of service forms used by her deputies comply with the requirements of the law. The return of service used by the deputy sheriff of Quthing in CIV\APN\244\84 leaves much to be desired and falls far below the legal requirements. Be that as it may I am convinced that the late Chief Qefate Nkuebe was served with the Notice of Motion and all the affidavits accompanying it. The documents clearly indicated that he was expected to file his notice of intention to oppose on the 30th November, 1984, which happened to be the same day on which he was served. He was expected to file his answering affidavit within fourteen days of the above notification. It was clearly stated that if no such notice of intention to oppose be given the application would be made on the 10th December, 1984 at 9.30 a.m.

The applicant's late husband did not react in

any way. One would have expected him to have at least come to Court on the 10th December, 1984. In fact on that day or the following day the matter was postponed to the 14th January, 1985. The deceased took no action until July, 1986 when he died.

It is inconceivable that the deceased received the process of this Court and immediately concealed it so that not one member of his family saw it. It is probable that some members of the deceased family saw the process and they decided not to take any action. The reason being that in 1983 the respondent sued the applicant at Quthing Central Court under CC3\83 restraining him from exercising chieftainship powers in the area of jurisdiction of the respondent at Tele through the headmen mentioned in present application. Judgement was given in favour of the respondent. Despite the judgment of Quthing Central Court the applicant persists in the administration of the respondent's area through the headmen referred to above.

This defiance by the applicant of a valid judgment of a competent court led to the institution of the present proceedings (

CIV\APN\244\84). The applicant's late husband knew the judgment of Quthing Central Court and never appealed against it. In her founding affidavit the applicant does not say anything about that judgment. She behaves as if it does not exist. I am of the view that the present proceedings are res judicata and should not be entertained by this Court again except the interdict applied for by the respondent in CIV\APN\244\84.

It is improbable that the applicant was not aware of the judgment of the Quthing Central Court and again of the service upon her late husband of the process in the present application. We are asked to accept the applicant's story that her late husband had not been mentally stable for some time and that he was even unable to manage his affairs. The question one may asked in how was her late husband able to defend himself in CC3\83 of Quthing Central Court? How was he able to sign the process in the present proceedings? And where was the applicant when her allegedly seriously ill or mentally disordered late husband was doing all these things which appear to be the actions of a sound and normal person? Surely if her late husband was so mentally disordered she or any other

person had to attend to him all the time so that people like the deputy sheriff could not sneak into the house and serve him with papers he could not understand. I am inclined to believe that the applicant was aware of all the proceedings in the Quthing Central Court and in this Court. Her husband did not do anything about them and accepted that the area in question has lawfully fallen into the jurisdiction of the respondent. I am convinced that the applicant was aware of this state of affairs. She apparently became wise almost a year after the death of her husband and tried to challenge what can no longer be challenged.

The Minister of Interior and the Solicitor General were the 1st and 2nd respondents respectively in CIV\APN\244\84. They entered Notice of Intention to oppose but later withdraw their opposition. They must have noticed that Government Notice No. 182 of 1969 and Government Gazette No. 27 of 1970 had been overtaken by the judgment of a court of law.

Mr. Ramafole, counsel for the respondent submitted that it is in the interests of justice and peace that the application be granted because

this is not an issue between two persons but an issue where the entire nation has an interest, particularly Quthing people. He further submitted that it can only be just that in a matter that is hotly disputed as this one, a matter affecting status that the application be granted and the issues tried in a full trial. He submitted that consideration be given to the fact that the said headmen and their people have always been under applicant's administration until when the default judgment was granted; that in itself calls for full determination of the matter.

It seems to me that it is not correct that the said headmen had always been under the jurisdiction of the applicant. It was only in 1969 and 1970 that they were placed under the jurisdiction of the applicant by Government Notice No.182 of 1969 and Government Gazette No.27 of 1970. Before then they were under the jurisdiction of the respondent. The matter may be hotly disputed but is **res judicata**. It is a principle of our law that it is in the interests of justice that litigation must come to finality and that once finality is reached it should not be reopened unless the circumstances require so. In the present case there is no

justification for doing so simply to satisfy a person who showed no interest when the decisions of the courts of law were made.

The evidence of the Principal Chief of Quthing, the subaccountant of Quthing and the headmen concerned, is quite correct that the said headmen have been under the jurisdiction of the applicant. However, they are probably not aware that in 1983 the respondent won a case in the Quthing Central Court and that in 1984 the respondent won another case in the High Court. The Principal Chief of Quthing withdrew his evidence as soon as proof was shown to him. I think the sub-accountant and the headmen themselves will withdraw their evidence when they see the judgments of the courts of law.

In the result the application is dismissed with costs.

J.L. KHEOLA
JUDGE

9th December, 1991.

For Applicant - Mr. Ramafole
For Respondent - Mr. Malebanye.