CIV/APN/219/89

IN THE HIGH COURT OF LESOTHO

In the matter between:-

ELIZABETH KAMELE — Applicant

and

EDWARD LEPHATSOE — Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 31st day of July, 1991

The facts of this case are well summarized by the Local Court President in his judgment on pages 6 - 8 and the read as follows:-

> "The case started de novo before this Court on 8th February, 1984 in which the plaintiff Edward Lephatsoe sues the defendant Sefora Kamele for his site which he says the defendant uses without his permission and in his answer to plaintiff's plea the defendant denied this, so the onus is upon the plaintiff: when the plaintiff started he said the site he sues the defendant for belongs to his grand-mother Nthoto after whose death the site remained in his mother's possession 'Mapaballo Lephatsoe who once disputed this site with Elizabeth Kamele and this point is contained in Ex. "A", copy of the Central Court, CC 17/77 where the case was remitted to the

administrative court and so to date there is no valid judgment on this site; the plaintiff told this court that he saw the defendant unroofing the house and carrying the house stones to his site which the plaintiff had left in the care of Tseko Mpobole. Plaintiff called P.W.1, Tseko Mpoble who says the plaintiff left him in charge of this site in dispute, it is there that he saw the defendant unroofing the house and carrying away the stones of the wall of the plaintiff and the plaintiff's last witness was chief Moletsane Koali who is running the administration on behalf of Chief Molapo Koali who said he knows this site which presently belongs to his grand-mother Nthoto after whose death it belonged to the plaintiff's parents, today it belongs to the plaintiff, he says this site used to belong to Timoti Nolutshungu who sent out P.W.2 chief Moletsane to go and allocate Nthoto, the plaintiff's grand-mother and he allocated her next to the defendant's wife's business site which was already there, he therefore says the defendant uses this site wrongly, he had no right at all to it.

After the plaintiff's evidence it was found that a prima facie case had been made for the defendant to answer once he is offered such an opportunity, the defendant says he himself does not claim the site because this site belongs to his wife as business site whose documents he has and also says the instruction to unroof the house and demolish the wall in question came from Elizabeth, his wife; this is the defendant's evidence. After the litigants and their witnesses have given their evidence the court went on inspection in loco and after the pointings this court came to the conclusion that the plaintiff has ably proved his case and the defendant was to refute that he and the other men did not unroof and demolish the wall and also to carry away everything for his own good but he failed to rebut this part where he was personally involved in his wife's, Elizabeth's site nor did he call her as a witness to assist him in all that was done on the site whereas his wife is still alive and it appears he does not want his wife from whom he says the instructions came should come and rescue him.

> In the premises the plaintiff's claim is upheld the defendant is ordered by judgment to withdraw his hands from this site which should solely remain as the plaintiff's, on the west it ends above the oven of the defendant who is ordered to remove it from there. On the north is the aloes, on the East is Shadrack Makhale's site and between the plaintiff's site and that of Shadrack is 3 paces foot path leading to the hills, on the South is a big road currently used. The plaintiff conveyed the court to and from in his vehicle, he also conveyed the court to the chief's place. The defendant should contribute to this by paying M7.50 before this court. The defendant is ordered to pay M50.00 plaintiff's costs in this court."

The only correction to be made is that the appellant's late husband who was the defendant in Mt. Moorosi Local Court did not admit that he removed the roofs and demolished the walls of the respondent's house. (See page 4 of the record).

It is common cause that after losing the case the appellant's late husband appealed to Quthing Central Court. While the appeal was pending in that court he was killed in a road accident. It is alleged that the appeal was eventually struck off the roll.

The appellant did not make any application to reinstate the appeal but made an application for the review of the proceedings by the magistrate in terms of section 26 of the Central and Local Courts Proclamation No.62 of 1938. I am of the opinion that the appellant was entitled to apply for review because there was no longer any appeal pending before the Central Court when she made her applciation.

However she had to satisfy the magistrate that grave irregularities or illegalities had occurred during the course of such proceedings. The learned Resident Magistrate referred to the case of Johannesburg Consolidated Investment Co. v. Johannesburg Town Council, 1903 T.P.D. 111 in which review was defined as follows:

> "(a) Review by summons. The process by which, apart from appeal, the proceedings of inferior Courts of Justice both civil and criminal are brought before the Supreme Court in respect of grave irregularities or illegalities occuring during the course of such proceedings.
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> (b) Review by motion. The process by which where a public body has a duty imposed on it by statute, or is guilty of gross irregularity or clear illegality in the performance of that duty, its proceedings may be set aside or corrected."

The learned Resident Magistrate found no gross irregularity in the procedrue adopted by both the Central and Local Courts and dismissed the application with costs. The appellant is now appealing to this Court on a number of grounds. The first ground being that the learned reviewing magistrate erred in ignoring the fact that first respondent sued a wrong person while the first respondent knew that the appellant had a registered title to the site. I think this statement is incorrect because in his judgment the learned Resident Magistrate states that the respondent had a right to sue the appellant as he is a major and is the one in possession of the site in dispute. I tend to agree with this reasoning because

there was evidence by Chief Moletsane Koali that the appellant's business site is different and separate from the site now in question. It seems to me that the appellant cannot capture all the sites surrounding hers on the simple ground that she has a Form C for her site.

The second ground of appeal is that the learned Resident Magistrate misdirected himself on a point of law in coming to the conclusion that appellant should have noted an appeal against the judgment of Mt. Moorosi Local Court wherein the appellant had not been heard as the owner of the site which is the subject matter of the claim. Again I think the court a quo regarded the site in question as separate from that of the appellant. I have no quarrel with that finding.

The third ground of appeal is that the learned Resident Magistrate erred in ignoring the fact that the Central Court had made a ruling that before the matter is referred to the court of law the parties must take the matter before their chief to determine the boundary of the site in question. Since the Chief had not been called to determine the boundary, this was a gross irregularity by the Local Court to e overrule the ruling of the Central Court which was to the effect that before the matter is brought to the courts of law, the chief had to determine the boundary.

It is common cause that at the trial the respondent handed in as an exhibit a copy of a judgment of the Central Court in CC 17/77 which was marked Exhibit "A". Unfortunately that copy of judgment

has not been included in the papers before me. Be that as it may, in his judgment at page 6 of the record the Local Court President acknowledges that there was such a judgment and that the matter was remitted to the administrative court and he admits that there has been no compliance with the order of the Central Court.

It seems to me that even in CC 17/77 Chief Moletsane Koali was a witness but the Central Court rejected his evidence and remitted the case to the chief of the area to draw the boundaries. There was no appeal against that ruling and no compliance with it. I come to the conclusion that it was a grave irregularity for a Local Court to refuse to comply with the order of the Central Court.

The demarcation of boundaries is a matter for the land allocating authority to determine where there is uncertainty. Although the case of the Minister of Interior and others v. Chief Letsie Bereng C. of A. (CIV) No. 17 of 1987 dealt with a boundary between two Principal Chiefs, I am of the opinion that where there is incertainity concerning a boundary between two sites leading to continued litigation without any final decision because of uncertainty of the boundary, the courts of law may refer the matter to the chief to redefine the boundaries. The Quthing Central Court apparently made such an order but the parties have not complied with that order. The Mt. Moorosi Local Court was aware that there had been no compliance with an order

of a Central Court but decided to hear the matter de novo. This point was not argued before the court a quo and there is nothing to show that his attention was drawn to it. It would have probably come to a different conclusion.

AT the hearing of this appeal Mr. Maqutu, attorney for the appellant, submitted that there was no evidence before the Mt. Moorosi Local Court upon which the court would have found that there was a proof of a boundary and encroachment by the applicant's late husband. It will be noted that in their evidence in court the respondent and Tseko Mpobole did not give any evidence regarding the boundaries of the site. Chief Moletsane Koali did not also describe the boundaries of the site. No one gave any evidence about the boundaries until an inspection in loco was made. The normal practice is that in his or her evidence in court a witness must give some description of the boundary and then during the inspection in loco he or she merely points out what he or she has already described in her or his evidence while under oath.

In Rex v. Van Der Merwe, 1950 (4) S.A. 17 at p. 20 Brink, J said:

> "Now explanations made by witnesses or what they pointed out at an inspection in loco are not evidence before the Court. It is usual after an inpsection in loco, when the hearing is resumed, to call the witnesses to give evidence in open Court under oath as to the explanations made at the inspection and as to the points indicated by them.

> In London General Omnibus Co., Ltd. v. Lavell (1901), Ch. 135 at p. 139) the Court remarked that a view was not to be put in the place of evidence, but was to enable the tribunal to understand the questions raised and to follow and apply the evidence. In Goldstuck v. Mappin & Webb, Ltd. (1921, T.P.D.. 723) Feetham, J. said it was difficult to draw a line between a view for the purpose of understanding and applying evidence and a view for the purpose of obtaining evidence. The learned Judge then remarked:
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> "I think there is good ground for the opinion expressed on this point in Wigmore on Evidence, sec. 1168: 'It is wholly incorrect in principle to suppose that an autoptic inspection by the tribunal does not supply it with evidence; for, although that which is received is neither testimonial nor circumstantial evidence, nevertheless it is an even more direct and satisfactory source of proof, whether it be termed evidence or not. The suggestion that, in a view or any other mode of inspection by the jury, they are "merely enabled better to comprehend the testimony", and do not consult an additional source of knowledge, is simply not correct in fact' ".
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> Accepting this wider view of an inspection in loco, it does not permit the Court to take cognisance of the words or deeds of the persons present at such an inspection and to utilise them as evidence in the case. If they are to be relied on, evidence under oath must be given in Court as to such words or deeds."

I agree with Mr Maqutu that there was no evidence before the Court upon which it would have found for the respondent. It is a grave irregularity to decide a case without any evidence. Another serious irregularity is that the Court President does not seem to have noted his own observations e.g. the position of the demolished house in order to determine whether there was encroachment or not. The pointing out of the boundary cannot be regarded as a deed amounting to evidence inasmuch as it was not done under oath. As I have said about the witnesses ought to have fully describe the boundaries while giving their evidence under oath in court; in such case the pointing out would be accepted.

In the light of the gross irregularities I have described above the appeal is upheld with costs. The order of the court a quo is set aside and replaced with an order:

"The application is granted with costs."

J.L. KHEOLA
JUDGE

31st July, 1991.

For Applicant - Mr. Maqutu
For Respondent - Mr. Malebanye.