CIV/A/8/93

IN THE HIGH COURT OF LESOTHO

In the Appeal of

'MAHOPOLANG KOALI Plaintiff

and

MBONESOA NKOSI Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice W.C.M. Maqutu, Acting Judge on the 14th day of March, 1994.

Summons were issued by Plaintiff on the 27th September, 1988 in which he asked for the following order against Defendant:

(a) An order that Dependant shall not, after vacating the premises and house, interfere with the Plaintiff's possession of the premises and house.

(b) Costs of suit.

(c) Further and/or alternative relief.

Defendant entered appearance but did not plead

timeously. Consequently a default judgment was entered against Defendant on 10th January, 1989. This judgment was later rescinded and Defendant duly pleaded.

According to particulars of claim to the Summons, Plaintiff is the son-in-law of Defendant because he married Defendant's daughter by customary rites in 1972 and solemnised the marriage by civil rites on the 2nd January, 1979. Defendant's daughter died on 20th January, 1988. In Defendant's plea, the marriage by civil rites is admitted while that by Basotho Custom is denied. The fact that Defendant's daughter died in 1988 is not denied.

Plaintiff's particulars of claim state that while Plaintiff and Defendant's wife were in the Republic of South Africa they asked Defendant to go and live in Plaintiff's house at Phaphama Ha Sechele. Defendant moved into that house of Plaintiff in or about 1987.

In her plea, Defendant denied that he lived in Plaintiff's house. She says the site in question is not Plaintiff's. She says the site and the house are hers. She built the house, Plaintiff and Defendant's

daughter came to the said site when it was already Defendant's. She concludes by saying the site is at Phaphama Ha Mopeli not at Phaphama Ha Sechele as Plaintiff alleges.

The Defendant's plea adds that her Form C dated 4th August, 1971 which is the letter of allocation justifies her refusal to vacate the said site.

The Magistrate after hearing evidence delivered judgment in favour of Plaintiff on the 29th September, 1992 and grounds of appeal were filed of record on the 16th October, 1992 on behalf of Defendant.

The record of appeal must have been sent to this Court at the beginning of 1993. The Notice of Set-Down dated 10th June, 1993 in which this matter was to be heard on the 14th May, 1994 was filed of record on 28th June, 1993. This Notice of Set-Down is signed by Respondent's attorney. On the 8th December, 1993 another notice of Set-Down changing the date of trial to 18th February, 1994 was filed of record.

On the 18th February, 1994, the matter was postponed because Mr. Mofolo had withdrawn as

Appellant's counsel. The court pointed out that the record was in an unsatisfactory state and the incoming attorneys should attend to the record. This message was given to Mr. Sello's clerk because the Court was informed that Mr. Sello was going to be the attorney of record. Costs of the day were awarded to Respondent after the matter had been postponed to 28th February, 1994.

The record on the date of hearing was tidily compiled but the original manuscript of the record was not available although it had been here on the 18th February, 1994. The record as compiled by the new attorney did not have the exhibits. On the 28th February, 1994 the court was informed that the record was compiled and handed to the Registrar but was misplaced. The court directed Mr. Sello, attorney for Appellant to reproduce his copy of the record to enable the matter to proceed on 2nd March, 1994. The case was, therefore, heard without the original manuscript of the record and the original magistrate court file. The Court directed that it should be found.

Mr. Sello for Appellant's first point was that

although judgment in CIV/A/7/73 was not handed in, at the trial, because D.W.2 Sehalahala Joel Molapo had referred to its contents, the court ought to take Judicial notice of it. The reason why it has to do so is that judgment is the law. A perusal of the record showed that only a vague general reference was made to it without giving its number. The point that Mr. Sello was making was that the judgment had ruled that Phaphama fell under Chief Kuini Mopeli, the Principal Chief of Butha-Buthe.

The Court pointed out that whether Phaphama was at Mopeli's was a question of fact not law. If this court had made such a decision on the facts it was bound by that decision as a question that had been decided. *If this fact was used a bar to further* enquiry (res judicata) the party putting it forward had the onus of proof. That party had to show that, the subject matter is the same, the parties are the same or their previous and a final judgment had been given.

The judgment in this case was never produced whether properly (through the Clerk of Court or the Registrar) or improperly by just handing it in. The

Appellant's grounds of appeal at No.7 complain that the judgment was seen and perused in Court and Appellant alleges that the judgment must have formed part of the proceedings. Mr. Mofolo who acted for Appellant is an advocate of twenty four years experience. We can only assume he forgot to hand over the judgment. The Court accepted the judgment for perusal over the objections of Mr. Ramodibeli Counsel for Respondent who stated hat on appeal the Court is bound to work within the four corners of the record.

It is the court's view that if Defendant sought to prove that the site was at Mopeli's not lipelaneng where Sechele is the gazetted headman. He ought to show the court where the boundary is and then bring the judgment to show that in terms of that judgment, the boundary disputed was finalised. In that case, the dispute was whether a place called Phaphama falls within Lipelaneng (Sechele's area) or in Chief Kuini Mopeli's area where Sechele was only a hand and eye. Apparently evidence on the issue was heard on 10th November, 1969. In that judgment CIV/A/7.73 the boundary is not disclosed. It is only said it was pointed out. To say in general terms Phaphama falls under Mopeli would not have carried Appellant's case

any where because it had to be shown that this particular site was at Mopeli's not at Sechele's

Respondent's witnesses have shown that the area is named after business premises called Phaphama. They have no hesitation in saying the site is at Lipelaneng. Both Sechele and Mopeli allocate land. They both on the face of the record have issued letters of allocation Form "C". The dispute between chief is not important for purposes of this case. The real issue is who was allocated this site and who of the two parties caused a house to be built. One of the parties is using the dispute between chief to gain an advantage over the other. The Court has to determine this issue. The reason disputes among chiefs are not important is that in Lesotho it is very common for chief to use allocation of sites as a means to assert or maintain territorial claims.

The Land Act of 1979 came into force on 16th June, 1980 and Section 82 thereof states:

> "Where at the commencement of this Act any land or part thereof has, whether by error or otherwise, been the subject of two or more allocations, the allottee who has used the land and has made improvements thereon shall hold title to the land in preference

> to any allottee who left the land unused and undeveloped."

The legislature has solved this problem in this particular case (for all it is worth). I say so because the land by common consent was allocated before June, 1980. Therefore, it does not matter which of the two chief had the right to allocate that particular land. This should lay the Phaphama controversy to rest.

Coming to the merits. In so doing, I will use both the record as compiled by Appellant and the record of the Court below in manuscript. I will also refer to the exhibits which Appellant omitted accidentally. The magistrate court's file has been found and I now have the benefit of it.

At Page 38 of the record as compiled by appellant in seeking a default judgment plaintiff said he bought the site in dispute from the chief and he was given a Form C dated 15.3.78. He built a house and then asked Defendant to live on it. His first wife the daughter of Defendant died. Defendant refuses to vacate the house so that his Second wife can live there. Judgment was later rescinded and evidence was

heard de-novo.

On page 40 giving evidence afresh, Plaintiff has given details of his allocation. Plaintiff further states that he built a five roomed house in 1978. He then says he never kept receipts. Defendant kept the receipts. At page 41 says the Form C Defendant is holding is not legal. The site was on a field previously allocated to one Chalali Matsaba. Under cross-examination, Plaintiff denies that the particular receipts that Defendant holds are in respect of the building in dispute. Plaintiff denies the field was occupied by Chalali in 1971. Plaintiff denies Defendant got a Form "C" (letter of allocation) before Plaintiff could get his. Plaintiff denies he ever gave evidence before this occasion and that he ever said he bought that site. Later he admits having given evidence before when he is re-examined. He also admits the land once belonged to Chalali. at the beginning of his evidence Plaintiff had handed his letter of allocation Form "C" dated 15.3.1978 which was given to him by Mampe Matela Sechele.

Defendant states in her evidence in rebuttal that she resides at Phaphama. What follows in her evidence

obliged the Court to check the handwritten record of the original record compiled by the Magistrate. The Court found it corresponded with the typed record. The particular portion reads:-

> "The land in dispute was allocated to me in 1971. A Form "C" was issued to me I lived in this land in 1978 I erected a house in 1972. The land was allocated to me by Chief Joel Mafa Molapo occupied in 1978. I hired one Linko who erected the building. I bought the building materials for which I possess receipts."

Defendant states she works at Butha-Buthe Hospital and she handed the following receipts in evidence:-

Ex "a" dated 27/8/78	50.00
Ex "B" dated 1/6/82	316.70
Ex "C" dated 9/12/82	88.56
Ex "D" dated 29/12/82	198.67
Ex "E" dated 11/5/82	17.00

All these receipts are for building materials such as cement, timber, iron but not all that is written on them is legible Defendant handed an acknowledgement of receipt of money that is written as if it is a letter. In it is stated that "money I gave to Mr. J. Matsaba Chalali is R40.00 The balance is R80 in respect of her arable land (tsimo) Defendant" has signed her name and below it the name Julia Chalali is written. A date 21.7.71 is written towards the top of the document in

the middle just opposite the address. This document is marked Ex "F".

Defendant also handed Ex "G" the top of which has been torn off. It is a receipt for the amount of R18.25 for building a wall Gilbert Nkone Baholo has written his name and so has Defendant. This document is undated. There is Ex "H" dated 5/4/78 which reflects an agreement between Defendant and Linko to complete three rows of a wall of a five roomed house for R100.00 At the bottom are acknowledgments that M45.00, M.30.00 has been received by Linko M. Koali.

Defendant handed in her Force C issued in respect of the land which was marked Exh 1. the Court examined Ex I in the original file and record and found it was a photo-copy. Defendant told the court that there was no legal marriage between her late daughter and Plaintiff. As proof that her daughter was married to one Mahoko, Defendant handed a South African passport in the names of Magaret Mahoko of 78 Motsamai Street Katlehong. This passport dated 4/4/1979 was marked Ex "J". An examination of this passport reveals it was used between 1979 and 1983. Defendant denies she ever kept receipts for Plaintiff

and says she has on the site 5 roomed house, a rondavel, a mud "heisi" and 2 flat-roomed houses.

Before dealing with the merits, it is necessary briefly to see what evidence each of the two litigants brought.

Plaintiff witnesses are two in number. The first one was Botha Nchee who states that site was allocated to Plaintiff by Chieftainess 'Mampe Sechele aided by his land allocation committee of seven members who he named. He claimed Defendant appeared on that occasion as mother-in-law of the Plaintiff. He does not accept the Form C of Defendant. Replying to questions he says only the law tells if Plaintiff's allocation is invalid. He does not know of the dispute between chiefs over the area. P.W.3 Thafeng Linakane is the other member of the land allocating committee to give evidence in favour of Plaintiff. He lives 300 metres from the disputed site.

Defendants witnesses are D.W.2 Chief Sehalahala Molapo. He says he was told by Chieftainess Majobo Molapo that Plaintiff was Defendant's son-in-law. D.W.2 says Defendant "resides in the estate of her

daughter the late Hopolang". D.W.2 says there was dispute over Phaphama. The courts of law held it was under the Principal Chief of Butha-Buthe, only he could allocate land there; D.W.2 then says and I quote.

> "The land committee of Chief Mopeli allocated the site in question to Plaintiff."

I checked both the type written record and the hand-written original record. They are the same on this point. I can only infer this was a slip of the tongue on the part of D.W.2, he must have meant the land was allocated to Defendant. The difficulty I have, however, is how D.W.2 can say Defendant resides in the estate of her daughter, the late Hopolang, if indeed the site was allocated to Defendant. His evidence on this point would not be of any help because he was not there when the allocation was made. If D.W. 2 had brought the land register which the chief of Butha-Buthe or Mopeli had recorded the allocation in terms of Section 8(4) of the Land Procedure Act of 1967, referred to it and exhibited it in court, his evidence would be of value on the question of allocation.

On the question of where the site in question was

situated, it was not (as already stated earlier) enough for D.W.2 to say it was situated at Phaphama without showing that in accordance with the boundary it falls within the area of the Principal Chief of Butha-Buthe or Mopeli. This is all the more so because the site used to be an arable land which means in 1971 it was not part of the village. In Lesotho arable lands are outside the village and form one mass of land which is parcelled out to villagers. Nobody builds in that area. To say the land is at Phaphama was not being helpful. It is also a notorious fact that there are expansions of villages that always lead to disputes. Under cross-examination except for saying he read the judgment, D.W.2 admitted that he did not know what was in issue.

D.W.3 Chieftainess Majobo was the sister-in-law to of Defendant . The record states:

> "My father-in-law asked me to apply for land to the defendant."

This is unintelligible. D.W.3 says Defendant was nevertheless issued a Form C by Chief Joel Mafa on behalf of Chief Kuini Mopeli Principal Chief of Butha-Buthe. That Form "C" was issued in 1973, she only

came to know Plaintiff in 1982-83. D.W.3 lived in Sekubu. D.W.3 does not know when Plaintiff's wife died. D.W.3 says he told D.W.2 that Plaintiff was the boy friend of the daughter of Defendant. D.W.3 says there were no certificates of allocation in 1971 that is why the Form "C" was issued in 1973 and had to be back-dated. D.W.3 claims Chief Mafa Joel Molapo had power to allocate land. She does not know what happened to the date stamp.

The trial court saw and heard the witnesses. D.W.2 Chief Sehalahala Molapo was found by the trial court to be giving hearsay evidence. He did not have much evidence to give except saying the place Phaphama was at some time awarded to Chief Kuini Mopeli in his dispute with Chief Matela Sechele. The judgment was not handed in nor was any serious attempted made to prove that in terms of a known boundary fell under Butha-Buthe or Mopeli. Indeed, neither the judgment nor the evidence of D.W.2 describe the boundary. For the judgment to be of use D.W.2 would not only have to relate the site to the boundary but there had to be a description of the boundary in the judgment. The Court chose to peruse the judgment after indicating that it could not be made part of the record on

appeal. The Court has also shown that Section 82 of the Land Act 1979 makes the question of which chief allocated the property unimportant because the site is a developed one. The only issue that is of importance is who had been allocated the site at the time it was developed.

The trial court was not impressed with Defendant's back-dated Form "C". It was also not impressed with D.W.3, Majobo Molapo. The trial court says "I have not been impressed by the evidence of this witness" This is not surprising because D.W.2 says D.W.3 told her that Plaintiff was the Defendant's son-in-law. D.W.3 says she only said Plaintiff was the boy-friend of Defendant's daughter. The trial court found D.W.2 's evidence that of a researcher who did not even hand in the High Court judgment.

In this Court's view, Chief Sehalahala D.W.2 would only have been of assistance as a researcher if he had handed in the 1971 record of proceedings of the allocation of Defendant which Chief Kuini Mopeli or Chief Joel Molapo was obliged to keep in terms of Section 8(4) of the Land Procedure Act of 1967. D.W.2 Chief Sehalahala. Such proceedings could have

advanced Defendant's case if he had produced the Register of Allocations for 1971 which Chief Kuini Mopeli was obliged to keep in terms of Section 11(3) of the Land Procedure Act of 1967. That register is meant to prove allocations when memories have faded and those who allocated the land have died.

The trial court criticised Defendant for not bringing a single member of the land allocation committee. The trial Court dealing with Defendant's Form "C" says.

> "Surely this Court cannot accept such an unreliable certificate of allocation. ..."

It is to be noted that the Defendant's Form was issued in terms of the 1973 Land Act. This Act came into force on the 1st March, 1974. It was assented to by the King on the 28th February, 1974. See the Land Act 1973. That being the case, it is difficult to believe D.W.3's story that the Form C was issued in 1973. This seems to have been a lie that was concocted when it became clear during cross-examination that the Defendant's Form "C" was flawed.

Defendant did not challenge the authenticity of

Plaintiff's letter of allocation. She only challenged the power of Chief Sechele to allocate the said land. If he had joined the issue on the reliability of the Plaintiff's Form "C" more would have been required out of Plaintiff. Plaintiff proved his Chief Sechele was a gazetted Chief who had power to allocate land. This was not disputed. What Defendant disputed was that he had no power to allocate land at Phaphama. Plaintiff claimed the site was at Lipelaneng, that portion is called Phaphama after a shop of that name at or near the area where the site is situated. The trial court held what Plaintiff alleged was more probable than what Defendant said. The Defendant has failed to discharge the evidenciary burden that Plaintiff threw on Defendant's shoulders. Among the trial court's reasons were that Plaintiff's evidence was supported by members of the land allocation committee.

I need only add that if the house was erected in 1972 none of the Defendant's exhibits from "A" to "E" support this allegation. Exhibit "A" for the sum of M50.00 is the only one that was issued in 1978. All the other receipts were issued in 1982. Exhibit F allegedly issued by Majulia Chalali has the date 21/7/71 that seems to have been added on the document

later or a time that may have been when it was issued or some other time. Julia and Majulia do not seem to be the person. 'Majulia means the mother of Julia. A married woman in Lesotho is normally named the mother of her first child. For Defendant to come and dispute the civil marriage of her daughter which she knew of and to suggest it was invalid does not create a good impression. In cross-examination, it emerged Defendant's daughter used two passports one with the surname of Mahoko which was South African and a Lesotho one which bore Plaintiff surname. Defendant admitted that this particular Lesotho passport was issued 1978.

Defendant did at one stage not deny under cross-examination that the site in dispute was at Lipelaneng. Plaintiff's counsel in the court below did not find the fact that Defendant's Form "C" Exhibit I was a photocopy important. The trial court also did not find that important. I shall also not comment upon this.

The evidence of Defendant indirectly supports that of Plaintiff in that Defendant says the disputed site was first occupied in 1978. This is the time

Plaintiff claims he was allocated this site which he built up and lived on before he asked Defendant his mother-in-law to live there as they went to the Republic of South Africa. D.W. 2 Sehalahala Molapo says Defendant lives at Phaphama in the estate of her daughter, the late Hopolang. That supports Plaintiff's case.

It must never be forgotten that here this court is dealing with an appeal. The Principles that govern appeals are set out in Rex v. Dhlumayo & Ano. 1948(2) S.A. 677. At page 690 Schreiner J.A. says the appellate court cannot interfere unless it is shown the court below is wrong and adds:

> "Where, however, the judgment appealed from is shown to be seriously unsatisfactory the appellate court may consider that proper advantage has not been taken of favourable opportunities presented by seeing and hearing the witnesses, and may then, without being actually satisfied that the verdict was wrong, be convinced that appeal ought to be allowed."

I was not persuaded that the trial court was wrong from the printed and hand-written words or that its reasons for judgment were on their face unsatisfactory. The printed or written word seems to show the trial court's decision was correct.

Therefore, I am satisfied the trial court used its opportunity of seeing and hearing witnesses correctly.

The trial court was not impressed that Defendant built the house on the site. From the amount of M494.06, the court could not infer that Defendant built the house. It was for that and other reasons that the trial court accepted Plaintiff's evidence and rejected Defendant's testimony. This court virtually retried the case without the advantages of a trial court. Defendant's counsel did not point at any real misdirection although he vigorously argued for a retrial. Even so, although this court was urged to seek anxiously to discover reasons adverse to the conclusions of the trial judge. The court noted what Davis A.J. A. said in R. v. Dhlumayo (supra) at 706, that is

> "No judgment can be ever be perfect and all embracing."

Aaron J.A. in Seetsa Tsotako v. Matsaisa Matabola in C. of A (CIV) No.10 of 1986 (unreported) dealing with a case that was substantially similar to this one said:-

> "Plaintiff had produced prima facie evidence in the shape of her Form C, and supporting evidence by two members of the Land Allocation Committee. The Magistrate accepted this evidence, and it was clearly a finding which a reasonable court could have made on the evidence, there is no basis upon which we can disturb it."

That being the case, the order of this Court is that the appeal is dismissed with costs.

W.C.M. MAQUTU

ACTING JUDGE.

14th March, 1994.

For Plaintiff : Mr. Sello

For Defendant : Mr. Ramolibeli.