

IN THE HIGH COURT OF LESOTHO

In the matter between:

TRABISO L. MAKHOOANE

Applicant

and

'MAMOHLOHOLO MOHLOHOLO

Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 22nd day of March, 1994.

This is an application for an order in the following terms:

1. Ejecting Respondent from a certain site and premises situated on plot No.13281-300 in the district of Maseru.
2. That Respondent pay the costs of this application;
- 3 Further and/or alternative relief.

On the 15th December, 1990 the respondent's husband and the

applicant signed a Deed of Sale in terms of which the latter purchased all rights and interests to the plot on which the respondent is presently residing, together with all improvements, fixtures and building on the said plot. The purchase price agreed upon was M30,000-00 payable in instalments. It was further agreed that the applicant would take occupation and possession of the property immediately upon payment of the purchase price as agreed. (See Annexure "A" the Deed of Sale).

The Deed of Transfer was registered on the 27th February, 1992 and on the same day the Lease was endorsed and transferred to the applicant. (See Annexures "B" and "C").

The respondent's husband is presently living in another house situated on site No.326 Moshoeshoe II, but the respondent is refusing to vacate the plot which the applicant bought from her husband and which has been lawfully transferred to him.

The applicant avers that in the meantime he is not aware of any objection to their conclusion of Annexure "A" with the respondent's husband, nor any other objection raised by the respondent during the time the Commissioner of Lands and the Registrar of Deeds processed all the documents for the transfer of the property over to him until the process was concluded on the 27th February, 1992.

The applicant avers further that the respondent's refusal to vacate the property is unreasonable, unjustifiable and insupportable in law and amounts to self-help. He avers that it appears to him that there is a matrimonial problem between the respondent and her husband but their matrimonial problems are no concern of his.

In her answering affidavit the respondent avers that the agreed purchase price between her husband, was M30,000-00. The registered deed of transfer shows that the purchase price was M1,000-00. She says that the purported registration of Deed of Transfer between her husband and the applicant was null and void and of no legal force or effect because her husband had already been interdicted in CIV\APN\21\91 of the High Court from selling and/or in any manner whatsoever disposing of the said house which is their matrimonial home. The said order was obtained on the 4th February, 1992. See Annexure "CLI".

The matter in CIV\APN\21\91 is still pending for determination.

The applicant has not disclosed that there is another matter in CC 996\92 of the Maseru Magistrate's Court. The matter concerns the same parties and the same cause of action. The same matter was instituted before the present action. The

magistrate's Court is also a court with competent jurisdiction to hear this matter. The applicant has not withdrawn the said action in the Magistrate's Court.

The respondent avers that the applicant has not approached this Court in good faith inasmuch as he conceals certain material facts which would assist the Court in making a proper determination of all the issues involved (A copy of the summons in CC 996\92 is Annexure "SM2").

She denies that she never objected to the said proposed transfer of her matrimonial house. Sometime in December, 1990 she objected to the applicant who was in the company of his wife and they informed her that they had come to inspect the house before entering into negotiations with her husband for its transfer. She informed the applicant emphatically that there was a misunderstanding between her and her husband regarding the same house and site. It was then that she instituted the proceedings in CIV\APN\21\91 to have her husband interdicted from selling the house. Her husband has been staying in a house at Moshoeshoe II since 1976. It is not correct that he vacated the house in 1992 after he sold the house to applicant.

It is significant that the applicant has not filed a replying affidavit to deny or admit some of the points raised by

the respondent in her answering affidavit. One of such points is that there is an action pending at the Magistrate's Court which is between the same parties and the same cause of action. I have checked the copy of summons (Annexure "SM2") and have come to the conclusion that the respondent's allegations are true. They have not been controverted by any evidence by the applicant. The question is: why has the applicant not disclosed this material fact in his founding affidavit? Secondly, why has he not filed an affidavit to refute these allegations?

During arguments Mr. Ntlhoki, attorney for the applicant, explained that the applicant had instructed his former attorney, who is now late, to withdraw the case at the Magistrate's Court. I do not accept his evidence given from the bar. In any case he has not produced any document evidencing a Notice of Withdrawal of the case in the court a quo.

Lis pendens is not, however, an absolute bar. It is a matter within the discretion of the court to decide whether an action brought before it should be stayed pending the decision of the first action, or whether it is more just and equitable that it should be allowed to proceed. (See *Michaelson v. Lowenstein* 1905 T.S. 328; *Loader v. Dursot Bros (Pty) Ltd*, 1948 (3) S.A. 136 (T)).

In the exercise of my discretion I have come to the conclusion that this is a matter that can be properly heard in the Magistrate's Court because the viva voce evidence will be heard to clarify certain points which remain unanswered in the present proceedings because no replying affidavit was filed.

In the result the present proceedings shall be stayed pending the outcome of CC 996\92 in the Maseru Magistrate's Court.


J.L. KHEOLA
JUDGE

22nd March, 1994.

For Applicant - Mr. Ntlhoki
For Respondent - Mr. Putsoane.