CIV/T/142/90

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOHAPI KHECHANE	Plaintiff
vs	
'MOTSENG MOSUOALLE	1st Defendant
THE REGISTRAR OF DEEDS	2nd Defendant
THE ATTORNEY - GENERAL	3rd Defendant

Before the Honourable Chief Justice B.P. Cullinan

For the Plaintiff : Mr Z. Mda
For the 1st Defendant: Mr S.N. Peete

JUDGMENT

The first defendant holds a registered certificate of title to Site No.260A, Mafeteng Reserve. The plaintiff claims that he, as the heir to Ramallane Khechane, a common ancestor, who originally held the site, is entitled to the site. He seeks in part,

"(a) A declaratory order that Plaintiff is a successor in title to the estate of the late Ramallane Khechane.

(b) An order declaring that site No.260 forms part of the estate of the late Ramallane Khechane.

(c) An order directing the Second Defendant to cancel the registered certificate of title issued in favour of First Defendant in regard of the said site."

The second and third defendants did not enter any appearance in the proceedings and are no doubt content to abide by the order of the Court. The first defendant is hereafter therefore referred to as "the defendant."

The defendant does not claim that she holds the site by devolution. It is her case that the site was acquired by 'Masariki Khechane, the first wife of Ramallane, and that 'Masariki donated the site to her. She also maintains that the plaintiff, a descendant of the "second house," is not, in any event, the heir of Ramallane. In brief there is dispute as to the family tree, that is, as to the "first house" but not the "second house" thereof. I thought it best, for case of description, to set out the family tree, in schematic form, that is, the version thereof of the plaintiff and his witness Liau Khechane:

1ST HOUSE	2ND HOUSE
(Ramallane) ('Masariki)	(Ramallane) (Mapule) also known as "Dora"
(Sariki)	(Pule) (Dora)

'Motseng (Defendant) (Moahloli) (Elizabeth)
Mohapi (Plaintiff)

The plaintiff, aged 52 years, claims and testified that there was no male heir in the first house, and indeed that the defendant is the illegitimate daughter of Sariki, who in turn was the daughter of Ramallane and 'Masariki. As to the second house, the plaintiff claims that he is the great grand-son and heir of Ramallane, as he is the eldest son of his father Moahloli who was the eldest son of Pule, who was the eldest son of Ramallane and his second wife Mapule.

The relevant part of the plaintiff evidence is hearsay, having been related to him by his deceased father.

The plaintiff called one witness, his uncle Liau Khechane, aged 81 years who is apparently a cousin of the defendant. He testified that Ramallane and 'Masariki had only one child, that is, Sariki, the defendant's mother. He denied that, as the defendant had pleaded Ramallane and 'Masariki had another child, a son called Simon. He maintained that the only male issue was Pule in the second house.

Liau testified that the defendant had been born out of wedlock, but that her father Leseme had subsequently married Sariki. In particular, he testified that the alleged donation or allocation by 'Masariki to the defendant "was not admitted",

as any such donation was never agreed by the family or given any publicity. In cross - examination he conceded that the defendant had a brother also named Leseme, but maintained that as her father's name was Leseme Nkome, similarly her brother must be named Leseme Nkome. He denied that the defendant's brother was named Leseme Khechane. He conceded that the defendant, unlike plaintiff, had been born at and had lived all her life at the site in question, and that she had nursed the aged 'Masiriki, as old then as the defendant, is now. That was the position when he as a young man departed for the mines, 'Masariki subsequently dying during his absence.

It was put to Liau that 'Masariki had acquired the site in her own right, while Ramallane was absent on the mines. His only reply was that Ramallane "wasn't in mines. He was in Orange Free State". It was his evidence, in any event that Pule had contested the defendant's claim to the site, but he "became sick and died", he said Moahloli in turn had merely left the defendant to "guard" the site, as he stayed in the Republic of South Africa in East London with his family, including the plaintiff.

In this respect he conceded that he had attended a family meeting in 1982, concerning the alleged donation, but claimed that the meeting had failed due to non-attendance of the principal parties. An agreed document was placed before the court, recording a family meeting at Mafeteng on 3rd April, 1982, attended by Liau Khechane, and also Mojalefa Khechane, Monyane

Khechane, Khechane Khechane and the defendant. The document is signed by the latter four persons but not by Liau. The document indicates that the plaintiff "did not care to be present at the meeting, even though he was still around."

Liau is recorded on the document as having said that "I know the site in dispute to be Pule Khechane's according to his statement." Monyane is recorded as having said however that Ramallane had lived and died at "Jarefanteng" (sic), and that the site belonged to 'Masariki and that Pule "when he arrived from Jarefanteng where he has a site" had initially lived with 'Masariki, who eventually, on his marriage, allowed him "to live at the site in dispute, but the site being 'Masariki's, that is, without she allocating the site to him. She even lent him a field. He lived there until his death."

Khechane Khachane is recorded as having confirmed what Monyane had said, adding that Moahloli had lived and died in East London where Mohapi also lived. The deft is then recorded as having stated inter alia that the site at which she lived was donated to her by 'Masariki. I shall return to the defendant's statement. Suffice it for the moment to say that it is then recorded that Liau was asked "if he disputed what had been said according to his statement." He was, however, "unable to dispute or erase the matter." The record then read:

"For these reasons the Khechane family sitting on a date mentioned made a decision that the site in dispute by the ones mentioned above, belongs to 'Motseng Masualle only, and Mohapi Khechane should remove his hands from there."

The record of the meeting of course is hearsay as to what Liau Monyane and Khechane said. I do not see that any question of a declaration as to pedigue arises at the contents concern devolution and not pedigue and there is no clear evidence that Monyane Khechane is deceased. Liau Khechane and apparently Khechane Khechane being very much alive. Liau concedes however that he attended a meeting also attended by Monyane and Khechane (but not Mojalefa). The document is at least a record of the decision of the family in the matter, a decision which in view of the fact that Liau did not sign, or was not asked to sign thereon, did not find Liau's approval.

To return to the aspect of pedigue, it is Liau;s evidence, therefore, that the family tree of the first house schematically looks like this:

FIRST HOUSE

(Ramallane) ('Masariki)

(Seriki) (Leseme Nkome)

Motseng Leseme Nkome

The deft gave evidence and called a witness. It proves convenient, for ease of comparison, to first set out schematically her version of the family tree of the first house:

FIRST HOUSE

(Ramallane) ('Masariki)

Sariki (Simon) (Maleseme)

'Motseng Leseme Motlatsi Tsepo

The defendant, aged 91 years, testified that, contrary to the plaitiff's evidence, Ramallane had not lived with his second wife Mapule another house on Site 260A, but had lived with Mapule at her home in Jaggersfontein in the Republic of South Africa and further that Mapule had never visited Lesotho. Indeed she testified that she (the defendant) had never met Ramallane, and that he had neglected 'Masariki, particularly in her old age, staying with Mapule in Jaggersfontein. Both Ramallane and Mapule preduceased 'Masariki, the latter serviving, apparently to a very old age, until 1932.

The defendant testified that Ramallane and 'Masariki had not one, but two children, namely Sariki and Simon, the latter being the younger. Sariki was not her mother, but her aunt. Her

father was not Leseme Nkome, but Simon Khechane, who married Meleseme. Simon and Maleseme had four children, namely Motseng, the defendant, who was the eldest child, followed by three sons Leseme, Motlatsi and Tsepo.

As to the site in question the defendant testified that she remained unmarried so as to care for the ageing 'Masariki. She was very fond of the old lady "and she of me", she said. In recognition of her care of 'Masariki, who had acquired Site 260A by custom in the absence of Ramallane in the Republic, 'Masariki donated the said site to her. Before her death the old lady "called the Reserve Chief and said she was about to die and wanted to give me something." The Chief did not come to 'Masariki, but sent three Messengers, namely Ramarou, Jonas Pitsa and Michael Lichaba. Two members of the Khechane family, namely Mpoko Khechane and Pule, were also in attendance. The disputed site had four houses thereon. In the presence of the defendant and the five witnesses, 'Masariki donated the site with the four houses to the defendant as a gift.

The defendant testified that subsequently she married and went to the matrimonial home for one month (Liau had said fourteen months). Before departure, she had refused to give the keys to Pule. On her return she found no one on the site. Pule had nonetheless disputed the defendant's claim to the site, but had subsequently abandoned his claim because "he was one of the witnesses", she said. She denied that Pule, who was then adult and married, had abandoned his claim because of ill health,

testifying that he lived for many years thereafter, before he ultimately became ill and died in the 1950s, aged at least 60 years. For that matter, even though her brother Leseme was the second male issue in the first house, and was therefore the heir (his father Simon having predeceased 'Masariki), he did not contest his sister's claim : neither for that matter did her brothers Motlatsi and Tsepo.

The defendant testified that Moahloli, Pulé's son, who had moved to East London, where he married and where Mohapi was born, had sought possession of the keys of the site when she had married, but she had declined to hand them over. It seems therefore that after 'Masariki's death in 1932, no claim in respect of the site was instituted in the courts until the present proceedings, that is, a lapse of time extending over some 58 years.

The defendant's witness was her nephew, Lebusa Khechane, aged 42 years. He testified that he was the son of Tsepo, who was the defendant's youngest blood brother and that his father's blood brothers were Leseme and Motlatsi. Both Leseme and Tsepo had passed away. He had not met his grandfather, as he had passed away before he was born, but his father had told him that his name was Simon. He had been reared at Matelile, some 46 kilometres from Site 260A. Subsequently he lived at Leribe, where he had acquired a site, being a Sergeant in the Army.

It was put to him that he knew little of site 260A but he claimed that "I knew the place well as my grandfather and grandmother were there and when the schools were closed I used to pay them a visit". It may be that the word "them" was there used to describe the witness' relatives in general but that strains the meaning of the word in the context used. On the face of it, the witness contradicted himself, in that earlier he testified that his grandfather had died before he was born, as it will be remembered that the defendant had testified that Simon had predeceased his aged mother 'Masariki, that is, before 1932. It may be that the witness referred only to visiting his grandmother, but the point is that he never mentioned, and was never asked, the name of his grandmother. The particular evidence cannot be completely true, that is, as to visiting the witness' grandfather. The question is, was he telling the truth when he spoke of the relationships within his family tree? He was briefly cross - examined on such relationships, and I have to say that the witness was adamant as to the truth of his evidence.

On the issue of credibility, the defendant was cross - examined on the contents of the record of the family meeting held in 1982. In it she is recorded as having commenced her address to the meeting with the following sentence:

"'M'e 'M'asariki had only one child and that is me".

Mr Mda submits that that sentence shatters the defendant's credibility. The defendant denied ever having uttered the statement, but then at the age of 91, I hardly think she could remember something uttered in 1982. Taken at its face value, the statement does not make sense, as 'Masariki, it seems, was some 50 to 60 years older than the defandant and could hardly therefore be the defandant's mother. If by the word 'child' the defendant meant "child and grandchild", then the statement would not coincide with her evidence. The statement, however, has to be read in context. Subsequently the defendant stated at the meeting.

> "None of 'Masariki's children know as to where her grave is or as to how she was buried."

That sentence indicates that 'Masariki had more than one child. It was the defendant's evidence however that 'Masariki's second child Simon had predeceased 'Masariki, so that it seems only Sariki had survived her, if at all. The word 'children' there used can only have been used therefore to cover children, grandchildren and possibly great grandchildren. I see no reason why the word 'child' was not used in the same sense in the first statement above. That statement taken in context, and in the context of the defendants evidence, can only mean that having for many years without aid from others, at great sacrifice, (to the extent of postponing her (the defendant's) marriage by some ten

years or more), cared for 'Masariki, neglected by her husband, the defendant considered herself to be the only caring and dutiful child (or grandchild or great-grandchild) that 'Masariki had, and that the other 'children' were so uncaring that they had not attended 'Masariki's funeral. That, I believe, is the only reasonable construction which can be placed upon the defendant's first statement above. In brief I am not satisfied that her credibility has suffered thereby.

The defendant is in possession of a certificate of litle to the site in question. Attached thereto is a certificate of the allocation of the site by the Principal Chief on 25th January, 1968. The allocation is expressed to have been effected under "sections 88 and 93 of the Basutoland (Constitution) Order in Council 1965". It seems that reference was intended to sections 88 and 93 of the Constitution of Basutoland (1965) scheduled to the Basutoland Order 1965. In any event, the latter Order was revoked by the Lesotho Independence Order, 1966 so that the form of allocation used by the Principal Chief was out of date. Nonetheless the provisions of the relevant 1965 sections were repeated in secitons 93 and 98 of the Constitution of Lesotho (1966), the salient point being that under the latter section the Principal Chief was obliged in making the allocation (in an urban area) to consult the local government authority concerned. Nonetheless, as Mr Mda submits the certificate of allocation is not conclusive proof of the defendant's claim to the site. Neither for that matter is the certificate of title, though as

the learned authors of Silberberg and Schoeman's The Law of Property 3 Ed (1992) observe at p107 it is "strong" evidence of title.

As to the donation or allocation in question, the maxim donatio non praesumitur applies. The defendant testified that the donation was recorded or rather that

> "There was something that was written down. She ('Masariki) wrote down that that house was a gift. From there she wrote that my brother (presumably Leseme) shouldn't fight against me about that site because it was my gift. I was given the whole site together with four houses."

The further particulars of her plea supplied by the defendant indicates that the document "evidencing this donation has subsequently got lost and has not been traceable despite all diligent searches". The donation or allocation was a remuneratory one and may also be said to have been effected mortis causa, so that to some extent the defendant's evidence is fortified thereby. Liau Khechane conceded that a donation may take place under customary law and indeed that it need not be in writing, and there is the defendant's evidence of publicity before five witnesses, including three representatives of the Principal Chief and two of the family, including the first male issue of the second house.

Mr Mda submits that even accepting the defendant's evidence, that is, that 'Masariki acquired the site in her own right, the site would nonetheless form part of the matrimonial estate: thus 'Masariki, as a widow, would under section 14 (2) of the Laws of Lerotholi only have the use of Site 260A and could not therefore donate or allocate the site. I observe that section 14 (2) speaks of "property allocated to her (the widows) house." I doubt if it could be said that Site 260A was allocated to the first house in the present case. Furthermore, section 14 (2) contains a proviso to the effect that "no widow may dispose of any of the property (so allocated to her house) without the prior consent of her guardian", which indicates that allocation or donation by the widow is permissible in such circumstances. In this respect the evidence of the defendant indicates that, inasmuch as her eldest brother Leseme, then adult and married and hence the heir and guardian of 'Masariki, had not contested the donation or allocation, he had consented thereto. Again, Mr Mda refers to work by Professor Poulter at pp311/312, whenin the requirements of an allocation are contained. If the evidence of the defendant is to be accepted in this case, I however consider that such requirements were met.

But as I see it, all of that concerns the validity of the defendant's title. That aspect is, however secondary. What is of primary importance is the validity of the plaintiff's claim. He cannot succeed in this case unless he can prove, and the onus is clearly upon him that his claim is superior, and that he is

the heir to the estate of Ramallane. As Mr Peete succinctly put it, "the only way Mohapi can get at the site is to remove Simon from the scene." If it is the case that the plaintiff is not the heir to the estate, then thereafter it falls to the true heir, if he so wishes, to challenge the title of the defendant.

The matter then turns solely on the issue of pedigue, which ultimately gives rise to an issue of credibility. The evidence of the plaintiff and that of Lebusa Khechane is largely hearsay, but is nonetheless admissible as to general reputation, or as to any oral declaration by a deceased relative solely as to pedigree and not the devolution of the site. Ultimately the case turns on the direct evidence of Liau Khechane and the defendant. I have to say that, if anything, considering the age of both witnesses, the defendant fared better under cross - examination. The defendant is ten years older than Liau and has lived all her life on the site, Liau having lived elsewhere and spent some time on the mines, so that her recollection of matters is probably more extensive.

As to the plaintiff's declaration, and indeed Liau's evidence, the plaintiff pleaded that the defendant was the illegitimate daughter of Sariki. When questioned by the Court in the matter, Liau agreed that as in his evidence, Leseme subsequently married Sariki, the defendant was therefore legitimate. To have alleged illegitimacy therefore was, as Mr Peete submits, malicious, and I have little doubt that it was

done in order to thereby hopefully, impugn the defendant's title. I have to say that, in any event, Liau being ten years younger than the defendant, Liau's evidence as to illegitimacy was completely hearsay.

Then there is the inordinate delay in bringing these proceedings. By all accounts, Pule did initially contest the defendant's title, but, his residence at the site not being contested, it seems that his claim was based on such residence: if it was the case that he was the heir to Ramallane's estate then it is likely he would have contested the donation or allocation on the basis that the site, as Mr Mda submitted, fell within the matrimonial estate and the donation or allocation had been effected without his consent. As it was, I was satisfied that, on the defendants evidence, which was not shaken, that he lived until the 1950s without approaching the courts in the matter. There is then a further delay of over thirty years and a total delay of almost sixty years in bringing these proceedings. To consider only the aspect of registration of title, there is a delay of twenty-one years in seeking to impugn the defendant's title. Such delay possibly gives rise to the inference that it was considered that delay might best serve the plaintiff's interests. There is no doubt that, at the age of 91 years, the defendant's memory must be dulled, but as she herself emphatically exclaimed, "Even if you are old you cannot forget the person from whom you are born."

Another aspect which puts me on inquiry, is the insufficiency of information contained in the plaintiff's declaration. The operative part thereof reads as follows:

"4.

4.1 Plaintiff is the great grand-son of the late Ramallane Khechane and his late wife Masariki Khechane who was the owner of rights petaining to a certain developed site, described as Site No.260 Mafeteng Reserve in the district of Mafeteng.

4.2 Plaintiff is a successor in title to the estate of the said Ramallane Khechane according to Basotho Law and Custom in that:

4.2.1 Ramallane Khechane first male issue was the late Pule Khechane whose wife was the late Dora Khechane; the latter's first male issue was the late Moahloli Khechane who got married to the late Elizabeth Khechane and their first male issue is Plaintiff.

5. Defendant is the grand daughter of the late Ramallane Khechane in that she is an illegitimate daughter of the late Sariki Leseme (born Khechane) who was the daughter of Ramallane Khechane."

There is no mention there of any first house or second house or indeed of a first wife or second wife. The reference in paragraph 4.2.1 to "Dora Khechane" (Mapule Khechane was also known as "Dora") can only be, in to context, a reference to *Pule's* wife Dora, Moahloli's wife's name (Elizabeth) being similarly stated. In brief, the plaintiff was apparently unaware of his own pedigree and in particular the identity of his own great grandmother. The defendant's plea served to enlighten him. It read in part:

"2. AD PARAGRAPH 4

The Defendant denies the allegations in this paragraph and alleges that though the Plaintiff is the great grand-son of the late RAMALLANE KHECHANE, the Plaintiff's grand-mother is DORA KHECHANE, the second wife of Ramallane and he is not the successor in title to the estate of Ramallane. The first male issue of Ramallane was SIMON KHECHANE, PULE KHECHANE being the sone of DORA and his son was MOAHLOLI KHECHANE the father of the Plaintiff.

3. AD PARAGRAPH 5

The Defendant admits that she is the grand daughter of the late Ramallane Khechane but denies she is illegitimate, her father being Simon Khechane, Sariki being her aunt, who was married to one 'Miff but they later separated and she came back into her maiden household of Khechane."

In view of the use of the words "great grand-son" in paragraph 2 above, I consider it was intended to refer to Dora (Mapule) Khechane as the plaintiff's great grandmohter, that is, "the second wife of Ramallane." The plaintiff thereafter sought and was given further particulars. He sought particulars as to Simon Khechane, namely the house in which he was born, his male issue if any the latter's name and that of his wife and children if any, the name of the defendant's mother, and details of the donation of the defendant. Under rule 25 (1) of the High Court Rules the purpose of further particulars is stated to be that of enabling a party to plead to any pleading delivered to him, and specifically in the case of a defendant's plea, to enable a plaintiff to replicate thereto. Under rule 24 (3) the non-delivery of a replication does not amount to an admission of the allegations in a plea. Nonetheless, in view of the further particulars, supplied in detail by the defendant, one would have expected, as Mr Peete submits, that the plaintiff would have replicated thereto.

In particular I observe that one of the further particulars sought by the defendant was, "Who was Ramallane's first wife?" The defendant had stated the identity of the second wife. The plaintiff had himself referred in his declaration to 'Masariki and one is left with the impression, when one considers the declaration, that the plaintiff was not so much seeking to establish the defendant's position as to pleadings, but to ascertain for himself where 'Masariki fitted into the scheme of things. That then can hardly engender any confidence in his or

his witness' denial of the existence of Simon Khechane.

More importantly, as I have said, Liau insisted that Sariki's husband was named Leseme Nkome and that, if the defendant had a brother also named Leseme, his name must then be Leseme Nkome. In this respect the evidence of Lebusa Khechane corroborates that of the defendant. It is corroborative of course as to the existence of Simon, as he learnt of that from his deceased father: so also is the plaintiff's evidence corroborative of Liau's evidence, inasmuch as his deceased father informed him that the defendant was the daughter of Sariki. The

importance of Lebusa Khechane's evidence, however, is that he testified that he has a father and two uncles, Tsepo, Leseme and Motlatsi, presumably all named, as he is, Khechane. The defendant supplied further particulars even as to Leseme's wife and children namely 'Mathabo Khechane (wife), and children Simon (junior) Khechane, Khechane Khechane (possibly the 'Secretary' to the meeting held in 1982) and Thuso Khechane. No replication was had to the defendant's plea. As I have said. More importantly still, Liau never explained how it was that if the defendant's father was named Nkome, she herself bore the maiden name Khechane, a fact which is evident from the record of the 1982 meeting where her name is stated to be " 'Motseng Masualle (born Khechane)" and which indeed she signed " 'Motseng Khechane."

Suffice it to say therefore that I prefer the evidence of and for the defendant to that of and for the plaintiff. I am satisfied therefore that the defendant is the daughter of Simon Khechane and that Simon, as the first male issue in the first house, was Ramallanes heir. Consequently the present heir is to be found among Simon's descendants in Ramallane's first house. The plaintiff cannot be the heir to the estate and cannot prove any better title than that of the defendant. The plaintiff's claim is therefore dismissed with costs to the defendant.

Dated this 15th Day of June, 1995.

B.P. CULLINAN

(B.P. CULLINAN)

CHIEF JUSTICE