

IN THE HIGH COURT OF LESOTHO

**In the matter between:**

RETS'ELISITSOE KHOMO MOKHUTLE N.O.

PLAINTIFF

and

M.J.M. (PTY) LIMITED

THE COMMISSIONER OF LANDS AND SURVEY

REGISTRAR OF DEEDS

THE ATTORNEY GENERAL

MAMALIA JOYCE TSEPPE

1<sup>ST</sup> DEFENDANT

2<sup>ND</sup> DEFENDANT

3<sup>RD</sup> DEFENDANT

4<sup>TH</sup> DEFENDANT

5<sup>TH</sup> DEFENDANT

JUDGMENT

**Delivered by the Honourable Chief Justice Mr. Justice**

**J.L. Kheola on the 2nd day of February, 2000.**

This is an exception by the first and fifth defendants in terms of Rule 29 of the High Court Rules 1980 to the summons of the plaintiff. The exception is based on the following grounds:

“1.1 No basis in law or in fact is advanced for the claim that annexure “D”

was “granted and issued upon and after false and/or incorrect ‘facts’

and/or documents were submitted to second and/or third defendants by the late 'Mamileng Mosethi Ana Mokhutli...'

- 1.2 The allegation that the "... exact nature of the said false and/or incorrect 'facts' and/or documents.... are not known to plaintiff" clearly establishes the absence of any cause of action on the part of the plaintiff.
- 1.3 No basis in law or in fact has been advanced in support of the allegations in paragraphs 12.3 and 12.4.
2. There is no basis in law or in fact for the allegation in paragraph 13 that 'Mamileng Mosethi Anna Mokhutli could not have passed or transferred any rights to the property simply because no executor has allegedly been appointed to administer her estate.
3. There is no basis in law or in fact advanced in support of the allegation in paragraph 14.3 that there were no grounds or iusta cause for and in favour of Mantebaleng Adelinah Mokhutle to obtain any rights to the property in dispute and that 3<sup>rd</sup> defendant could not, in

consequences, register a lease in her favour.

4. There is no basis in law or in fact advanced in support of the allegation in paragraphs 14.4 and 14.5 that because no executor has allegedly been appointed to administer her estate the late Mantebaleng Adelinah Mokhutle could not have passed or transferred any rights to the property in dispute and that the lease of the same to 1<sup>st</sup> defendant is unlawful or flawed.

In his particulars of claim the plaintiff states that he is a citizen of Lesotho. His father is the late Frank Moeti Mokhutle who died on the 18<sup>th</sup> January, 1969. On the 19<sup>th</sup> June 1968, the third defendant duly registered a binding and proper certificate of title to occupy and certificate of registered title to immovable property with reference number 5601 A to and in favour of Frank Moeti Mokhutle (the deceased) in respect of certain immovable properties situated and known and described as site numbers 36 and 37 Cathedral (Pitso Area) Maseru.

It is common cause that on the 1<sup>st</sup> July, 1998 the plaintiff was appointed executor of the deceased estate of the late Frank Moeti Mokhutle. The plaintiff has stated that before his appointment as executor of his late father's estate no

other executor was ever appointed. He alleges that as the eldest son of the late Frank Moeti Mokhutle he is the heir. He sues in his capacity as the executor and heir of the property in question. He alleges that because no executor was ever appointed before his own appointment as such, the distribution of the deceased estate could never have been done properly.

It is common cause that on the 22<sup>nd</sup> May, 1984 the second defendant issued a lease in terms of the Land Act of 1979, in respect of the same property in favour of a certain 'Mamileng Mosethi Anna Mokhutle. The lease was registered by third respondent as lease NO. 13283-232. Plaintiff alleges that as far as he can ascertain no executor has been appointed to wind up the deceased estate of 'Mamileng Mosethi Anna Mokhutle who died a few years ago.

The plaintiff alleges that the said certificate of lease was granted and issued upon and after false and/or incorrect facts and/or documents were submitted to second and/or third defendants by the late 'Mamileng Mosethi Anna Mokhutle in order to move and convince second and/or third defendants to issue and register the said lease agreement in respect of the said property to the said 'Mamileng Mosethi Anna Mokhutle.

The plaintiff alleges that the exact nature of the said false and/or incorrect facts and/or documents which were submitted to second and/or third defendants in order to convince them to grant the said rights and register the said lease are not at this time known to plaintiff. There were consequently no grounds or **iusta causa** for and in favour of the late 'Mamileng Mosethi Anna Mokhutle to obtain any rights to the relevant property and the only lawful rights to the property vest in the estate of the deceased's estate and now, in the plaintiff in his capacity as executor of the deceased's estate.

On the 27<sup>th</sup> September, 1996 and after the death of 'Mamileng Mosethi Anna Mokhutle a certain 'Mantebaleng Adelinah Mokhutle entered into a written agreement of sublease with the first defendant in the present case in respect of the relevant property. Second defendant consented to the above sublease on the 20<sup>th</sup> March, 1997 whilst third defendant registered the sublease agreement on the 2<sup>nd</sup> June, 1997 under registration No.25354.

In **Inkin v. Borehole Drillers**, 1949 (2) S.A. 366 (A) 374 it was held that

"It is the duty of the Court, when an exception is taken to a pleading, first to see if there is a point of law to be decided, which will dispose of the case in whole or in part. If there is not, then it must see if there

is an embarrassment, which is real and such as cannot be met by the asking of particulars, as the result of the faults in pleading to which exception is taken. And, unless the excipient can satisfy the Court that there is such a point of law or such embarrassment, then the exception must be dismissed.”

**Mr. Wessels** submitted that the plaintiff has primarily sued in his capacity as executor in the deceased estate of his late father. It is his duty to take custody of the property of the deceased in respect whereof he has been appointed and “the executor has the same and no greater right to repossession than the deceased himself had”. D. Meyerowitz: *The Law and Practice of Administration of Estate*, 5<sup>th</sup> Edit., p. 108.

He submitted that the plaintiff also has an interest and vested right in the relevant property.

“The position under our modern system of administering deceased estates is that when a testator bequeaths property to a legatee, the latter does not acquire the dominium in the property immediately on the death of the testator, but what he does acquire is a vested right to

claim from the testator's executors' at some future date, delivery of the legacy, i.e. after confirmation of the liquidation and distribution account in the estate of the testator. If, for instance, immovable property is bequeathed to a legatee, he acquires a vested right at the death of the testator but he does not acquire the dominium in that property until it is transferred to him by the executor." See **Greenberg and Others v. Estate Greenberg**, 1955 (3) S.A. 361 A.D. at 364 G.

In **Ankin v. Borehole Drillers** - supra - it was held that "it is the duty of the Court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part." It is now pertinent to consider whether in the present case there is such a point of law.

Section 35 (3) of The Land Act 1979 provides that -

In the event a lessee dying intestate -

- (b) where the lessee qualifies thereunder the disposition of his estate shall be governed by the written law relating to succession; or
- (c) where the lessee does not qualify under paragraph (a), section 8(2) and (3) shall apply as if he were an allottee and the Commissioner

shall thereupon request the Registrar of Deeds to endorse any registered lease or other registered document of title accordingly.”

Section 8 (2) reads as follows:

“(2) Notwithstanding subsection (1), where an allottee of land dies, the interest of that allotted passes to,

- (a) where there is a widow - the widow is given the same rights in relation to the land as her deceased husband but in the case of re-marriage the land shall not form part of any community property and, where a widow re-marries, on the widow’s death, title shall pass to the person referred to in paragraph (c);
- (b) where there is no widow - a person designated by the deceased allottee;
- (c) where paragraphs (a) and (b) do not apply - a person nominated as the heir of the deceased allottee by the surviving members of the deceased allottee’s family;”.



**Mr. Wessels** submitted that the plaintiff's claim is simple. He alleges that, since the deceased became the registered owner of the immovable property, had been such at the time of his death and since no executor had been appointed for his estate, the rights which he had obtained and possessed at the time of his death, could not, lawfully, have been passed to the relevant persons, in particular, 'Mamileng Mosethi Anna Mokhutle; therefore and since the later deed was issued, the later deed must have been obtained, granted and issued upon and after false and/or incorrect facts and/or documents were submitted to second and/or third defendants.

**Mr. Wessels** seems to be under the impression that unless an executor is appointed immovable property/land which forms part of a deceased estate, cannot be distributed or transferred. This perception is not in accordance with the law. Section 35 (3) of The Land Act 1979 makes it clear that if the lessee qualifies the disposition of his estate shall be governed by the written law relating to succession. The law of succession appears in Section 8 (2) of The Land Act as stated above. Under Section 8 (2) (a) when the allottee dies the interest in the land passes to the widow. In the present case we know that the mother of the plaintiff was divorced before the deceased died. For that reason there was no widow when the deceased died. Under Section 8 (2) (b) it is provided that where there is no

widow the land shall pass to a person designated by the deceased allottee.

The plaintiff has not made any proper inquiries at the Law Office to find out under what circumstances the title to the property in question was transferred to 'Mamileng Mosethe Anna Mokhutle. Was 'Mamileng not designated by the late father of the plaintiff? Such information is readily available at the Law Office (Deeds Registry Section). Section 8 (2) (c) provides that where 8 (2)(a) and 8(2)(b) do not apply the property shall be transferred to a person nominated as heir of the deceased allottee by the surviving members of the deceased allottee's family. There is no indication whatsoever that the plaintiff was so nominated.

It seems to me that after the death of his father the plaintiff disinherited himself or failed to claim his right for about thirty years. In 1992 the Land Act 1979 was amended by Order No. 6 of 92 which provides that where there is a widow the rights of the deceased allottee pass to her, where there is no widow the rights pass to a person designated by the deceased allottee. Where there is neither a widow nor a person designated by the allottee the rights pass to a person nominated as the heir by the surviving members of the deceased allottee's family. It is most probable that 'Mamileng Mosethi Anna Mokhutle was so nominated.

The first ground for the exception is that

“no basis in law or in fact is advanced for the claim that Annexure “D” was granted and issued upon and after false and/or incorrect facts and/or documents were submitted to second and/or third defendants by the late ‘Mamileng Mosethi Anna Mokhutli.’”

I have already stated above that the availability of documents supporting the issue or granting of Annexure “D” is not a problem because they are kept by the Law Office. The plaintiff would have no difficulty to obtain them. He would not be speculating that false or incorrect documents were submitted to second and/or third defendants by ‘Mamileng before Annexure “D” was issued. The question is whether without the production of such documents it can be said that the plaintiff’s particulars of claim disclose a cause of action. The answer is obviously in the negative. These documents form the very basis of the plaintiff’s case and without them it cannot be said that his particulars of claim disclose a cause of action. He actually confesses that the exact nature of the said false and/or incorrect facts and/or documents are not known to plaintiff. I agree that this clearly establishes the absence of any cause of action on the part of the plaintiff.

There is something in this action which needs an explanation but the

plaintiff has decided not to give such an explanation. His father died on the 18<sup>th</sup> January, 1968. The plaintiff did not do anything to claim his title to the property for more than thirty years until the 1<sup>st</sup> of July, 1998 when he was appointed the executor and authorised to administer the estate of his late father. (See Annexure "A"). I find it very strange that for thirty years after the death of his father the plaintiff just lay low and did nothing to have himself appointed as the executor of the deceased estate. In the mean time on the 22<sup>nd</sup> May, 1984 'Mamileng Mosethi Anna Mokhutle was granted a lease over the same property now in dispute. The lease was granted in terms of section 29 of The Land Act 1979. The lease was registered under No. 13283-232 in the Deeds Registry under the Deeds Registry Act 1967. Section 29 reads as follows:

"29. (1) Whenever a person to whom section 28(1) or (3) applies is desirous of granting or creating any interest in the land held by him or whenever section 30 or 31 applies to that person, he shall apply to the Commissioner for the issue of a lease and shall produce with his application: -

- (a) evidence that he is qualified to hold land under section 6;

- (b) a description of the boundaries of the land in question (by reference to a plan or otherwise); and
- (c) any one of the following documents: -
  - (i) a registered certificate of title issued by the Registrar of Deeds under the Deeds Registry Act 1967;
  - (ii) a registered deed of transfer or a certified copy thereof if the registered deed is lost;
  - (iv) an affidavit by the Chief or other proper authority that the applicant lawfully uses or occupies the land;
  - (v) an affidavit by three persons resident for over 30 years in the locality in which the land is situated to the effect that it is to their personal knowledge

that the applicant and his predecessors have been occupying and using the land for a period of at least 30 years.

- (va) a certificate of verification of title issued by the Commissioner or an Allocating Authority in the form "CC2" as prescribed in the Third Schedule."
- (vi) any other official document evidencing that the applicant is in lawful occupation of the land.

- (2) Where, upon examination of the documents produced under subsection (1), the Commissioner is satisfied of the bona fides of the applicant, he shall so inform the Minister and, shall cause a lease to be prepared for issue to the applicant."

It seems to me that the Commissioner of Lands was satisfied of the **bona fides** of 'Mamileng Mosehe Anna Mokhutle that she was entitled to the grant of a lease for the property in question. She must have produced some of the documents prescribed in section 29. If she had failed to produce the necessary

documents no lease would have been issued. The plaintiff in the present case has made no attempt to obtain those documents from the Deeds Registry but merely speculates that those documents must be false. That speculation does not disclose any cause of action.

The second ground in support of the exception is that there is no basis in law or in fact for the allegation in paragraph 13 that 'Mamileng Mosethe Anna Mokhutli could not have passed or transferred any rights to the property simply because no executor has allegedly been appointed to administer her rights. Earlier in this judgment I pointed out that in terms of section 8 (3), 28, 29 and 35 of The Land Act 1979 there is no need for an appointment of an executor when land has to be transferred to a person who has to inherit the estate of a deceased person. In other words there was no need in law that an executor ought to have been appointed when 'Mamileng Mosethe Anna Mokhutli died. After her death the property was passed or transferred to one Adelina 'Mantebaleng Mokhutle who entered into a sublease agreement with the first defendant. In that sublease agreement it is alleged that she holds title to the property.

The plaintiff confesses that he could not establish whether third defendant registered a deed of lease in respect of the property in favour of 'Mantebaleng

Adelinah Mokhutle, but in the event this being so, it is alleged that, having regard to the allegations set out above, third defendant could not have registered such a lease as there were no grounds or **iusta causa** for and in favour of 'Mantebaleng Adelinah Mokhutle to obtain any rights to the relevant property. This is again mere speculation because in the sublease it is stated that 'Mantebaleng Adelinah Mokhutle held title to the property. Although it is not stated what kind of title she held it can be reasonably assumed that it must have been a lease in terms of section 28(1) of The Land Act 1979.

For the reasons stated above the exception is upheld. The action is dismissed with costs.

**J.L. KHEOLA**  
**CHIEF JUSTICE**

**7th February, 2000.**

For Applicant - Mr Sello  
For Respondent - Mr Wessels