IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 47/14
LC/T/09/2013

In the matter between:-

'MABASIA NKHOLI	**1ST APPELLANT**
'MATLOTLISO MPHANYA	**2ND APPELLANT**
PHILLIP POOPA	**3RD APPELLANT**

and

MOKOMANE THABO BONIFACE NKHOLI	**RESPONDENT**

CORAM: MAHASE, JA
CHINHENGO, AJA
DAMASEB, AJA

HEARD: 23 July 2015
DELIVERED: 7 August 2015

SUMMARY

Land Court – Sale of site – Whether same is in compliance with the Land Act. – Alleged instructions of the deceased for sale of his site – Whether or not such were lawful – Rights of a customary heir after death of his father the deceased herein – Legality of such sale being challenged by the third respondent (the customary heir) – Respondent seeking a declaratory order that he is the customary heir to his late father's estate.

JUDGMENT

MAHASE, JA

[1] The respondent filed an application in the Land Court on the January 2014 against the three appellants, in which he is praying for the granting of an order against them in the following terms:

(a) "An order declaring applicant the lawful and rightful successor to plot No. 23131 – 224 Maputsoe urban area by virtue of his being the customary heir to Manuel Nkholi.

(b) That first and second respondents be ordered to cause the release or surrender of the original lease document in respect of the above – shown plot to the applicant by the third respondent.

(c) That the third respondent be ordered to surrender or release the original lease document in respect of the above-shown plot to the applicant.

(d) That the third respondent be restrained and interdicted from in any manner whatsoever dealing with the said plot.

(e) That the respondents be ordered to pay costs hereof.

(f) That applicant be granted such further and or alternative relief as the court may deem fit".

[2] The respondent, who is the first born son of the deceased Manuel Nkholi, had been staying in the Republic of South Africa for over ten years and would never come home to Lesotho.

[3] In his absence, his elderly sick father was being taken care of by the first and second appellants. His father passed on in the year 2006.

[4] During his lifetime, the deceased was the lawful title holder of a commercial site described as plot no. 23131 – 224 situate at the Maputsoe urban area; he held that site by virtue of a lease bearing these numbers which had been issued in the year 2002; exhibit "D.

[5] The deceased had or was a holder of title to some other plots in that Maputsoe urban area. Those are, however, not subject-matters in this appeal.

[6] After his death, and in the absence of the respondent, the first and second appellants sold that site to the third appellant for one hundred thousand maloti (M100,000.00). According to the facts and evidence presented before the court a quo, that sale had been effected between the first appellant and the third appellant and was concluded with the concurrence of the second applicant. The translated version reads as follow:-

> **'**I Mabasiea Nkholi agreed with Mr. Philip Poopa of the account number 03200 161534, Sesame Trust (PTY) Ltd, for a site plot number 23131-224, which I sell to him at Maputsoe Urban Area at Ha-Mathata.
>
> The total price is One Hundred Thousand Maloti (M100,000.00). Mr. Phillip Poopa shall pay twenty thousand maloti every month until it is settled in full and final settlement.

I have received Twenty Thousand Maloti (20,000.00) with a cheque number 4254, on the 17 October, 2011 the remaining balance is Eighty Thousand Maloti (M80,000.00)'.

[7] Subsequent to the alleged sale agreement being concluded, the lease document was handed to the third appellant in whose possession it remains to date.

[8] I pause to observe that none of the procedural steps laid down in the Land Act, (No. 8 of 2010) and in the repealed Land Act (No. 17 of 1979) regarding the transfer of land have been complied with by the three appellants.

[9] The above are all matters of common cause. Also of common cause is the evidence that in fact the deceased had specifically requested the first and second appellants to assist him to get a buyer for the site so he can raise money for his sustenance and pay for his medical expenses and in the event he passed on, the funeral expenses also.

[10] Put differently, the sole purpose for which he wished to have that site sold during his lifetime was so that he could use the proceeds of sale from the site during his lifetime. However, the appellants only sold that site some five years after the death of the deceased.

[11] The first and second appellants who are closely related to the deceased and the respondent knew very well that the respondent was still alive although he was residing in the Republic of South Africa.

[12] The first and second appellants had not formally sought to have the third respondent declared dead because they knew that the respondent was still alive and living in the Republic of South Africa.

[13] It is also a matter of common cause that the first appellant had also been appointed as a caretaker of the deceased's said site by the Nkholi family precisely because they knew that the respondent was still alive and that he was the rightful

customary heir to his late father's estate. This evidence was not challenged in court hence the court granted the prayers in the notice of motion in favour of the respondent.

[14] The appellants have now noted an appeal to this court and are only challenging the findings of the court a quo in respect of the learned Judge reliance on the provisions of the repealed Land Act of 1979 when he declared the sale to be null and void for want of a ministerial consent before the sale agreement was concluded between the appellants and the third appellant. The grounds of appeal are set out in these terms:

> "a) The Learned Judge erred and misdirected himself by applying the repealed law herein i.e. The Land Act 1979.
>
> b) The Learned Judge also erred and misdirected himself in holding that, the transaction of sale of plot number 23131 – 224 is null and void in the absence of the ministerial consent.
>
> c) The Learned Judge erred and misdirected himself in ordering for the return of lease document from the third respondent (third

> Appellant) by the applicant (Respondent) yet the authority to sell the plot in question has been the clear instructions of his late father (Emmanuel Nkholi)".

[15] In fairness to the appellants, it was conceded on behalf of the respondent that indeed the entire reading of the judgment of the court a quo reveals that the learned Judge had in mind the provisions of the Land Act of 1979 when he wrote the judgment. It was submitted and argued on behalf of the respondent, and correctly so in my view, that notwithstanding, that fact does not alter or change anything as the law remains same even under the new Land Act of 2010. This brings me to deal with the applicable law and issues for determination in this appeal.

[16] **The Law and issues for determination:**

As a matter of common cause, the Land Act of 1979 was repealed by section 93 of the current Land Act of 2010. This explains why at the hearing of this appeal counsel for the

appellants ultimately abandoned the issue regarding the provisions of section 35(1) (b) (i) of the repealed law.

[17] In the Land Act of 2010, the relevant provisions relating to the requirement to obtain the consent of the Commissioner of Lands before disposal of any interest and title to land are found in section 35 (1) (b) (i). It provides as follows in so far as is relevant:

"*Rights of a Lessee:- A lessee shall be entitled:-*

(b) Subject to obtaining the consent of the Commissioner

(i) to dispose of his interest:

(iv) *to deal with his interest in such other manner as the law may permit"*.

Also refer to the provisions of section 35 (2) which illustrate the point clearly

(2) In the event of a lessee dying intestate –

(a) *"Where the lessee qualifies, the disposition of his interest in land shall be governed by the written law relating to succession".*

[18] In the instant case the alleged seller of the site in question have not invoked the provisions of the Land Act of 2010. The appellants have in fact usurped the powers and duties of the Commissioner of Lands as spelt out in sections 12(ii) and 36 of the Land Act 2010. They have also not complied with the Land Regulations No. 21 of 2011. Regulation 30 (1) of these regulations provides that:

> "The land which is subject of lease may be acquired by a transfer from one lessee to another person subject to the consent of the Commissioner or the relevant authority and the Deeds Registry Act of 1967".

Therefore where such a consent has not been obtained prior to the transfer, then the transfer cannot be lawful, because the transfer is conditional upon the consent of the Commissioner.

[19] There is no doubt in my mind that, nowhere in the Land Act 2010 and the Land Regulations (supra) has it been prescribed by the Legislature that land can and should be sold in the

manner in which the first and second appellants have allegedly sold the site in question to the third appellant.

[20] There are clear procedures prescribed indicating how land held under a lease should be disposed off; whether it's through a transfer or through surrender. Regulation 36 of the above-shown Land Regulations is relevant in this regard.

[21] In conclusion, it is patently clear that in disposing of the site of Manuel Nkholi, the appellants did not invoke or comply with any of the provisions of the Land Act and the Land Regulations. This, together with the fact of disposal by sale of this site contrary to the wishes or instructions of the deceased given before he passed on some five years ago, renders the alleged sale unlawful. The respondent is therefore perfectly justified to have challenged the sale as he did. For these reasons the alleged sale agreement of this site to the third appellant is declared null and void *ab initio*.

[22] It is my considered view that the consent of the minister about which the appellants complained has since been replaced by that of the Commissioner of Lands in the 2010 Land Act. Therefore the fact that the learned Judge *a quo* relied on the repealed provisions of the Land Act 1979, does not advance the appellants' case. The issue of the legality of this sale, whether examined under the repealed Act, or the current Act, can be answered in one way only; namely that the sale was and is, unlawful for want of the consent of the Commissioner of Lands.

[23] For the foregoing reasons the court a quo cannot be faulted for having ordered as it did in its judgment, now being appealed against.

[24] In the light of the above, this appeal has no merit and it ought to be dismissed.

[25] As a matter of principle an award of costs is a matter in the discretion of the Court. The general rule in our law is that

costs follows the event, which means that the successful party is entitled to an award of costs. Accordingly the appeal is dismissed with costs and the order of the court a quo is substitute with the following order.

1. The application is granted – as prayed in the Originating Application.

2. The respondents shall pay the applicant's costs jointly and severally, the one paying the other to be absolved.

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M. MAHASE
ACTING JUSTICE OF APPEAL

I agree: _____

M.H. CHINHENGO
ACTING JUSTICE OF APPEAL

I agree: _____

P.T. DAMASEB
ACTING JUSTICE OF APPEAL

For Appellant	**:**	Adv. K.E. Kao
For Respondent	**:**	Adv S.Ratau