IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 59/2015

In the matter between:

KEFUMANE TAKA	**APPELLANT**
AND	
NTHATI PHEKO (Executor of the Estate of Tsotang Rakepa	**1ST RESPONDENT**
THE REGISTAR OF DEEDS	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**3RD RESPONDENT**

CORAM: CLEAVER AJA
DR MUSONDA AJA
CHINHENGO AJA

HEARD: 21st APRIL, 2016
DELIVERED: 29th APRIL, 2016

Summary

Land law – meaning of locus standi – Failure by the purchaser of an interest in land to pay a full price – failure by the holder of Form 'C' to register the interest within three months in terms of section 15(2) and 15(4) of the Deeds and Registry Act 1967, renders the interest in land null and void – Land reverts to the Basuto Nation – Failure by the Land authorities to enforce section 15(4) and 15(5) despite being joined to the proceedings – It is not for the court to initiate compliance.

JUDGMENT

DR. MUSONDA AJA

[1] This is an appeal against a judgment of the High Court in favour of the respondent's prayer for ejectment. At the commencement of the appeal an application was made to substitute advocate Nthati Pheko as First Respondent. The original 1st Respondent has since passed on. Advocate Matooane for the appellant did not object to the application which was granted.

[2] The 1st Respondent was the only person who testified at the trial. His evidence was the following:

[3] He was allocated the commercial site in dispute on the 21st May 1977. In 1978 he commenced to develop and put up improvements on what he regarded as his site as he was in possession of Form 'C" evidencing his right to occupy and use the said commercial site.

[4] The evidence of the respondent in the court a quo was that he manufactured burglar bars at the site and installed those for customers. There was no evidence of blacksmith or operation of a grocery shop as the Court a quo found.

[5] In 2000 the Respondent and Appellant entered into a verbal agreement of sale of the said commercial site. The parties agreed that the site together with fixtures should be sold to the Appellant for four hundred and fifty thousand Maloti (M450,000). The amount was payable in two instalments, of which the first payment of one hundred and fifty Maloti (M150,000) was due immediately after the verbal agreement on 10th February, 2000.

[6] Prior to that date, the Respondent had enjoyed peaceful possession since 21st May, 1977. The Appellant was immediately given possession as per the agreement of sale. The second and final instalment was payable sometime in February, 2002.

[7] It was the tenor of the agreement that the Respondent would assist the appellant to obtain Form 'C" after payment of the second and final instalment.

[8] The Appellant refused to pay the second and final instalment, though in physical possession and occupation of the property.

[9] The Respondent frequently visited the Appellant to demand the balance of the purchase price. This annoyed the Appellant who became aggressive and threatened violence. When the appellant failed to pay the balance, the respondent cancelled the deed of sale and offered to refund the one hundred and fifty thousand Maloti (M150,000), which had been paid to him.

[10] Although the Appellant was in possession of Form 'C" and Agreement of the lease issued out to him by the

authorised Land Allocation Agencies; he was not able to use the form 'C' and the Lease Agreement to assert his rights in the court a quo. He had to rely on the Agreement of sale.

[11] The appellant did not testify in the Court a quo, but relied solely on his Special Plea, that of lack of *locus standi*, as respondent had no Title Deed or Lease document. In the alternative he pleaded that even if the respondent had a form 'C', it was not registered in terms of section 15 of the Deeds Registry Act.

[12] Relying solely on the evidence of the 1st Respondent the learned trial Judge, found it as a fact that the Appellant had a Form 'C' and a Lease Agreement issued by the Commissioner of Lands, which were fraudulently procured without the document being produced in Court.

[13] The Appellant, the learned trial Judge found, placed reliance on the failure of the Respondent to register the property in terms of Section 15(2) of the Deeds Registry Act[1].

[1] Deeds Registry Act, 1967

[14] The learned Judge referred to sections 15(4) of the Deeds Registry Act[2], which provides that, "the rights of occupation and use shall revert back to the Basotho Nation in default of registration".

[15] Notwithstanding the 1st Respondent's failure to register the property in terms of the Deeds Registry Act, the learned Judge concluded:

> *"From the date of allocation to him which is 21st May, 1977, the plaintiff enjoyed peaceful undisturbed occupation and use of this disputed site. Therefore in these circumstances the plaintiff's claim must succeed. The judgment is entered in favour of the plaintiff as prayed in the summons as amended."*

[16] Dissatisfied with the judgment, the appellant noted an appeal to this court. For the Appellant three grounds of appeal were canvassed, these were that:-

(a) The learned Judge in the court a quo erred and/or misdirected herself in failing to address the question of the Respondent's *locus standi,* having not registered his interest in land;

(b) The learned judge in the court a quo erred and/or misdirected herself in relying on the *locus*

[2] Ibid

standi of the appellant as a deciding factor in the matter.

(c) The Court a quo failed to consider and/or apply the provisions of section 15 of the Deeds Registry Act 1967, as read together with section 15 of the Land Act of 1973.

These grounds were augmented by oral arguments.

[17] Advocate Matooane argued that the case for the 1st Respondent was that he had as owner sold the property to the appellant and that he had failed to prove ownership of the property. However the case pleaded by the 1st Respondent was that as a *bona fide* owner and possessor of the site who had made improvements thereon, he was entitled to the relief sought.

[18] Advocate Matooane graciously conceded that *locus standi* means a party has sufficient interest to protect, not that he has an enforceable legal right. This concession is dispositive of the first and third grounds of appeal.

[19] The gravamen of the 1st Respondent's case in this appeal is that he was the *bona fide* occupier of the site. He had made significant improvements during the occupation and this was uncontroverted. The case of **Attorney General and Another vs Moletsane and Others[3],** was cited in support of that proposition. In any event, this was pleaded in the court a quo at page 7 at para 4.8 of the record.

[20] A bona fide occupier is a person who occupies land under the bona fide, but mistaken belief that he has title to the land. He would have *locus standi* to claim the relief sought. The cases of **Rubin v Botha[4]**, **Fletcher and Fletcher v Bulawayo Water Works Co. Ltd.[5]** and **Kommisaris Van Binnelandse Inkomste v Anglo American (O.F.S.) Housing Co. Ltd,[6]** were cited in aid of that proposition of the law.

[21] Advocate Pheko alluded to section 82 of the Land Act No.17 of 1979 which is couched in these terms:-

> *"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*

[3] LAC (2005-2006) 146
[4] (1911) AD 568
[5] (1915) AD 636
[6] (1960)(3) SA 642(A) at 649

allocations, the allottee who has used the land and made improvements thereon shall hold title to the land in preference to any allottee who left the land unused and undeveloped."

This is not on all fours with the facts, before the court a quo and in this court. However, I will revert to this legal provision later in this judgment. Advocate Pheko conceded that the one hundred and fifty thousand Maloti (M150,000) is refundable to the appellant.

[22] The Respondent was entitled to compensation for the improvements. People with better rights have successfully claimed their sites or lands even after the Minister and Commissioner of Lands have issued long leases, which are supposed to have extinguished prior titles. The cases of **Mphofe v Ranthimo and Another[7] LAC (1970-1979) 464 and Tlele-Tlele and Another v Matekane and Five Others 1991-1996 LLR 1655 (HC)[8]** were cited in support of that proposition.

[7] LAC (1970-1979) 464
[8] 1991-1996 LLR 1655 (HC)

[23] In my view, the learned trial Judge based her finding that the Appellant had no interest in the land on a triad of factors namely:-

(a) The appellant had fraudulently obtained the form 'C' and a lease from the Commissioner of Lands;

(b) He did not rebut the fraud allegations before the Court a quo, and despite having a reasonable opportunity to present his case; and

(c) He would not have concluded a contract to purchase the property it at that time he had a form 'C' and lease for the property, as he told the 1st Respondent he had

[24] The 1st Respondent said he had a form 'C' which he had handed in at the Magistrate's Court hearing.

[25] The 1st Respondent had seen the appellant's form 'C' dated 1st May, which was a public holiday. There was no documentary evidence from both sides, but that notwithstanding the Court was entitled to accept respondent's evidence that there had been a sale.

[26] This was a finding supported by evidence which this court, as an appellate court cannot disturb. I therefore agree with the learned Judge in the court a

quo that the appellant in this court had no legal interest in the land which can be enforced in law. His integrity and credibility had been deeply wounded in the court a quo.

[27] I now have to deal with the 1st Respondent interest in the land. There was an illegality by his failure to register within three months or within the period extended by the Registrar of the Land and Deeds, as enacted in section 15(2) and 15(4).

[28] I now turn to the provisions of the Deeds and Registry Act, 1967, which came into operation on the 15th May, 1967 and is couched in these terms:-

(1) 15(1) No deed or agreement purporting to or having the effect of conferring, conveying or transferring the right of ownership in and to the land shall be executed, attested or registered in the deeds registry.

(2) Every person or body holding a certificate issued by the proper authority authorising the occupation or use of land shall within three months of the date of issue of the certificate apply to the Registrar for a registered certificate of title to occupy or use the land;

(3) Every person or body who prior to the commencement of this Act, was issued with a certificate by the proper authority authorising

the occupation or use of land shall likewise apply to the Registrar within a period of (nine) months from the date of commencement of this Act, for a registered certificate of title to occupy or use;

(4) Failure to lodge with the Registrar the said certificate of occupation or use for registration in terms of sub-sections(2) and (3) within the prescribed period or within such extended period (as the Registrar may allow (and the Registrar is hereby empowered so to allow extensions of that period) or within such period as the court may allow, shall render the certificate null and void and of no force and effect and the right of occupation and use shall revert back to the owner of the land, being the Basotho Nation; and

(5) Any person who fails to comply with the provision of subsection (2) or of subsection (3) within the period prescribed therein or within that period as extended in pursuance of the provisions of subsection (4) in guilty of an offence and liable on conviction to a fine not exceeding two hundred Rands or in default payment thereof, to imprisonment for a period not exceeding twelve months. Nothing in this subsection affects the operation of any provision of subsection (4).

[29] In **Molapo v Molefe**[9], this court said:

> *"Indeed sub-sections 15(2); 15(3) and 15(4) of the Deeds Registry Act, 1967 are further examples of land reverting to the Basuto Nation for reallocation as a result of failure to apply for registered*

[9]LAC (2000-2004) LAC at 771

certificate of title to occupy or use (title deed) within the time-frame laid down therein.

In view of the fact that sub-sections 15 (5) actually provides for a penalty for failure to apply for a registered certificate of title to occupy or use. It is the considered opinion of this court, that section 15 as a whole requires strict interpretation to ensure that the legislature's intention is achieved, namely that the effected land should revert to the Basotho Nation for the allocation to the landless members of the public."

[30] The tenor of the judgment is that, the legal regime governing the allocation, registration and reversion of land, mirrors the philosophy, that of, equitable distribution and efficient utilization of land.

[31] For the respondent it was canvassed that he was a bona fide occupier who was entitled to compensation and the cases of **Attorney General and Another v Moletsane, supra,** and **Tlele-Tlele and Another v Matekane and Five Others, supra,** were cited in support. These cases recognise the right of the bona fide occupier to get back to the land where he had made improvements.

[32] Under section 15(2) and 15(5), there is a violation of the law, by not registering with the Registrar of Deeds.

The fact that form 'C' was not registered does not mean that the 1st Respondent cannot exercise his right as a bona fide purchaser to gain access to the land and improvements on the land. More so that the land allocating authorities did not seek to enforce section 15 of the Deeds and Registry Act. This appears to be a widely held view.

[33] However, the difficulty the court a quo found itself in and equally this Court finds itself in is that section 15(4) of the Deeds and Registry Act, does not prescribe a period by which Registrar can extend registration.

[34] The 1st Respondent cited the Registrar and Attorney General, who did not participate in the proceedings.

[35] The court a quo and this court can only speculate, whether the Registrar intends to extend the period in which the respondent can register his interest. It is not for the court to initiate the enforcement of section 15(4) and (5), but for the Land Allocating Authorities to do so, should they wish to do so.

[36] The later legislation cited by Advocate Pheko, gives deference to improvements on the land, where there have been double allocations.

[37] In the event if there are rival claimants to the site in question that is a matter to be dealt with by another court.

[38] The disposition of the appellant was, "if I can't have it, the respondent shouldn't have it either." I must say this is unconscionable conduct, most crucially when he was in default of the agreement.

[39] As I said earlier that the philosophy underlying the land legal regime in the Kingdom is to ensure equitable distributions of land and effective utilization of land. Section 82 of the Land Act, No. 17 of 1979 mirrors that noble objective. The spirit of the section should be interpreted in favour of the 1st Respondent who had built on the land. The legislature gives deference to the occupier who utilizes the land. In my view the appeal lacks merit.

[40] The matter was heard on the 22nd February, 13th August and 19th September, 2012 and judgment was

delivered on 21st October, 2015. I must say the basic function of a judge is to deliver judgments in a timely manner. Otherwise the much trumpeted position of adhering to the rule of law will be contradicted. The timely handing down of judgments must be an overriding concern to every judicial officer.

[41] There have been allegations of certain issues not canvassed in the Court a quo appearing in the judgment. This was attributed to the length it took for the judgment to be written.

[42] However, the learned Judge's judgment is upheld as the appellant has failed to prove the "Special Plea" based on form 'C' and section 15 of the Deeds Registry Act 1967. It is eminently reasonable for this court to uphold the ejectment order by the court a quo. Legally there was no coherent alternative to the argument advanced by the Respondent in the court a quo and this court. The granting of the 1st prayer is affirmed. There is no evidence in support on the 2nd and 3rd prayers. I have considered with manifest care before comprehensively, dismissing the appellant's "Special Plea" and respondent's 2nd and 3rd prayers.

[43] Ms. Pheko, accepted and conceded that in the event of this Court confirming the order of ejectment by the Court a quo, the respondent will be obliged to refund the sum of one hundred and fifty thousand Maloti (M150,000) paid by the appellant to the deceased.

[45] **ORDER**

The orders granted by the High Court are set aside and replaced by the following:

1. An order is granted for ejectment of the defendant from the site situate at Lekhaloaneng in the district of Maseru which was previously allocated to Plaintiff.

2. Plaintiff will be entitled to vacant possession of the site upon payment of one hundred and fifty thousand Maloti (150,000) to defendant.

3. The defendant to pay the Plaintiff's costs

DR P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree

R. B. CLEAVER
ACTING JUSTICE OF APPEAL

I agree

M. CHIHNENGO
ACTING JUSTICE OF APPEAL

FOR APPELLANT: Advocate T. Matooane

FOR RESPONDENTS: Advocate N. Pheko