

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 42/2016)
LC/APN/165/2014

HELD AT MASERU

In the matter between

LEHLOHONOLO MASUPHA

APPELLANT

And

MEISI ANTHONIED NKOE

1ST RESPONDENT

LAND ADMINISTRATION AUTHORITY

2ND RESPONDENT

CORAM : ***I.G. FARLAM AP***
 M.H. CHINHENGO AJA
 S.N. PEETE AJA (Ex officio)

HEARD : ***26 APRIL 2017***

DELIVERED: ***12 MAY 2017***

SUMMARY

Land Court Rules 2012 – Rule 66 (1) - Preliminary objection – “Special Answer” – Power of the Land Court – Jurisdiction – Non-Compliance with Regulations 7 and 8 of the 1980 Land Regulations – need for matter to go to trial – Summary dismissal of application at pre-trial stage – The Scope of Rule 67 (2) – Discretion of court thereunder – Dispute of fact to go to trial – Land litigation “sui generis” and inquisitorial.

Condonation for late filing of appeal – Principles – Rules 4 (1) and 15 (2) of the Court of Appeal Rules 2006.

Where a preliminary objection (***special answer***) is raised before trial in terms of **Rule 66 (1)** of the **Land Court Rules 2012**, the Land Court should not summarily dismiss the main application where a dispute of fact is real. Matter must proceed to trial if the court affirms its jurisdiction. **Rule 67 (2)** gives a wide discretion to the court to afford both parties an opportunity to present their cases at the trial. The court can **suo motu** order a deficient application to be amended with an appropriate order as to postponement and costs thereby occasioned.

Condonation - In an application for condonation for late filing of a notice of appeal in conformity with the Rules of the High Court and of the Court of Appeal, in essence the applicant

must satisfy two requirements, namely (1) that there is sufficient explanation for the delay in question, sometimes expressed as “**sufficient cause**” and (2) that there are “**prospects of success**” on appeal. The court has a judicial discretion to exercise in determining whether or not condonation should be granted in the particular circumstances of the case.

Obiter Dictum – Delivery of judgements of the High Court must always be listed in the Weekly Roll for the convenience of the litigants who may wish to lodge an appeal timeously in conformity with the time frames set by the Court Rules.

Annotations

Statutes

Constitution of Lesotho 1993.

Land Act No. 17 of 1979.

Land (Amendment) Order No. 6 of 1992.

Land (Amendment) Order No. 27 of 1986.

Land Court Rules - Legal Notice No.1 of 2012.

Land Regulations - Legal Notice No.6 of 1980.

Court of Appeal Rules – Legal Notice No.182 of 2006.

Cited Cases

Ntoa Abel Bushman vs Lesotho Development and Construction and Other – C of A (CIV) No.3 of 2015.

Makhutla and Another vs Makhutla and Another – LAC (2000-2004) 480.

Motake v Moqhoai – LAC (2009-2010) 89.

Books

Duncan P – *Sotho Laws and Customs.*

Wille's *Principles of South African Law (8th Ed – 1991) 257.*

*Cur Adv. Vult.
Postea (May 12).*

JUDGMENT

Peete AJA (Ex officio):-

An Introduction

[1] This is an appeal against the judgment of **Sakoane AJ** (*as he then was*) delivered on the 10th February 2016. The application had previously been heard by him on the 6th September 2015.

[2] In the Originating Application - **LC/APN/165/2014** - the applicant had sought the following relief that:-

- “(a) the 1st respondent is evicted from Plot No. 14303-1964 with immediate effect.**
- (b) the Lease No. 14303-1964 issued in favour of the 1st respondent is declared null and void and of no force and effect.**
- (c) the applicant is declared the lawful owner of rights in the plot and not the 1st respondent.**
- (d) the 2nd respondent is directed to expunge lease no. 14303-1964**
- (e) Costs of suit.**
- (f) further and/or alternative relief.”**

According to the Originating Application, the plot in dispute (now under *Lease No: 14303-1964* – issued on 29/7/2014 in favour of 1st respondent by the 2nd Respondent - Land Administration Authority) had originally been allocated to applicant’s father – one *Lebeoana Masupha*; the said allottee¹ *Lebeoana Masupha* died in 1994. His rights over the land had passed to his wife *Malebeoana Masupha* in terms of Section 8 (2) of the **Land Act** No. 17 of 1979 as amended by Order No.6 of

¹ See the Land Act No.17 of 1979 – Section 2 (definition of “**allottee**” - Section 12 - Allocating Authority – Land Committee).

1992. She died in 1996. It was not in dispute that the applicant was the legitimate son of *Lebeoana Masupha*.

[3] It was after the death of applicant's mother in 1996 that a family council had purportedly sat and had nominated the applicant to inherit the site at Ha Matala. The annexed letter of nomination is date - stamped 19th December 2001.

(4) It is not in dispute that this nomination by the family council was never submitted to the Land Committee as required by *Land Regulation 7* of the ***Land Regulations 1980*** – [*Legal Notice of 1980*]². This Regulation deals with the processing of the registration of “*inherited land*;³ Regulations 7 and 8 give power to the Chairman of the Land Committee having jurisdiction to process the registration of the inherited land⁴. In fact, the notice of

² See Section 12 of *Land Act 1979* (*supra*).

³ *Constitution of Lesotho 1993* - Section 107. *Inheritance right over land is founded on the fundamental ethos that all land is vested in the Basotho nation of which a family is the nucleus* – See ***Makhutla and Another vs Makhutla and Another*** – LAC (2000 -2004) 480 - Section 4 of the *Land (Amendment) Order No. 27 of 1986*.

⁴ See also *Putsoane vs Lekatsu* – (1991-1996) (vol 2) P.876 at 877 (*per Ackermann JA*).

the nomination should be made “*within 12 months*” after the death of the allottee. In my view, the legal effect of registration of inherited land creates a right *in rem*⁵ in the plot and is valid against the whole world.

[5] Publication of the process is to ensure that any persons who may have (competing) claims or objection can come forward, and that any such person can be given a reasonable opportunity to be heard - *Regulation 8(3)*. It is only after all this process that “*the Chairman of the Land Committee having jurisdiction shall publish the decision and endorse the register of allocations accordingly.*”

[6] It is clear that a nomination by a family council that a person should inherit land does not *per se* confer title; and in the circumstances of this case, the founding Originating Application is deficient in this regard. There was an apparent non-compliance with the provisions of *Regulations 7 and 8 of the 1980 Land Regulations*.

⁵ *Wille's Principles of South African Law – (8th Ed) page 257*

Sakoane AJ gave his Ruling holding that non-compliance with *Regulations 7 and 8* justified the dismissal of the applicant's application. The Learned Judge then dismissed the application. More about the Ruling later.

[7] On the 9th December 2015 when the application was called for argument, the 1st Respondent as the holder of the *Lease No. 14303-1964* raised a preliminary objection "*by way of special answer*" in terms of *Rule 66 (1)* of the **Land Rules (Legal Notice No.1) of 2011**⁶. *Rule 66 and 67 read seriatim in part:-*

"Preliminary objection

66. (1) *Before proceeding with the trial, the Court shall decide such objections between the parties as may be made by the parties by way of a special answer.*

(2) *Any party may make an objection on the following grounds:-*

- (a) *that the court has no jurisdiction;*
- (b) *.....*
- (c) *.....*
- (d) *.....*
- (e) *.....*
- (f) *.....*

(3) *Where more than one objection is made under this rule, they shall all be taken together and any objection not made at the first court appearance shall be considered to have*

⁶ *Ntoa Abel Bushman vs Lesotho Development and Construction and Others – C of A (CIV) No.3 of 2015.*

been waived, unless the ground of objection is such as to prevent a valid judgment from being entered.”

Decision on objection

67. (1) *The court shall decide any objection made under rule 66 after hearing the opposite party and ordering the production of such evidence as may be appropriate for the decision to be made.*
- (2) *Where the court is satisfied that the objection is well founded, it shall, in the case of an objection under rule 66 (2)(a) and (f) dismiss the application and, in all other cases, strike out the application or make such other order as it thinks fit. (The emphasis is mine)*

[8] Having confirmed its jurisdiction to adjudicate in the matter, the court ought to have dismissed the preliminary objection and was thereupon at liberty to strike out the application or make such an order as it thought fit (Rule 67(2). Rule (3) provides that:

“(3) The striking out of the application shall not of its own force preclude the institution of a new application with respect to the same cause of action and the court shall, in appropriate cases, inform the applicant that he may sue in the court having jurisdiction or in the court in which the previously instituted application is pending.”

[9] The 1st respondent filed her answer to the Originating Application on the 4th November 2014 and had

on the 27th November 2014 also filed a “*notice of intention to raise a preliminary objection*” – in terms of Rule 66 (1).

The notice read thus:

“(a) LACK OF JURISDICTON:-

*The Honourable Court will readily realize that Applicant’s relief is based on the alleged inheritance from his parents. It has not been alleged let alone proved that Applicant has complied with the mandatory provisions of the **Land Regulations 2011**. In the circumstances the matter in as much as the relief sought is tenable before the District Land Court. In any event, the Honourable Court would still have no jurisdiction to entertain the matter in as much as the relief sought is tenable before the District Land Court. In the premises this application ought to be struck out with costs for want of jurisdiction.*

(b) LACK OF LOCUS STANDI:-

On applicant’s papers it is clear that he has not applied for and obtained registration of his alleged title to the land at issue. Assuming without conceding that the land belonged to his father as alleged in the papers, there is further no proof that even his father applied for

and registered his certificate of title to the land. In the result the alleged certificate has been rendered null and void. Consequently, Applicant lacks the necessary standing to call for cancellation of the First Respondent's lease."

[10] *En passant*, it ought to be stated that in her answer filed the 4th November 2014, the 1st respondent strongly challenged the authenticity of the **Form C** to the extent that she questioned whether the applicant was claiming a site different from the one in the *Lease No. 14303-1964*. An "*inspection in loco*"⁷ was appropriate had the matter gone to trial.

[11] A dispute of fact clearly arose over the plot and was a dispute which could not be resolved upon the papers (affidavit) without *viva voce* evidence being led – which procedure is permissible under Part IX of the **Land Court Rules 70 – 81**. Indeed, land litigation under Land Court Rules is inquisitorial and **sue generis**.

⁷ At the inspection in loco it may be possible to establish whether the applicant's inherited plot is in the urban or it is in the rural area and what its correct dimensions are.

[12] It is also worth noting that in terms of *Rule 81* the ***Land Court Rule 2012*** also has power to inspect the plot in dispute. *Rule 81* reads:-

Powers of court to inspect

“81. The Court may, at any stage of the application, inspect any property concerning which any question arises and shall in such a case draw up a recording of its proceedings which shall form part of the whole record of the application.”

[13] In upholding the preliminary objection (*special answer*)⁸ and dismissing the application, **Sakoane AJ** held that the applicant had failed to prove that Land Regulations 7 and 8 of 1980 had been complied with and that the nomination of the applicant as heir was not sufficient to confer title and reliance was placed on the Court of Appeal case of ***Makhutla and another vs Makhutla and Another***.⁹

⁸ *Rule 66 (ibid)*

⁹ *LAC(2000 – 2004) 480 - per Ramodibedi JA; see also Patrick Duncan – Sotho Laws and Customs – p.88*

[14] **Sakoane AJ** then upheld the preliminary objection and dismissed the application on the merits. *Rule 67* of the *Land Court Rules* reads:

“67. (1) *The court shall decide any objection made under rule 66 after hearing the opposite party and ordering the production of such evidence as may be appropriate for the decision to be made.*

(2) *Where the court is satisfied that the objection is well founded, it shall, in the case of an objection under rule 66 (2)(a) and (f) dismiss the application and, in all other cases, strike out the application or make such other order as it thinks fit.*

(3) *The striking out of the application shall not of its own force preclude the institution of a new application with respect to the same cause of action and the court shall, in appropriate cases, inform the applicant that he may sue in the court having jurisdiction or in the court in which the previously instituted application is pending. **(my emphasis)***

Condonation *(for late filing of appeal)*

[15] Preliminary to the notice of appeal before the Court of Appeal is an application for condonation for late noting

of appeal. It is not in dispute that whereas **Sakoane AJ** delivered his “*Ruling*” on the 16th February 2016, a notice of appeal was only filed **seven (7) months** later on the 12th September 2016.

[16] The **Court of Appeal Rules 2006** clearly state that an appeal must be noted “*within 6 weeks*” after the delivery of judgment by the High Court. In this case 6 weeks expired on or about 30th the March 2016. *Rule 4(1)* of the *Court of Appeal Rules* (Legal Notice No.182) reads:

“4. (1) *In every matter which there is a right of appeal to the court, the applicant shall, within six weeks of the date of the delivery of the judgment in the High Court, file a notice of appeal and such notice shall, as near as may be, be in accordance with Criminal Form I or Civil for, I, as set out in the First Schedule.*

[17] Rule 91 of the **Land Court Rules** reads:-

“Form and time of appeal

91 (1) Every appeal shall be lodged by filing a notice of appeal in the register of the court which gave the judgment that is appealed against upon payment of the prescribed court fee.

(2) The notice of appeal shall be in the form provided by rule 91 and signed by the appellant or his legal representative.

(3) The notice of appeal shall be filed together with the court records within 45 days of the judgment appealed against being delivered.” (my emphasis)

[18] The date of delivery of a judgment in the High Court is by practice listed in the Weekly Roll. If the judgment was indeed delivered on the 16th February 2016, the relevant Weekly Roll of the Land Court must reveal this fact. The inspection of the Weekly Roll and compliance with the Rules is the professional responsibility of every

diligent practitioner who has received instructions from a client.

[19] A Weekly Roll is also a court record. In this case, the Weekly Roll for the 15th to 19th February 2016 is blank and **LC/APN/165/2014** was not listed. The applicant is therefore given the benefit of the doubt when **Adv. Pheko** explains that she had no knowledge that the judgment had been delivered on the 16th February 2016.

[20] There exists a *plethora* of Court of Appeal cases which establish the principles which the court must consider in the exercise of its judicial discretion whether or not to condone the late noting of the appeal, all the time taking into account the particular of each case. As **Ramodibedi P** stated in **Motake vs Moqhoai and others**:¹⁰

“[12] *The principles applicable in an application for condonation of late filing of an appeal are now well*

¹⁰ LAC (2009-2010) 89 at page 92 [Para 12]

established in this jurisdiction. In essence, the applicant must satisfy two requirements, namely:

(1) that there is sufficient explanation for the delay in question, sometimes expressed as “sufficient cause” and (2) that there are prospects of success on appeal. It must be borne in mind that an application for condonation is a matter which lies pre-eminently within the discretion of the court. See in this regard Rule 15 (2) of the Court of Appeal rules 2006. This Rule reads:

(2) The Court shall have a discretion to condone any breach on the application of the appellant.”

[21] Although the delay of six months (February to September) may seemingly appear inordinate, it is quite probable that **Adv. Pheko** did not know that the judgment had been delivered on the 16th February 2016.

[22] I am satisfied that condonation of the late filing of the appeal should be granted.

Prospects of Success

[23] *Land Regulations 7 and 8 [Legal Notice No.15 of 1980]* provide that where title to land is founded on inheritance, the beneficiary should fulfil certain procedural steps for the final registration of title by the Land Committee having jurisdiction.

[24] A close perusal of the Land Court Rules indicates that land litigation regulated by the Rules is unique and *sui generis* and inquisitorial and each of the litigants “*must have his/her day in court*” and in the present case the pleadings had been closed when a “*preliminary objection*” was raised in terms of Rule 66 and a ruling was made dismissing the main application.

[25] The main question was whether the applicant had been afforded a fair trial when the court ruled dismissing his whole claim at a pre-trial stage.

[26] Whereas the learned judge had correctly ruled that he had jurisdiction¹¹ over the land dispute he should in my view have either struck off the matter or ordered amendment of pleadings¹² within a given time frame addressing the issue for non-compliance with *Regulations 7 and 8* of the Land Regulations and ultimately allow evidence to be led at the following trial. The striking out the application is permitted under *Rule 67 (2)* of the Land Court Rules (*see para [13] above*).

[27] Although the learned judge was correct in asserting his jurisdiction and dismissing the preliminary objection directed at the Land Court's jurisdiction, his summary dismissal of the application without a trial deprived the

¹¹ Section 73 of the Land Act 2010

¹² Rule 30 of Land Court Rules 2012

applicant the opportunity to present his claim regardless of its prospects. Indeed even a frivolous claim deserved a hearing. It should be noted that the respondents made no appearance at the hearing of this appeal.

[28] It is our considered view that the Order/Ruling made by **Sakoane AJ** on the 16th February 2016 should be set aside and substituted with the following order.

[29] The following order is made:

1. The appeal is upheld with costs.
2. The order made in the court *a quo* is set aside and the case is remitted to the Land Court for rehearing before another judge in accordance with the directions in para [26] of this judgment.

S.N. PEETE
ACTING JUSTICE OF APPEAL (ex officio)

I agree:

I.G. FARLAM
ACTING PRESIDENT OF APPEAL

I agree:

M.H. CHINHENGO
ACTING JUSTICE OF APPEAL

For the Appellants	:	<i>Advocate Pheko (instructed by T. Maieane & Co)</i>
For the Respondents	:	<i>No appearance</i>