IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 53/2014
LC/APN/126/14

In the matter between-

SHALANE SHALE	**APPELLANT**
v	
MANAMOSHE LIMEMA	**1ST RESPONDENT**
LAND ADMINISTRATION AUTHORITY	**2ND RESPONDENT**
THE LAND REGISTRAR	**3RD RESPONDENT**
O/C LITHOTENG POLICE STATION	**4TH RESPONDENT**
COMMISSIONER OF POLICE	**5TH RESPONDENT**
ATTORNEY GENERAL	**6TH RESPONDENT**

CORAM: **FARLAM – ACTING PRESIDENT**

MUSONDA AJA

CHINHENGO AJA

HEARD: **27 APRIL 2017**

DELIVERED: **12 MAY 2017**

SUMMARY

Appellant and main respondent each granted a lease over same piece of land – Neither of them having registered within three months certificates proving allocation of land to them (Form 'C') which each alleged was issued to them, allocations fell away and neither entitled to seek registration of a lease in his or her favour – law enunciated in ***Mphofe v Ranthimo and Another*** *restated*

CHINHENGO AJA:-

Introduction

[1] The main parties to this appeal are the appellant, (Shale), and 1st respondent, (Limema). This appeal is against the judgment of the Land Court handed down on 21 August 2014 in favour of Limema. Shale who was aggrieved by that judgment and has appealed on seven grounds set out in his notice of appeal.

[2] This is not the first time that this appeal came before this Court. On 7 August 2015 this Court remitted the matter to the Land Court to be heard by a different judge. The judge to hear the matter was required to take evidence from Chief L M Keiso on the role that he played in the matter and from two land commissioners who granted the leases, the subject of the dispute between the parties. He was also required to establish whether or not the relevant Minister had declared, by way of a notice in the Government *Gazette* that the area in which the piece of land in dispute is situated was subject to systematic land administration and regularization and to conduct an inspection *in loco*. That order was not carried into effect. Apparently the judge to whom the matter was assigned considered that he could not deal with it in respect of the specific issues referred to him when he had not heard any evidence in the matter before. He cannot be faulted for adopting that attitude.

[3] It is common cause that Chief Keiso is now deceased and the two land commissioners who were required to explain how they each issued the leases are no longer in the employ of the 2nd respondent, the Land Administration Authority (LAA), and therefore not available to testify. Following an application by Limema

that this Court should ignore the fact that the remittal order was not implemented and proceed with the appeal on the available evidence, the parties agreed that this be so.They also agreed that the Gazette notices, now available, should be accepted as evidence of the existence of those notices, leaving it to parties to argue their effect and import.

[4] I think this matter is capable of disposal on the evidence adduced in the Land Court. It is therefore proper, as agreed between the parties, that the appeal should now be finalised as it is. Such a course serves to bring this matter to finality.

Factual background

[5] Shale and Limema were each issued with a lease over the same piece of land. Without any proof thereof each of them averred that they purchased the rights to the land from the previous holder, one Ernest Marole, apparently since deceased, who had sold portions of his field to several people, some of whom could now no longer be identified or even remembered by name.

[6] Limema said that her late husband bought the piece of land from Marole in 1976 and that she later fenced it. She applied to the Land Administration Authority (LAA) in March 2011 for a lease under the Land Act, 2010 to be issued to her through the "systematic land registration project". Her application was accompanied by a letter from Chief Keiso confirming that the land had been allocated to her. The letter was given to her because the Form 'C' which should be produced as proof of allocation of the land had been lost. A file reference number (No. 25575) was allocated to her application. About two years later she received a message from the LAA to go to the office and collect her lease document on 1 August 2013. She eventually collected it in 2014 after repeated and unsuccessful attempts to do so. The document shows that it was issued on 26 June 2013. It grants to her residential leasehold rights for 90 years from 17 June 2013 to 16 June 2103. Her lease is No.13302-1433

[7] In her founding affidavit in the court *a quo* Limema said that she learnt for the first time that Shale was claiming leasehold rights to her piece of land when he sued her in the District Land Court (Case No. Civ/DLC/MSU/16/14), seeking her eviction from the site among other relief, including an interdict. From Shale's

application she saw that he was claiming that he was also granted a lease in respect of the same site on 26 November 2012 after lodging his application on 21 November 2012. The LAA also wrote to her on 30 January 2013 advising her of Shale's claim and further that her claim was therefore invalid. She noticed that in his application seeking her eviction Shale claimed that he bought the site in 'the early 1980's' and that his application was supported by a Form 'e' which she said "he wrongly obtained before the site was sold to him.'. She went on further to narrate that Shale's application in the District Land Court was dismissed on the basis that the court had no jurisdiction. Thereafter Shale did nothing until he took the law into his own hands on 14 February 2014 when he started removing her fence, digging holes to put up his own fence and putting up a corrugated iron dwelling structure, two toilets and a 'container' on the site.

[8] Limema contended that Shale's lease was wrongfully and unlawfully issued to him contrary to land allocation procedures; she was not advised of the revocation of the allocation of the site to her before it was allocated to Shale and that the LAA wrongfully allowed Shale's lease on the basis of the sporadic land regularisation scheme

when the area was under a systematic land regularisation system. She accordingly applied for an order cancelling Shale's lease, interdicting Shale from entering and "vandalising" her property on the site and replacing it with his own, and taking over possession of the site without due process. She asked for other relief designed to secure the removal of Shale's structures and property from the site.

[9] In his application to the District Land Court Shale had stated that he was granted the lease in 2010 after buying it from Marole in the early 1980's. He also said that Limema interfered with his rights to the site by erecting a fence and, and that after he brought a contractor onto the site to commence development works on 14 and 15 February 2014, Limema's people chased them away.

[10] In opposition to Limema's application in the Land Court seeking his eviction from the site, Shale alleged that Limema fraudulently acquired the site. Her husband did not buy it from Marole. He was never given a Form 'C'. She did not put up a fence on the site. The letter by Chief Keiso was also a fraud. It did not have the Chief's offical stamp. Concerning his own application for a lease,

he said that it was properly accompanied by a Form 'C'. He produced a letter by Chief Keiso dated 21 November 2012 supporting his application for a lease and another dated 28 September 2011 in which the Chief said that "Limema has made an application regarding the same site by error on 23-03-11 under application 25 575 and I therefore request that her application be cancelled because the site is not hers."

[11] Shale contended that no issue of a revocation of Limema's rights to the site arose because the site was never allocated to her in the first place and that the Chief, in any event could not have done so without the involvement of the LAA. He prayed for the dismissal of Limema's application. As a further response to Limema's claims Shale launched, simultaneously with his opposing papers, a counter application in which he alleged that Limema fraudulently obtained the lease; she had been advised by the LAA about his right to the site before a lease was granted to her and that it should not have happened that the LAA granted her a lease without cancelling his lease. In the counter application Shale also sought to interdict Limema from interfering with his rights of occupation of the site and prayed for the cancellation of Limema's lease.

Sequence of events in summary

[12] The sequence of events leading to the issuance of the leases to Shale and Limema in respect of the same site is, according to their affidavits, as follows. Limema's husband bought the site from Marole in 1976. (The purchase consideration is not specified.) A Form C issued by the Chief, then Chief Mothobi, was lost along the way. It is not clear when her husband died but when she wanted to apply for a lease, she had to approach the Chief, now Chief 'Malepipi Mothobi, for a letter confirming that a Form 'C' had been issued to her in 1976. Thereafter she applied for a lease in March 2011. She was advised by the LAA that the area in which the site is situated was under a systematic land regularisation programme and that she did not have to hire a land surveyor of her own. Her application was eventually processed and she was granted a lease in June 2013. She erected a fence around the site before the present dispute arose.

[13] Shale on the other hand bought the site from the same Marole. He was not certain when that was. He

mentioned three dates. His evidence is dealt with by the judge a quo at paragrph 3.5 of the judgment:

> *"… [Shale's] testimony was full of contradictions and contrary to the truth. He contradicted himself primarily in respect of when the site in dispute was allegedly bought by him. In his originating application (CIV/DLC/16/14) (application in the District Land Court) he claimed that he bought the site in the 1980's. In his answer in the present application, he claimed to have bought the site in 1976 whereas in court he testified that it was in 1977. [Shale] tried to explain the contradictions by saying the 1980's in the District Land papers was a mistake. This is dubious since one hardly makes a mistake by referring to a collective period of years… However even assuming that it was a mistake, it does not explain why he said the sale was in 1976 in his answering papers in the present application. That cannot be explained as a mistake since he referred to 1976 twice, in paragraph 10 of his answer and in paragraph 1 of his list of witnesses and documents."*

[14] Shale finally argued his case on the basis that he purchased the site in 1977. He said that upon purchase of the site, he was issued with his Form 'C' on 6 February 1977. He did not take occupation or develop the site until February 2014 when he attempted to do so. He applied for a lease in September 2011 and was granted such lease on 20 December 2012. On 14 and 15 February 2014 he brought a contractor onto the site but the contractor was unable to commence work because persons acting on behalf of Limema interfered with him. He instituted proceedings in the District Land Court on

or about 19 February 2014, seeking, among other relief the eviction of Limema. That application was dismissed on the basis that the court had no jurisdiction in the matter. Thereafter he attempted to enforce his rights to the site by taking occupation of the site and starting development work thereat.

[15] When this matter came before the LAA an attempt was made to settle the dispute through mediation. That attempt came to nought. Thereafter Limema lodged the application in the Land Court in 2014 which culminated in this appeal.

[16] The Land Court received *viva voce* evidence from both parties. Limema was the only witness in her case. Shale led evidence from Marole's wife and Chief Keiso and he also testified in person.

[17] During his cross examination Shale admitted that Limema had erected a fence on the site. This contradicted his evidence on affidavit. He admitted that he did not take occupation of the site until after his unsuccessful application in the District Land Court. Shale claimed in his papers that he had approached

Chief Lebipi for his Form "C" in 1977. Limema however said that it was not Chief Lebipi, but Chieftainess 'Malebipi Mothobi, who was in office at the time and so Chief Lebipi could not have allocated the site to Shale.

[18] An official from the LAA was called to assist the court in understanding how the two leases were issued. It was his evidence that one can apply for a lease either through the systematic regularisation process or through the sporadic regularisation process. He testified that Limema acquired her lease in terms of the Systematic Land Regularisation Regulations of 2010 and Shale through the sporadic adjudication process.

[19] The Land Court judgment was in favour of of Limema. The court found that that there had been a double sale of the same site and that the law regarding double sales therefore applied. That meant that the person who acquired the rights to the site first was entitled to be confirmed in his or her rights to the site. At paragraphs 4.5 and 4.6 of the judgment, the court said-

> *"4.5 The present case is basically about a double allocation. The general principle which applies to double allocation can be found in section 82 of the Land Act 1979. That section provides as follows:*

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

4.6 The essence of the case is that the rights in the plot were sold to either the one or the other of the parties by its earlier owner.It is apparent that the same site was sold to both the Applicant and the 1st respondent. The general principle which applies where there has been a double sale of rights to immovable property is clearly articulated in the case of Haroon Abdulla Mahomed v KPMG and Morris Joint Venture N.O. (Liquidators of Lesotho Bank) and Others (C of A(VIV) No.34/2013. In the aforesaid case, the Court of Appeal adopted the principle expressed in the maxim qui prior est tempore potior est jure which translates that one prior in time has a superior right in law."

[20] On analysing the facts the court took the view that it was Limema who acquired the prior right as she was in occupation of the site as evidenced by the fact that she erected a fence on the site before Shale who, incidentally, admitted that he only erected a fence after he had been unsuccessful in the District Land Court. The court also took the view that Limema acquired the rights to the site in 1976 whilst Shale had given conflicting dates as to when he did so although had eventually settled on 1977.

[21] The court considered that, because the site fell within land identified for systematic regularisation in terms of s 69 of the Land Act 2010 it should not have been registered through the sporadic regularisation process which meant that a lease granted pursuant to a sporadic adjudication was null and void. Sections 68 and 69 of the Act provide as follows:

> **'Presumption of sporadic adjudication**
>
> 68. All land for the time being not under systematic adjudication shall be deemed to be under sporadic adjudication.
>
> **Systematic adjudication to prevail over sporadic adjudication**
>
> 69. Where the Minister, pursuant to the regulations, publishes a notice in the Gazette
> declaring an area to be an adjudication area for purposes of systematic adjudication, then section 68 shall automatically cease to have effect in respect of all land defined in the said notice.'

[22] After a consideration of the above provisions the court concluded:

> *"5.5 Section 68 of the Land Act 2010 therein provides tha all land for the time being not under systematic adjudication would be presumed to be under sporadic adjudication. It is obvious from the above provision therefore that the site in dispute was not under sporadic adjudication since it had been declared an area of systematic adjudication as the officer of the 2nd respondent testified. It was wrong for 2nd respondent therefore, to allow the application through sporadic adjudication in an area under Systematic Regularisation process. Section 69 of the Act provides that where the*

Minister declares an area to be an adjudication area for purposes of systematic adjudication, then section 68 shall automatically cease to have effect in respect of all the land defined in the said notice.

5.6 It is common cause that this site in dispute is under Systematic Regularisation; it means that applications by way of sporadic adjudication ceased to have effect. 1st respondent's application for a lease was therefore unprocedural and contrary to the provisions of the Land Act 2010 and 2nd respondent made an error in registering the lease. It follows therefore that the issuance of the lease in favour of the 2nd respondent in an area which had been declared an area for Systematic Regularisation would violate section 69 of the Land Act, it was therefore unlawful.

5.7 It was also common cause that the 1st respondent did not lodge an objection to the applicant being issued with a lease in respect of this plot if he was opposed to the applicant's lease application. Regulation 16(5) of the Systematic Land Regularisation Regulations of 2010 corroborates this position. This would have allowed 2nd respondent the opportunity to undertake adjudication in terms of section 65 of the Land Act which provides that 'Every registration of a lease under this Part shall be preceded by adjudication of the rights relating to that land."

[23] The court *a quo* thus granted an order in favor of Limema. have already stated that this Court remitted the matter to the *court a quo* in August 2015 with directions that it be heard by a different judge who was to (a) establish whether there was a Ministerial Gazette that declared the area to be under the systematic regularisation scheme at the material time; (b) hear the evidence of Chief L.M Keiso; (c) hear the evidence of the

two Land Commissioners who granted the two leases and for them to produce the office files on the leases and; (d) conduct an inspection in *loco.*

Grounds of appeal

[24] The judgment of the Land Court is challenged on appeal on basically four grounds, namely that the court erroneously held that -

> (a) this was a dispute involving a double allocation of the land;
>
> (b) the area was declared as an area of systematic regularisation in the absence of proof that that it was so declared in terms of regulations 4(1) (a) and (b) of the Systematic Regularisation Regulations 2010 (No. 103 of 2010);
>
> (c) section 68 as read with s 69 of the Land Act 2010 was applicable;
>
> (d) its judgment as a whole went against the weight of evidence and the probabilities; and
>
> (e) Limema was lawfully allocated the site before it was allocated to Shale.

[25] Shale's grounds of appeal and the submissions made on behalf of either party do not, in my view, fall for consideration for purposes of deciding this appeal. The issue that emerged during argument as critical and

dispositive of the appeal is concerned with the effect of s 15 of the Deeds Registry Act as amended by the Land Act 1973 (Act No. 20 of 1973). That section provides in subsection (2) and (4) in relation to Form 'C' as follows –

> *"(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.*
>
> *(4) Failure to lodge with the Registrar the said certificate of occupation or use for registration in terms of subsection (2) and (3) within the prescribed period or within such extended period [as the Registrar may allow (and the Registrar is hereby to so allow extensions of the 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 rights of occupation and use shall revert back to the owner of that land, being the Basuto Nation."*

[26] A case similar case to the present came before this Court in *Mphofe v Ranthimo and Another*[1]. In that case the appellant and the first respondent had been allocated the same piece of land in 1969 and 1973 respectively. Both failed to register their respective certificates in terms of s 11(1) and (2) of the Land (Procedure) Act No. 24 of 1967 and s 15(2) and (4) of the Deeds Registry Act. SCHUTZ P had the following to say[2]-

> *"The said s 15(4), when read with the said s 11(1), is explicit as to the effects of non-compliance with these sections. If no certificate is issued in terms of the said*

[1] (1970-1979) LAC 464
[2] at 468F -H

section 11(1), or if a certificate so issued is not timeously registered, all rights of use and occupation are lost. One would have thought as much when one considers the desirability, almost necessity, of having clarity to commercial and industrial titles. Without such clarity it would be difficult to encourage entrepreneurs to start businesses or to obtain secure loans from lenders.

Accordingly I am of the view that both alleged allocations fell away in the distant past. See also the decision of Rooney J in Mokhethi v Makhetha and Another Civil Trial 170 of 1977 (HC) (unreported).”

[27] Both Limema and Shale gave evidence at the hearing in the Land Court and neither of them stated that he or she registered the Form ‘C’ as required by law. In that court the judge’s attention was not drawn to the parties’ failure to register the Form ‘C”s. Throughout their evidence Shale and Limema stopped short of telling the court that they registered their certificates in terms of the relevant legislation. Counsel for both parties acknowledged that if the court found that neither party registered his or her certificate then as stated by SCHUTZ P the allocations to both of them ‘fell away in the distant past’. The evidence before the court a quo shows that neither Limema nor Shale registered the Form’C’ which they both alleged to have been in possession of at some point in time. I conclude that the allocation of the land concerned to each of them fell away and neither of them had any right to seek the registration

of a lease. By the time they sought to obtain leases the land had long reverted back to the Basuto Nation.

[28] An argument was advanced before us that Limema as the applicant in the court below had the onus to prove her right of entitlement to a lease and that since she did not establish that she registered the Form 'C' in terms of the law her claim should have been dismissed. That may be so but in this case Shale lodged a counter claim and although he submitted on appeal that the judge *a quo* did not comment on the counter claim in his judgment, the fact remains that by making a counter claim Shale placed himself in exactly the same position as Limema in respect of the onus of proof. Whilst the judge *a quo* did not comment on the counter claim he specifically dismissed it with costs. In these circumstances I think that his order was, in substance, one dismissing both the main claim and the counter claim. That is the order I propose to make.

[29] In regard to costs I think each party should bear its own costs in the court below and on appeal. Both parties had no basis for bringing the matter to the courts. Their alleged rights to the land in dispute had long since fallen away. Accordingly the order of this Court is that –

1. The appeal is dismissed.

2. The order of the Land Court is set aside and the following order is made-

   "1. The application is dismissed with no order as to costs.

   2. The counter-application is dismissed with no order as to costs."

3. There is no order of costs of appeal.

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M. H. CHINHENGO
ACTING JUSTICE OF APPEAL

I agree

_____

I.G. FARLAM
ACTING PRESIDENT

I agree

_____

P. MUSONDA
ACTING JUDGE OF APPEAL

FOR APPELLANTS: ADV H NATHANE KC

FOR RESPONDENTS: M TAU-THABANE assisted by L LEPHATSA