

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

**C of A (CIV) No. 42/2017
CCA/98/2013**

In the matter between:

LENKA MAPILOKO (Estate of the Late Hyde Mpuke Mapiloko) APPELLANT

And

FRAGMAR (Proprietary) LIMITED 1ST RESPONDENT

THUSANANG CLINIC 2ND RESPONDENT

F. M. FRUITS AND VEGETABLES 3RD RESPONDENT

BUTCHERY AND RESTAURANT ENTERPRISE 4TH RESPONDENT

REGISTRAR OF DEEDS 5TH RESPONDENT

LAND AND ADMINISTRATION AUTHORITY 6TH RESPONDENT

ATTORNEY GENERAL 7TH RESPONDENT

CORAM: MOSITO, P

MOKHESI, AJA

MTSHIYA AJA

HEARD : 22 NOVEMBER 2018

DELIVERED : 7 DECEMBER 2018

SUMMARY

Jurisdiction of the High Court: Jurisdiction cannot be ousted by agreement of private parties. – Jurisdiction further cannot be conferred by agreement where the law ousts it.

JUDGMENT

MTSHIYA, AJA

[1] This is an appeal against a judgment of the High Court delivered on 13 June 2017.

[2] In September 2013 the appellant filed an application in the court *a quo* seeking the following relief:-

- “1. *The 1st and 2nd respondents be directed to pay all monthly rentals due to first applicant to Messrs V. M. Mokaloba & Company to be kept in trust pending finalisation of the application.*

2. a) *That the sub-lease agreement registered under Deed No. 28658 between Applicant and first Respondent be cancelled;*
- b) *That the 5th to 8th Respondents take all the necessary steps to cancel the said sub-lease agreement upon granting of prayer 2 (a) herein;*
- c) *That immediately upon the granting of prayer 2 (a) herein 1st to 4th Respondents tenancy agreements also be cancelled and they be directed and compelled to vacate the said premises or alternatively to enter into a new sub-lease agreement with the Applicant;*
- d) *Costs of suit in the event of opposition;*
- e) *Further and/or alternative relief.”*

[3] The above relief was being sought on the ground that the first respondent had breached a Sub-lease Agreement between the parties mainly through failure to pay agreed and stipulated monthly rentals.

[4] It is common cause that on 23 May 2008 the appellant and the first respondent registered a Sub-lease Agreement in respect of Plot No. 30082-508 situated at Likoting, in the District of Butha-Buthe. The sub-lease spelt out the monthly rentals, which for the purposes of this judgment, I need not spell out.

[5] Under clause 18 of the Sub-lease Agreement, dealing with disputes, it was provided as follows:-

“The Sub-lessor and the Sub-lessee hereby consent to the jurisdiction of the Magistrate’s Court in regard to any case, dispute or procedure, which may arise directly from this sub-lease.”

It is important to note that the sub-lease was attached to the appellant's founding affidavit.

[6] In opposing the appellant's application, the first respondent, through a supplementary affidavit, raised the issue of jurisdiction. In relying on clause 18, quoted above, it averred:-

“Contents herein vehemently denied. This Honourable Court has no jurisdiction over this matter, per the agreement of the Applicant and the 1st Respondent, the court with jurisdiction is that of the magistrate court. This Honourable Court as matter of trite law, is expected to give effect to the agreed method of resolving the disputes arising between parties herein.”

[7] As the matter progressed, and notwithstanding the challenge on jurisdiction, on 5 November 2014, the Judge of the court *a quo*, whose judgment is being appealed against, granted the following interim order:-

1. *1st Respondent is to pay all outstanding and arrears rentals up to 30th day of November, 2014.*
2. *The said amount of **M131,827.00 (One Hundred and Thirty One Thousand Eight Hundred and Twenty Seven Maloti)** shall be paid in monthly installments on or before the 30th Day of November, 2014.*
3. *1st Respondent is directed to continue paying monthly rentals in the amount of **M4,053.50 (Four Thousand and Fifty Three Maloti and Fifty Lisente)** for the period of September 2014 to September 2015 over and above the monthly installments for area rentals.*

4. *1st Respondent is to file their supplementary affidavits with 14 days hereof and Applicant is to reply with 7 days thereof.*
5. *The Applicant is postponed to 5th day of March 2015 for hearing if no settlement is reached.”*

[8] The above order was, on 17 December 2015, followed by yet another order from the same Judge of the Court a quo. The second order read as follows:-

- a) *The application to file a supplementary affidavit is granted, and such affidavit to be filed within 14 days of this order;*
- b) *That the 1st Respondent is also allowed to respond thereto as he deems fit and appropriate;*
- c) *That the costs occasioned by this application are awarded to 1st Respondent;*
- d) *The matter is postponed to the 12th February 2016 for mention and further consideration.”*

[9] On 20 January 2016, in response to the issue of jurisdiction, the appellant had, through an answering affidavit, responded as follows:-

*“Contents herein are denied the Magistrate’s Court does not have jurisdiction in this matter in so far as the sub-lease agreement does not oust the jurisdiction of this Honourable Court but to the contrary what it does is to enable the Magistrate’s Court to have jurisdiction where it normally would not have what is further pertinent in this case is that I maintain that the Magistrate’s Court would not have the capacity to cancel registered sub-lease agreement in terms of the Deed Registry Act. To take it even further on this issue of jurisdiction Magistrate’s Court are territorial and in casu the sub-lease agreements were entered into in **MASERU** whereas the implementation of the contract and the breach that occurred in **BUTHA-BUTHE** and to avoid a situation where it said it is the **BUTHA-BUTHE** or **MASERU** Magistrate’s Court that has jurisdiction it is only prudent to*

approach a court that has jurisdiction all over Lesotho. The last pertinent issue is that deponent cannot and does not tell the court how these would prejudice him by coming to this court. This is another after thought technical point which the court should over look.”

[10] The matter was then heard on 9 May 2017 and on 13 June 2017 the Judge of the court a quo, in dismissing the application, had this to say:-

“It is therefore unavoidable to give effect to the agreement of the parties and I have to agree that this court has no jurisdiction to determine this matter at this stage.”

In arriving at the above conclusion, the court *a quo* was actually accepting that private parties can, through an agreement (i.e. *in casu*, clause 18 of the Sub-lease Agreement between the parties), oust the jurisdiction of the High Court. Unfortunately that determination, as I shall demonstrate, is not legally sustainable.

[11] It will be noted that all the grounds of appeal here are anchored on the question of jurisdiction:- e.i. Did clause 18 in the Sub-lease Agreement oust the jurisdiction of the High Court? The appellant has, in my view, correctly submitted that it did not.

[12] In determining the main issue herein, it is important to commence by visiting both the Constitution of Lesotho and the **High**

Court Act and find out exactly what jurisdiction is conferred by statutory law on the High Court.

12.1 Section 119 (1) of the **Constitution of Lesotho** provides as follows:-

“There shall be a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings and the power to review the decisions or proceedings of any subordinate or inferior court, court-martial, tribunal, board or officer exercising judicial quasi-judicial or public administrative functions under any law and such jurisdiction and powers as may be conferred on it by this Constitution or by or under any other law.” (My own underlining)

Clearly in terms of The Constitution, the High Court has unlimited jurisdiction not only in this particular civil matter but in all civil matters.

12.2 In line with the above Constitutional provision Section 2 (1) of the **High Court Act No. 5 of 1978** provides as follows:-

“The High Court for Lesotho shall continue to exist and shall, as heretofore, be a superior court of record, and shall have:-

- a) unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in force in Lesotho;*
- b) In its discretion and at the instance of any interested person, power to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination; and*

c) *Such jurisdiction and power as may be conferred on it by this Act or any other law.*” (My own underlining).

As provided for in the Constitution, the unlimited jurisdiction of The High Court in all civil matters is reconfirmed under section 2 of the High Court Act as quoted above. There is therefore no doubt that the High Court enjoys jurisdiction in all civil matters. That jurisdiction can only be ousted through a statute provided such statute would not offend the above quoted constitutional provision.

[13] In support of its argument, the first respondent relies on Section 28 of The ***Subordinate Courts Order 1988*** which provides as follows:-

“Subject to Section 29, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto.”

Admittedly where concurrent jurisdiction exists the general practice is to give first preference to the lower court. However, *in casu* the consent envisaged above is an election by a party to hold others to the jurisdiction of the Magistrate’s Court but does not in any way oust the jurisdiction of the High Court. The parties herein had no capacity to clothe the Magistrate’s Court with exclusive jurisdiction over their matter. That, I believe, was clearly intended to cover issues of statutory limits and cancellation of land leases.

Section 7 (1) of the Deeds Registry Act provides as follows:-

“It has been indicated that save as is otherwise provided in this Act or in any other law, no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying a title to immovable property or any real right in immovable property other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by the registrar except upon an order of the High Court of Lesotho.”

In like manner the court *a quo* could not decline jurisdiction on the basis of a private treaty. The court *a quo* had no discretion to exercise on the question of jurisdiction. It could, however, exercising the jurisdiction it has, decline to entertain the matter for any other judicially reasoned out decision. Such a discretion would include the decision on whether or not to remit the matter to the Magistrate’s Court. (See ***Dorby Vehicle Trading and Finance Company (PTY) LTD vs Mokheseng 399 LAC {1995-1999}***).

[14] It is surprising that the court *a quo*, having properly assumed jurisdiction in the matter, as reflected by the court orders referred to in paragraphs 7 and 8 herein, then later turned around to declare that it had no jurisdiction in the matter. The issue of jurisdiction should have arisen on 5 November 2014 when the court issued the first order. It could be true that the parties did not raise the issue, but the record shows that the sub-lease containing the clause relied on was already before the court. The jurisdiction that the court had already correctly assumed could not be thrown away midway. That was wrong.

[15] Clearly a Judge cannot exercise discretion on the jurisdiction that is already conferred on it by statute. As already stated, using existing jurisdiction, it was open to the court *a quo* to use its

discretion on whether or not to remit the case to the Magistrate's Court. It was therefore wrong to use that discretion to declare that the court had no jurisdiction. The court *a quo* had jurisdiction to deal with the matter.

[16] It is my view that the finding that the court *a quo* had jurisdiction to deal with the matter calls for a remittal of the case to the same court. To that end, it is only proper that all issues raised by the parties be attended to by that court. In view of the foregoing, the appeal should succeed.

[17] I take note of the fact that remittal means the case is still to be decided and as such, I think it is only fair that costs be costs in the cause.

[18] I therefore make the following order:-

1. The appeal be and is hereby upheld.
2. The order of the court *a quo* declaring that it had no jurisdiction in the matter be and is hereby set aside.
3. The matter be and is hereby remitted to the court *a quo* to be heard and determined by the same Judge; and
4. Costs shall be costs in the cause.

N. T. MTSHIYA
ACTING JUSTICE OF APPEAL

I agree:

K. MOSITO
PRESIDENT

I agree:

M. MOKHESI
ACTING JUSTICE OF APPEAL

For the Appellant : Adv. L. D. Molapo
For the Respondents : Adv. E. T. Potsane