IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) 54/2016
LC/APN/73/2015

In the matter between

THE MASERU LIBRARY SOCIETY	**1ST APPELLANT**
ALLIANCE FRANCAISE DE MASERU	**2ND APPELLANT**
AND	
ANGLICAN CHURCH OF LESOTHO PROPERTY COMPANY (PTY) LTD	**1ST RESPONDENT**
ANGLICAN CHURCH MISSION OF LESOTHO	**2ND RESPONDENT**
THE LAND REGISTRAR	**3RD RESPONDENT**
THE COMMISSIONER OF LANDS	**4TH RESPONDENT**
THE LAND ADMINISTRATION AUTHORITY	**5TH RESPONDENT**
THE ATTORNEY GENERAL	**6TH RESPONDENT**

CORAM: **Dr. K. E. Mosito P**
Dr. P. Musonda AJA
M. Chihnengo AJA

Heard: **15th January 2019**
Delivered: **1st February 2019**

Summary

Court practice in the Land Court – Land Court Rules 2012 – Ruless 11, 28, 63(1) 64(1) 67(2) 71 and 72 – Preliminary objection – power of the land court jurisdiction – need for matter to go trial – summary dismissal of application on pre-trial stage – The Scope of Rule 67(2) – where court not sure of the site – necessity of calling evidence pursuant to Section 3, of the Land Survey (Amendment) Act No. 15 of 2012.

JUDGMENT

DR. MUSONDA AJA

[1] This is an appeal against the judgment of the Land Court Judge (as she then was Mahase J now ACJ) on 26th October 2016. The appellants originating application proceedings in the High Court in which they sought an order in the

following terms:

(a) An order in terms of which lease 12284-449 currently registered in the first respondent (Anglican Church of Lesotho Property) Company Pty (Ltd), be declared null and void on the ground that it was issued in error, and that the applicant has prior title to the property.

(b) An order for costs against the first and second respondents.

[2] The first and second respondents opposed the application by means of special answer that the applicants lacked ***locus standi in judicio.*** The applicants have no legal right to sue in respect of plot number 12284-449 for the following reasons:

(i) The first respondent has been granted a lease to occupy plot No.12284-445 in terms of the Land Act, 1979;

(ii) The first appellant has been aware of the fact since 1973 and never took steps to assert the alleged right;

(iii) The appellant is using the library site contrary to the tenor of the donation as a liquor restaurant trading as Oul lala shebeen; and

(iv) The matter is yet to be determined by the Honourable Court and is yet to be finalised. A file with the registrar of sites containing the history of this site has been misplaced or caused to disappear which has a proper history of the site.

[3] **THE FACTS:**

In the Land Court the present appellants were the applicants and the respondents in this appeal were respondents in the court ***a quo***. The first appellant, first and second respondents both claimed to have title to this plot. For its part, the first appellant averred that the plot previously housed the public library, then known as Maseru Library and on 11th day of June 1946, was donated to the then (Basutoland Government) by Mr Ernest Hubert Stephens.

The donor's desire was that the said buildings shall be utilised in perpetuity for the purposes of a public library for the benefit of the inhabitants of the territory of Basutoland and further subject to the condition that the said buildings shall be maintained and kept in proper state of repair by the Basutoland Government. There was annexed a sketch map of the library building in which the boundaries between the library and St John's Church are clearly indicated.

[4] For its part the first and second respondents were transferees of land. The first respondent being a subsidiary of the second respondent. The second respondent was granted a lease to occupy in terms of the Land Act 1979. The deed of donation was registered in favour of the Basutoland Government not the appellants. At

the time it was purported to register the site, the first appellant was not yet registered as a Society and could not make such a resolution. There was no basis as to why the registration of title was made in favour of the first appellant. Therefore the said registration was made in error. The first appellant was aware that the first respondent had been the holder of the lease in respect thereto since June 1973 and first appellant took no measures to challenge that fact. The first respondent followed the procedures under the Land Act 1979, which the first appellant did not do. In 1993, the first respondent was issued with a lease and the first appellant could not object, as it was not supposed to own land, land is owned by the Government of Lesotho in terms of the deed of

donation dated 11th June 1946. In any event the first appellant has violated the deed of donation, as the building has been leased to the second appellant, who uses it as a restaurant and shebeen.

[5] The Court ***a quo*** held that the deed of donation annexure "A" was executed on the 15th June 1946. It was subsequently registered as No.1949 by the then Government Secretary of Basutoland.

[6] There is nowhere in the deed of donation where it is indicated that the plot in question was ever donated to any of the applicants or the first and second respondents, so the lower court found.

[7] To be precise, the first applicant – the Maseru Library Society was then not yet in existence

because the purported registration executed in its favour was executed as 18th March 1970. This was 24 years after the library building was donated to the Basutoland Government. In any event the library society was registered in the year 2006 and was allocated registration number 68/06, which was 60 years since the donation to the Basutoland Government was executed.

[8] The Maseru Library not Maseru Library Society, consented to the transfer to the then English Church Mission now the Anglican Church of Lesotho by letter dated 12th January 1973. This is a period of twenty seven (27) years before an entity referred to as the Maseru Library Society had been incorporated and or before it was in existence.

[9] There was notably absent from the documentary evidence filed on behalf of the first applicant/appellant the sketch map plan of this site which unlike annexure “A” above is described as being site No11A area Maseru Central. The learned Judge was of the view that may be they were referring to a different plot from 48.

[10] In a nutshell, and due to the fact that the alleged allocation of title in favour of the first applicant/appellant is highly questionable for the reason that nowhere has it been alleged that at the time the donation was made, the first applicant was already in existence, the special answer/preliminary objection raised had to be upheld.

[11] **THE APPELLANTS' APPEAL**

The appellants were dissatisfied with judgment of the Court a quo for a variety of reasons. It was argued on behalf of the first appellant that the Court a quo erred in finding that there was no similar transfer of title over the site to the first appellant as there was with the respondents. The first appellant had received every right to the buildings and other improvements on site No 11A, as the lawful owner thereof. In terms of the Registered Certificate of Title to occupy, the first appellant had also been lawfully granted the right to use and occupy the site in question. The allocation is dated 6th December 1968.

[12] The rights of the appellant precede those of the

respondents. It is trite law that rights first established receive preference over other claims. In support thereof the case of ***Haroon Abdulla Mahomed v KPMG Harley Morris Joint Venture N.O. (Liquidators of Lesotho Bank) and Others***[1]***.*** The general principle which applies in a situation such as this is expressed in the maximum ***qui prior est tempore, potior est jure***[2] The later edition at P582 succinctly said:

> *"- - - it can now be taken as settled law that the processor of the earlier right is entitled to specific performance unless the other (later purchaser) can show a balance of equities in his favour."*

[13] The Court had erred in finding that it has not been denied that the first appellant lacks ***locus standi*** to claim to be the library committee. The onus rested on the respondent to prove the

[1] C of A (CIV) No.34/2013 LSCA
[2] Christies, "The Law of Contract in South Africa" 3rd Edition

special plea and this can only be done by enlisting evidence in the usual way. The finding that the committee or the Maseru Library Society does not have the right, to sue in terms of their constitution was flawed, as the constitution was silent on the matter. The Societies Act[3], under section 11, which was quoted in extensio, confers on the registered society the right to sue and be sued (b) hold property or assets save and except where the society's constitution provide to the contrary. The constitution of the first appellant did not say the contrary, so it was submitted.

[14] The first appellant obtained his Title Deed to the property on 18th March 1970, while the first respondent got the title much later in March

[3] Act No20 of 1966

1993. The first appellant had the site transferred to the first respondent. If the first respondent impugn the title of the first appellant, who was the transferor of the site from himself to the first respondent, how valid can be the transfer from Maseru library to the English Church Missions or the Anglican Church? That will violate the, ***"nemo dat quod not habet,"*** literally meaning "no one gives what they don't have." The "Special Answer" must therefore fall away, so it was argued.

[15] When the matter came before the Court ***a quo*** on 12th September, the first appellant was ready to call a witness from the Land Administration Authority to lead evidence. The Court however denied the first appellant an opportunity to lead evidence and ruled that the ***special plea*** will be

argued first. This denial by the court ***a quo*** of the first appellant to lead evidence led the court *a quo* to reach an anomalous conclusion or conclusions.

[16] In the present case the procedure laid down in Rule 64, was unfortunately not followed in the court ***a quo*** instead, the court without hearing evidence or examining the parties or any of them and without first giving any directions as contemplated in the rule, dealt summarily on the papers with the two points in *limine* raised by the fourth respondent upheld them both and disposed of the applications by dismissing it with costs. This was a procedural error. Rule 64, goes on to provide for an "examination of parties at the first hearing. It would seem that the framers of the rules had in mind the

identification and definition of disputes of fact which might arise on the papers. Rule 64 (2) and (4) reads:

> *(2)The court may orally examine either party in relation to any material fact of the legal actions*
>
> *(4)After examining the parties the court shall give directions as to the further conduct for the proceedings*

In support of that proposition the case of ***MAKOALA vs MAKOALA***[4], where it was held:

> *"Moreover a court, when faced with an application for only a preliminary point to be argued, should be astute not to grant that relief too readily, mindful of the need to avoid piecemeal hearings with concomitant delays and the incurring of additional costs"*

[17] Mr. Cronje, augmented his filed grounds of appeal with oral submissions. He restated that certi-ficate of Title was issued to the first appellant in 1970, after it had already come into existence contrary to the finding of fact of the

[4] C of A (CIV) 04/09 [2009] 3 LSCA

court *a quo* that the Maseru Library Society came into existence in 2006. The allocation of land was signed for long before, by the Principal Chief and the District Commissioner. Given the way the land was documented in 1970 and post 1979 Land Act, a factual enquiry was imperative. The appellants had asked for a hearing, which was refused. The issue of ***locus standi*** and the merits are interwoven. The matter should be referred back to the court ***a quo*** for hearing.

[18] **THE RESPONDENTS CASE ON APPEAL**

It was canvassed on behalf of first and second respondents, that the first appellant was registered on 31st day of May 1968, under registration number 6 of 1968. The portions of the land was acquired by first and second respondents in 1973 for a ninety (90) year term

commencing 16th day of June 1980. The parties had sued each other in 2003 CIV/T/628/2003.

[19] The appellants filed the application subject of this appeal forty three (43) years later. Factually this was an inordinate delay. The action was therefore prescribed. In **Attorney General vs Majara and Others,**[5] it was said:

> *"[15] This allegation was accepted as correct by the appellant in the special plea in which, it will be recalled, it was pleaded that the cause of action arose, as far back as 1985. Regard being had to the fact that it was common cause on the pleading that the acts complained of which gave rise to the respondent's cause of action had occurred as far back as 1985, it was in my view unnecessary for evidence to be lead on that point."*

[20] It was strenuously argued for the first and second respondents, that it was clear on the pleadings on record that the acquisitive

[5] C of A (CIV) 63/2013) at Para 13

prescription is satisfied by the first and second respondents. Supporting this proposition it was canvassed for the respondents as follows:

> *"Among the common law requirements in addition to continuous uninterrupted possession, necvit nec clam, necprecaro are these:*
> *The possession must be adverse to the rights of the true owner (**see Malan v Nabygelegen Estates 1946 AD 562 at p.574**), and it must be full juristic possession (possession civilis), as opposed to mere detentio (**see Welgemoed vs Coetzer and Others, 1946 T.P.D. 701 at pp 711 – 712.** There must have been no acknowledgement by the possessor of the owner's title (voet, 44.3.9). Clearly, even if the applicant was unable to prove that the site belongs to it, then applicant would have created a prescriptive title over the said land because the case falls squarely under acquisitive possession."*

For further support the cases of ***Morkels Transport v Melrose Foods and Another,***[6] was cited and ***ZCC v Barolong Molise.***[7]

[21] The first and Second respondent canvassed for

[6] (1972) 2 SA 4521, 476 G
[7] LC/APN/47/13

the dismissal of the appeal due to the first appellant not having title for the site, while the second appellant was a mere tenant in question. Further, that the first appellant having come into existence in 1969. The first appellant did not follow the procedure laid down by Section 29(1) of the Land Act 1979.

[22] It was argued that remitting the matter for hearing would not be appropriate. The decision of this court in ***Shale vs Limema,***[8] following ***Mphofe v Ranthimo and another,***[9] where it was said:

> *"There is no need to refer the matter to hear evidence on the special answers as the witnesses are the Land Allocating Authority who would be compromised in court as they failed to mediate."*

[23] Augmenting the filed heads of arguments Mr.

[8] C of A (CIV) 53/14 Para 26 per Chinhengo AJA
[9]

Taaso, for the respondent submitted that the acquisition process commenced on 15th November 1967 before the first appellant was born and before the Land Act 1967, came into force. He disagreed with court ***a quo*** that the first appellant came into existence in 2006. He further agreed that Sections 3 of the Land Survey Act.[10] Impels the office of the Chief Lands Surveyor to bring expert evidence where there are boundary disutes.

[24] **FACTUAL CONTRADICTIONS**

The learned judge in the court ***a quo*** made a flawed finding of fact that the first appellant was registered in 2006. On page 15, there was a certificate of Title in the name of the first appellant dated 18th March 1970. Interestingly

[10] Land Survey (Amendment) Act No15 of 2012

both advocates for the appellant and the respondent on appeal contradict this finding, which was crucial to the learned Judge's determination see Para 14 of her judgment. On para 15, the learned Judge says the Maseru Library and not the Maseru Library Society, consented to the transfer of the site to the then English Church Mission, now the Anglican Church of Lesotho by letter dated 12th January 1973, 27 years before an entity referred to as the Maseru Library Society had been incorporated and or before it was in existence.

[25] This site was donated to the Government of Lesotho. The lingering questions are: (i) did the Government of Lesotho transfer the site to the Maseru Library, who in turn transferred to the English Church Mission, (ii) did the government if

ever it did transfer, not violate the tenor of the donation particularly para 4 of page 12, which presupposes that the Basutoland government shall in perpetuity operate a library and maintains and keep the said buildings in proper state of repair. How can land intended for philanthropic activities be transferred to a commercial entity A.C.L. Property Company (Pty) Ltd. Who authorised the transfer to this entitly PP21-27. First Respondent impugned the title of the first appellant of 1970 and yet wants title derived from the impugnable title under Annexure ACL2 at p52 to be valid. What a contradiction, couldn't he be estopped? And the Judge so agreed see para 22 of the judgment in Para 16 the learned Judge makes a flawed finding of fact that the Lesotho Government

transferred land to the first respondent when it was alleged to be the first appellant under Annexure ACL 2 at p52. She says in para 17, there was no similar transfer of title or rights to first and second appellants, when the 1970 title was acquired with the concurrence of the Principal Chief and District Commissioner and under 1967, Lands and Deeds Registry Act.

[26] In para 12, of the judgment, the Judge was oblivious of the fact that there were two titles to one property one the 1970 in the name of Maseru Library Society and the other the 1993 in the name of A.C.L. Property Company (Pty) Ltd and then there was a transfer by Maseru Library to the English Church Mission, which entity the learned Judge accepted as a forerunner to Anglican Church Mission of Lesotho, and we find

no justification in the same vein the Maseru library could not have been characterised as the forerunner to the Maseru Library Society.

[27] Mr. Taaso, for the first and second respondent contradicts himself by arguing that the first appellant would have resorted to acquisitive prescription, when the first appellant was Title holder in 1970 under the 1967 Land Act, and Lands and Deeds Registry Act and on the papers they seem to have followed procedure. He makes a knee-jerk rejection of a re-trial, while at the same time acknowledges Section 3, of Land Survey (Amendment) Act[11] facilitates the leading of expert evidence by the Chief Lands Surveyor.

[28] **THE LAW:**

In land law the **“earlier in time the stronger**

[11] Ibid

in law." The issue of prescription was not pleaded and ought not to have been dealt with by the lower court.

In ***Ranthimo Michael Motumi and Peter Seoehlana Shale, the Registrar Land, Administration Authority,***[12] this court said, following ***Likotsi and Associations and 14 Others v the Minister of Local Government and 4 Others:***[13]

> *"(12) ..... the procedure laid down in Rule 64 was unfortunately not followed in the court a quo. Instead, the court a quo, without hearing evidence or examining the parties or any of them, and without first giving any directions as contemplated in the rule, dealt summarily on the papers with the two points in limine raised by the fourth respondent, upheld them both and disposed of the application by dismissing it, with costs. In my view, she erred in doing so."*

[29] This court further mentioned in para 14:

[12] C of A (CIV) Vol 32 of 2017

[13] C of A (CIV) No.42/2012

> *"14 In the headnote in Masupha v Nkoe and Another C of A (CIV) 42/2006, this court pointed out that where a preliminary objection (special answers) is raised before trial in terms of Rule 66 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 even suo motu order a deficient application to be amended with an appropriate order as to postponement and costs thereby occasioned."*

[30] In para 12, of the learned Judge's judgment, she was not sure what site was being referred to whether 11A or 48. Had the matter proceeded to trial, as we are of the view it should have in compliance with the Land Court Rules 2012 (supra) these issues would have been resolved. For the respondents it was stated that the file containing cadastral information had gone missing, it would therefore been imperative to

have resorted to Section 3, of the Land Survey (Amendment) Act (supra). This court said in ***Letsoso Mohasoa v Matekane Transport and Plant Hire (Pty) LTD, and 3 others.***[14]

> *"(14) ---In our cadastral law, it is clear from section 3 of the Land Survey (Amendment) Act, that, it is the, functions of the office of the Chief Surveyor to administer the land cadastre system which includes: retaining accurate information and maps on the land cadastre system registering land onto the cadastre, updating the cadastre with details of any consolidations, sub-divisions or other changes in the legal boundaries, providing maps or other information regarding the cadastre, resolve cadastre complaints and disputes with regard to land parcels boundaries. It was therefore imperative in this kind of case, for the plaintiff to call this kind of expert evidence."*

[31] We agreed with the comments of Hartle J, in ***Shell South Africa Marketing (Pty) Ltd v Thamsanqa Steve Haku***[15] when he said:

> *"Accurate surveys are a prerequisite for the establishment and recording of the position*

[14] C of A (CIV) No. 01/2017
[15] Case No: 158/11 LAWSA Surveying of Land; volume 14(1) at para 176

of boundaries between different plots of land. An effective system of land title registration is impossible unless land is divided into units which are properly surveyed and represented on a diagram or general plan. A duly approved diagram establishes, for cadastral purposes, the description of a specific land unit; the extend and boundaries of such a unit; the description of the beacons marking the unit and co-ordinator fixing the position of the beacons; and the description, position on or in relation to the unit of any servitude feature already registered or to be registered, which affects the unit:

[32] **FINDINGS ON APPEAL**

Whichever division of the High Court would have handled this matter, could not make head or tail on papers alone. The documents are contradictory, so is the judgment of the court ***a quo*** and Counsel's submissions in this court. There is no explanation as to why the Maseru Library transferred the site to the first and second respondent and for what consideration as first respondent is a commercial entity. The

documents cry for explanation, which could only be done by complying with section 64, of the Land Court Rules 2012 (supra) and Section 3, of the Land Survey (Amendment) Act (supra) whether the library and fixtures seat on site 11A or no site 48 or on the portion of it, remained undetermined by the court ***a quo***. This begs the question as what extent of the interest in Land, the successful party so-called was entitled to and why?

[33] The philosophy underlying the two pieces of legislation is to obviate the situation the Court and the parties found themselves in. The court ***a quo*** was unable to determine which site was transferred to the first respondent and why it was transferred and for what, as this was contrary to the tenor of the donation. There

were factual differences and contradictions on the papers, which inevitably needed a factual enquiry by way of hearing.

[34] It must be acknowledged that Land matter must be decided with great care and consideration. This was the philosophy underlying the enactment of the Land Rules (supra) and the Land Survey (Amendment) Act No 15 (supra). We do not think one can credibly and with a pure conscience argue against the view that a hearing is inescapable.

[35] For what we have said the judgment of the court ***a quo*** is set aside for non-compliance with Land Court Rules 2012 and the Land Survey (Amendment) Act No.15 of 2012. Additionally the judgment contains findings of fact perverse

to the papers on record.

[36] **CONCLUSION**

The appeal is allowed, the orders of the court ***a quo*** are set aside and in substitution thereof we make the following orders:

(i) Appeal is allowed and the orders

(ii) Matter remitted to the High Court for re-trial before another Judge

(iii) Costs to be in the cause

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DR. P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree

_____

DR. K. E. MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree

_____

M. CHIHNENGO
ACTING JUSTICE OF APPEAL

For the Appellants: **Adv. P. R. Cronje**

For the Respondents: **Adv. T. Taaso**