IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) 16/2019**
LC/APN/17/2012

In the matter between

CHAKA MOEKO **APPLICANT**

and

MOEKETSI MOEKETSI **1ST RESPONDENT**

MAKHOTSO CECILIA MOEKETSI **2ND RESPONDENT**

THE DIRECTOR OF LEASES **3RD RESPONDENT**

THE LAND REGISTRAR **4TH RESPONDENT**

THE LAND ADMINISTRATION AUTHORITY **5TH RESPONDENT**

CORAM: **K.E. MOSITO, P**

DR. J. VAN DER WESTHUIZEN, AJA

N.T. MTSHIYA, AJA

Heard: **16 October 2019**

Delivered: **1 November 2019**

Summary

Whether or not the Land Court has jurisdiction over a contract on land – Procedure to be followed when court has jurisdiction.

Judgment

MTSHIYA , AJA

[1] This is an appeal against the Judgment of the High Court (Land Court) delivered on 18 September 2018. In the main, the court *a quo* made the following decision:

> "[28] There is therefore no doubt that when in 2012; the applicant lodged this application in this Court, the said two respondents had been in occupation of the plot in question for a period of twenty (20) years. Whatever case he may have had; if he had any, has long prescribed.
>
> [29] To come to any other conclusion, this court would be defeating the purpose(s) and objectives for which the Land Act and its attended Rules have been promulgated. In the circumstances, and bearing in mind that this Court is of the view that it would not have made a valid judgment should it ignore Rule 66(2)(e); it stands to reason that the preliminary objections raised should be dismissed.
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> [30] In the premises, the preliminary objections herein raised are dismissed with costs to the first and the second respondents."

[2] The grounds of the appeal are set out as follows:-

> -1-
>
> "The learned Judge a quo erred and/or misdirected herself in holding that the matter has prescribed. None of the parties had pleaded prescription nor was the court addressed on prescription by one or both parties. The matter had not prescribed as the learned Judge held, with due respect.
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> -2-
>
> The learned Judge a quo erred and/or misdirected herself in holding that the application has been dismissed. Whereas what was dismissed was the preliminary point of Lack of Jurisdiction, raised by the 1st and 2nd Respondents.

-3-

The learned Judge a quo erred and/or misdirected herself in awarding costs to the 1st and 2nd Respondents, when their preliminary point of Jurisdiction was dismissed and costs on that dismissal were due to Appellant.

-4-

The learned Judge a quo erred and/or misdirected herself in making a final decision in the matter without hearing the merits of the matter.

-5-

The learned Judge a quo erred and/or misdirected herself in awarding costs to the 1st and 2nd Respondents as they were unsuccessful in their preliminary point of Lack of Jurisdiction."

Background

[3] The facts of this case are that in 2012 the appellant applied for cancellation of a lease registered in favour of the first and second respondents. The appellant's mother had entered into a contract of sale over the disputed plot of land but the applicant contended that the contract had never been fully executed because the purchase price had not been fully paid. The appellant alleged that the first and second respondents fraudulently obtained a lease. To that end the appellant approached the Court a quo seeking the following relief:

> "(a) The Rules of this Honourable Court pertaining to periods of notice and service shall be dispensed with and the matter be heard as of urgency.
>
> (b) First and Second Respondents be interdicted forthwith from disposing of, encumbering and/or dealing with Plot No. 13282 – 1244 situated at Mapeleng, Maseru Urban Area in any manner whatsoever pending the determination of these proceedings.
>
> (c) Third and Fourth Respondents be ordered to cancel and/or expunge from the Records of Fourth

Respondent the registration of Lease No. 13283 – 1244 in favour of the First and Second Respondents herein.

(d) The Respondent be ordered to register Lease No. 13282 – 1244 in the names of the Applicant herein.

(e) Respondents be ordered to pay the costs of this Application in the event of opposing the orders sought herein.

(g) That prayers 1(a) and (b) operate with immediate effect as an Interim Order of Court."

[4] In opposing the application, the 1st Respondent avers in part, as follows:

> "The averments herein are denied and deponents put to the proof thereof. The correct and true position is that on or about 1992 applicant's late mother entered into agreement of sale of a portion of her plot and respondents got a Form C for the site which Form C lost in respondents' possession. It is from this portion that First and Second Respondents got Lease No. 13282 – 1244 and applicant's mother remained with the rest of the site. Applicant has signed for sale of the portion referred to in their annexure "EE" the other proof of payments is annexed marked "1(a)".
>
> When applicant's mother purportedly designated applicant as her heir under annexure "BB" first and second Respondents had been long in occupation of a house they built on the site applicant and his mother gave them. In 2010 Applicant's mother purports to give the same plot on which first and second Respondents have extensively improved and are living on as if it is an undeveloped unoccupyable site, what is strange is that applicant does not even want to show how the site they occupying was allocated to them.

[5] On 19 August 2015 a pre-trial conference was held and it was agreed as follows:

> "(A) **FACTS THAT ARE COMMON CAUSE**
>
> 1. Parties to stay as they are

2. Disputed site is registered in favour of First and Second Respondents.

3. There is contract between Applicant's Mother and First Respondent regarding the sale of this Plot to First Respondent.

(B) **ISSUE TO BE DETERMINED BY THE COURT**

1. Jurisdiction
2. Rightful title holder"

HEARING AND DETERMINATION OF THE PRELIMINARY – ISSUE JURISDICION

[6] The preliminary issue on jurisdiction was heard on 19 August 2019 and the court correctly dismissed it on the basis that in terms of Section 73 of the Land Act (amendment) No.16 of 2012 the Land Courts are established with jurisdiction, subject to the provisions of Part XII, to hear and determine all disputes, actions and proceedings concerning land. The grounds of appeal do not challenge that finding.

[7] **DISMISSAL OF MAIN APPLICATION**

Upon establishing jurisdiction, the Court *a quo* then dismissed the main application. The ground for dismissal of the application was that when the applicant lodged his application the 1st & 2nd respondents had been in occupation of the plot in question for a period of twenty (20) years and his case had therefore long prescribed. The issue of prescription, which can be raised as a defence, had, however, never been raised by the respondents. It is trite that the issue of prescription, when raised, normally requires evidence to be led. That was not done.

APPELLANT'S ARGUMENT

[8] The Appellant challenges the Court *a quo's* dismissal of the application on the ground of prescription when in fact what was before it was the issue of jurisdiction. Furthermore, the issue of prescription had never been raised and no evidence was led on it. The appellant is correct and even the judgment is entitled "Ruling on Preliminary Objection." The parties also agree that what was before the Court *a quo* on 19 August 2015 was the issue of jurisdiction. Furthermore, the issue of prescription had never been raised and no evidence was led on it. The parties further agree that the Court was never addressed on the merits of the case. Indeed the Court *a quo* could only proceed to the merits of the case upon pronouncing on jurisdiction.

PROCEDURE IN LAND MATTERS

[9] In reliance on the case of ***Masupha v Nkoe and Another C of A (CIV) 42/16*****,** the appellant contends that where a preliminary objection 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 when there is a real dispute of fact. Further, that Rule 66 (1) gives the court a wide discretion to the court to afford both parties an opportunity to present their cases at trial. The said Rule 66 provides as follows:

> "(1) Before proceeding with the trial, the court shall decide such objections 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) that there is a final and binding decision by a competent court over the same claim;

(c) that the suit is pending in another court;

(d) that the other party is not qualified for acting in the proceedings

(e) that the suit is bared by prescription; or

(f) that the claim has been previously been made the subject of a compromise or other agreement.

(3) Where more than 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 been waived, unless the ground of objection is such as to prevent a valid judgment from being entered."

[10] Upon establishing jurisdiction the Court *a quo* should have then brought into play the Land Court Rules. Rule 64 of the Land Court Rules also provides as follows:

"64 (1) At the first hearing the court shall read the pleadings and ascertain from each party or his legal representative whether he admits or denies such allegations of fact as are made in the application or answer and as are not expressly or by necessary implication admitted or denied by the party against who they are made.

(2) The court may orally examine either party in relation to any material fact of the legal action.

(3) Where the legal representative of any party who appears by a legal representative is unable to answer any material question relating to the application which the court considers that the party whom he represents has to answer and is likely to be able to answer if examined in person, the court may adjourn the hearing to a future day and direct that such party shall appear in person on that day.

(4) After examining the parties the court shall give directions as to the further conduct of the proceeding.

(5) The substance of the examination held under this rule and any admission or denial made in the course thereof shall be recorded by the court."

The above Rules were not followed and that constituted a misdirection on the part of the court *a quo*. The respondent conceded that there was indeed a misdirection and agreed that the matter be remitted to the court *a quo* for proper determination in terms of the Land Court Rules. That concession was well taken.

[11] The parties agreed that costs, would be costs in the cause.

[12] It is accordingly ordered as follows:

1. The Appeal succeeds
2. The decision of the court *a quo* is set aside.
3. The matter is remitted to the court *a quo* for it to be determined in terms of the Land Court Rules under a different judge.
4. Costs shall be costs in the cause.

N. T. MTSHIYA
ACTING JUSTICE OF APPEAL

I agree

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

I agree

DR. J. VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

For the Applicant: **Adv. M. Posholi**

For the Respondents: **Adv. E. M. Kao**