

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO 35/2019
CIV/APN/167/2018

In the matter between:

MOKHALI SHALE

APPELLANT

And

**MAMPHELE SHALE
KANANA COMMUNITY COUNCIL
MINISTRY OF LOCAL GOVERNMENT
ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT**

CORAM: P.T. DAMASEB AJA
DR. P. MUSONDA AJA
DR. J. VAN DER WESTHUSIZEN AJA

HEARD: 15 OCTOBER 2019
DELIVERED: 01 NOVEMBER 2019

SUMMARY

Heirship – Declaration of rights over immovable property – the Land Courts seized with jurisdiction not the High Court – whether High Court has power to declare the rights of the parties – High Court (Amendment) Act 1984, section 2, Land Act, 2010 sections 73, 74 and 89, Land Regulations 2011 regulations 43 and 44 construed – unlimited jurisdiction of the High Court does not mean limitless – jurisdiction may be prescribed by statute, where specialized courts have been created – the jurisdiction of the land courts is broad as it encompasses any dispute concerning land.

JUDGMENT

MUSONDA AJA

BACKGROUND

- [1] This is an appeal against the judgment of the High Court (Sakoane J). The applicant now appellant approached the High Court seeking the following relief:
- (1) Declaring him to be lawful and sole heir to the property that used to belong to the late Mokhali and 'Mamotlalepula Shale which was inherited by Shale Shale;
 - (2) Recognizing the family letter written in favour of the appellant by the Shale family to be in relation to the property that was inherited by Shale Shale from his parents;
 - (3) Declaring as improperly and unlawfully issued, invalid, null and void and of no force and effect, the certificates of allocation held by the 1st Respondent over the said property;
 - (4) Subsequently ordering the 2nd Respondent to cancel certificates of allocation over the said property which are held by the 1st Respondent;
 - (5) Declaring as lawfully issued and valid, the certificate of allocation issued by the 2nd Respondent in favour of the appellant;
 - (6) Granting the appellant leave to lead viva voce evidence in the court a quo in the event that there is an unforeseen dispute of act which cannot be resolved on papers; and

- (7) Further and/or alternative relief.
- [2] The property in respect of which the appellant sought relief in the court *a quo* was identified as 3 fields belonging to his great uncle's parents in the Matseng area. One at Lithakong and the other 2 at Beona. There was a homestead at Matseng, a large garden separate from the homestead as well as some tree plantation.
- [3] The basis for claiming heirship and title was that the appellant was nominated by the family to be heir on 22nd January 2017. The nomination was accepted on 6th June 2017 by the 2nd respondent as the land allocating authority. The appellant averred in the court *a quo* that he was issued with certificates of allocation. However, neither Form C nor a lease were annexed to his papers.
- [4] On July 2017 the appellant launched proceedings in the Magistrates Court at Berea to interdict the 1st respondent from interfering with his rights over the properties. This is when he learnt that the 1st Respondent had certificates of allocation for all the land that used to belong to his great grandparents.
- [5] The appellant alleged in the court *a quo* that the 1st Respondent obtained the certificates unlawfully and irregularly. Prior 2003 customary law would not allow a woman to inherit the properties upon her husband's death even if the 1st Respondent was legally married to the late Shale Shale. She would not in terms of the law that was applicable then hold title to land and therefore any land holding by her obtained in 2000 is unlawful,

irregular, invalid and of no force and effect. She could not even hold title to land she herself acquires.

PRELIMINARY POINT LAW

- [6] The 1st Respondent raised two preliminary points, one of lack of jurisdiction and the other *locus-standi*. She also pleaded on the merits in the court *a quo*.
- [7] The learned Judge was of the opinion that in the view he took on the validity of the point of lack of jurisdiction, it was not necessary to consider the point of *locus standi*, which is intricately linked to the merits.
- [8] It is law that when a jurisdictional challenge is raised, the court must dispose of it first before entering upon any further questions that are in the case. The learned Judge then decided to focus on the claim as pleaded and not its merits or other claim that has not been pleaded, but could possibly arise from the same facts. In aid to his statement, he cited the case of *Masupha v. Nkoe and Another*¹ and *Samsa v. McKenzie*².
- [9] From the pleaded facts there cannot be any denying that the gravamen of the appellant's case in the court below was the assertion of title to landed property. He challenged the 2nd respondent's allocation to the 1st respondent and the consequential invalidation of the 1st respondent's certificates of title over the same land. The dispute is over land and title thereto. It did not matter that the assertion of title is through inheritance.

¹ LC/APN/165/2014

² (2010) 3 All SA 1 (SCA) para [6]-[7]

- [10] The *Land Act No.8 of 2010* has created the Land Court as a division of the High Court with special jurisdiction to deal with all disputes over land: Vide sections 73 and 74. Its exclusive jurisdiction is buttressed by the transitional provisions in section 89, which provides that it is only cases which are pending before the High Court when the Act came into effect that would continue to be heard by the High Court until completion. Thus all new cases were and are to be heard in the Land Court.
- [11] When a statute creates and grants jurisdictions to a specialist court, the High Court's jurisdiction is ousted notwithstanding its unlimited jurisdiction: *Vice-Chancellor of the University of Lesotho and Another v. Lana*³.
- [12] Land allocation and title thereto is governed by the provisions of the *Land Act, 2010* and the *Land Regulations 2011*. The procedure for inheritance of title to land is provided for under Regulation 43 and 44. The scheme of these Regulations, is that it is the allocating authority that determines heirship after submission of nominations by families and consideration of any objections thereto. It is, therefore, not the duty of courts of law to settle disputes of heirship over immovable property. *Moteane v. Moteane And Others*⁴.
- [13] What that means is that, the creation of the Land Court with a specialist jurisdiction in land matters, the High Court's discretionary power under section 2, of the *High Court (Amendment) Act No.34* of 1984 to grant declarations of rights of inheritance to land has been supplanted. The scope

³ LAC (2000-2004) 527

⁴ LAC (1995-99) 207

of the right and determination is clearly defined by statute, *Ex Parte Noriskin*⁵.

LACK OF JURISDICTION

- [14] The learned Judge was of the view that the pleadings reveal that the dispute is about title to landed property. That being the case the High Court had no jurisdiction, as it is only Land Courts that have legal competence to determine land matters.
- [15] In conclusion the learned Judge upheld the preliminary point of lack of jurisdiction and dismissed the application.
- [16] The appellant was aggrieved by the dismissal of his application for the High Court's want of jurisdiction and noted an appeal to this court.
- [17] The applicant filed two grounds of appeal. In the first ground, the court *a quo* was faulted for holding that it lacked jurisdiction to entertain the issue that was before it on the basis that the dispute related to land. In the second ground, it was stated that the court *a quo* mischaracterized the issue before it. The court was called upon to make a declaratory order as to who was heir and successor to the estate of the late Mokhali and 'Mamotlalepula Shale. The issue for determination therefore resolved around heirship and succession and could not be categorized as a land dispute.

⁵ (1962) 1 SA 856 (D)

APPELLANT'S ARGUMENTS

[18] It was valiantly argued that the appellant in the court *a quo* sought to be declared heir to the estate of the late Mokhali and Motlalepula Shale. The family by appointing the appellant as heir to the estate of the late Mokhali and 'Mamotlalepula endowed the appellant with the necessary *locus standi*. The issue of jurisdiction was equally misconceived for the simple reason that the relief claimed was a declarator that the appellant be declared heir to the estate of late Mokhali and 'Mamotlalepula Shale. The issue of jurisdiction is without substance but a cloud to distract from the real issues. Therefore the points *in limine* were not taken.

[19] The appeal revolves around whether or not the court *a quo* erred in holding that the lis between the parties involved title to landed property or whether the issues involved were heirship and succession to the estate of the late Mokhali and 'Mamotlalepula Shale.

[20] In *Keneuoe Lepholisa v. Moleleki Lepholisa & Another*⁶, Mahase J sitting in the land court said the following:

[14] The crux of the applicant's application is based on inheritance or on succession. However, she cannot succeed on this, because, she has not been appointed an heir to that estate. This is aside from the fact that she has since been married and also her father has died intestate.

.....

⁶ LC/APN/12/2012 [2015] LBHC 6(17th February 2015) unreported

[16] The court does not clearly have jurisdiction to deal with disputes relating to claims based on inheritance and/or succession, nor can it deal with matters regarding a declaratory orders based on heirship. Such issues can be adjudicated by the High Court exercising its normal civil jurisdiction.’

[21] It was the appellant’s case that the High Court per Sakoane J exercising its normal civil jurisdiction declined to hear a matter involving heirship on the basis that the matter falls to be determined by the Land Courts. The appellant prayed that the matter be remitted to the High Court for determination of the merits: They canvassed for costs.

RESPONDENTS ARGUMENT

[22] The court observes that in the 1st Respondents Heads, the merits have been canvassed. The issue therefore is that of jurisdiction and only submissions that deal with jurisdiction will be considered.

[23] The issue of jurisdiction of the Land Courts is now trite, so it was argued. The Land Courts are a creature of the *Land Act 2010* (as amended) and it is from this same statute that they accrue their jurisdiction. Section 73 of the *Land Act 2010* designates land courts as being seized with the jurisdictions to deal with all matter concerning land.

[24] This court had occasion to interpret section 73 in the case of *Lephema v. Total Lesotho*⁷. We said:

⁷ C of A (CIV) 36/2014

“The phrase “concerning land” as meaning those claims and/or disputes from title to land, derogations from title and rights which override title.”

[25] It was therefore submitted that the Land Courts have been given exclusive jurisdiction to entertain matters relating to land. This Court in ***Vic-Chancellor of NUL & Another v. Lana***,⁸ held that:

“it has been decided by this court in the past that, interference with the ‘unlimited jurisdiction’ of the High Court can only be effected by express provisions...”

This court was then dealing with the provisions of the labour related Statutes. The same reasoning should apply to land matters. They should be brought before the Land Courts, so the respondents canvassed.

[26] The respondent further argued that the appellant had come before the High Court to ventilate his land rights by seeking to be declared as an heir. The appellant has a letter appointing him as heir. He has come to court to seek to nullify the 1st respondent’s certificates of allocation on ground of being an heir.

[27] Adv. Masoeu augmented the filed Heads with oral submissions. He argued that going through the prayers, prayers 3-5 are seeking relief, which is related to land. Heirship is just a stepping stone. The ownership rights of these properties except the site at Lithakong are in contention.

⁸ LAC (2000-2004)

[28] The proper Court is the Land Court. There are special rules on how the business of Land Court is conducted. The appellant would have first gone to the High Court to be declared heir and then go to the Land Court. Section 5 (2) of the *Land (Amendment) Order, 1992* where the allottee of the land dies the land goes to the deceased's widow.

ISSUES

[29] The issues in this appeal are simple and can be summarized as follows:

- (i) What was the nature of the dispute in the court *a quo*?
- (ii) Did the court *a quo* have jurisdiction?

CONSIDERATION OF THE APPEAL

[30] The learned Judge quoted in extensio the prayers in the notice of motion. That should paint a picture of the nature and character of the reliefs sought in the court *a quo*. The appellant in prayer 1 prayed that he be declared the lawful and sole heir to the property that used to belong to the late Mokhali and 'Mamotlalepula Shale which was inherited by Shale. In prayer 2, he sought recognition of the family letter written in favour of the appellant by the Shale family to be in relation to the property that was inherited by Shale from his parents. Prayers 3-7 sought the invalidation of certificates of allocations and are directed at the deprivation of the interest in land held by the 1st Respondent.

[31] The salient sections of the Land Act dealing with jurisdiction are sections 73, 74, 75 and 89 and are couched in these terms:

73. *Courts are established with jurisdiction, subject to the provisions of this part to hear and determine disputes, actions and proceedings concerning land:*

- (a) *The Land Court; and*

(b) *District Land Courts.*

74. *The land court as a division of the High Court.*

75. *Subordinate courts are designated as District Land Courts for the purposes of the Land Act.*

[32] The phrase ‘concerning land’ the meaning is not restrictive, but expansive. The verb ‘concern’ is defined by the Concise Oxford English Dictionary as: ‘relate to, be about, affect, involve’. Could it be credibly argued that prayer 3-7 do not relate to or affect land? Commonsense suggests it does.

[33] This court recently considered the matter in the case of *Theko Letsie v. Moeketsane Lirahalibonoe Letsie and 4 Others*⁹. The case was an appeal from the judgment of Mahase J, whose other judgment the appellants heavily relied on, she said:

‘25) Be that it may, there are a plethora of decided cases based on the law that an heir has to be nominated by the family council and not by a court of law. If a court of law were to do so, it would have usurped the duties and functions of the Letsie family’.

This passage run counter to the appellant’s assertion that the High Court, instead of the Land Court, has jurisdiction to make declaratory orders in heirship disputes. The heirship disputes may come to the High Court on appeal.

⁹ C of A (CIV) No.8/2018 (31st May 2019)

[34] In a high-water mark case, *Moteane v. Moteane and Others*,¹⁰ Kheola J's judgment explicitly interrogated section 14(4) of Part 1 of the *Laws of Lerotholi, the Land Act 1979* and the *Land (Amendment) Order 1992* when he said:

“A family meeting must be held designating an heir. If the applicant is of the opinion that there is a dispute between himself, on the one hand and the respondents on the other, he must follow the provisions of section 14(4) of Part 1 of the Laws of Lerotholi. If no agreement is reached at such a meeting only then can the applicant take the dispute to an appropriate court. I have come to the conclusion that the applicant has failed to prove that there is any dispute between himself and his brother. He has prematurely decided to bring this matter to court before the family has been given the first chance to decide the matter in terms of section 14 of the laws of the Lerotholi. I do not know what the applicant means by saying he should be declared as the sole heir, if he means that he alone must inherit his late mother's property and exclude all his young brothers, that cannot be done because the law is very clear that the heir must share with his brothers.”

[35] From the foregoing it is patently clear that prayer No.1 is inconsistent with this court's decision in *Theko Letsie and Moteane* supra. The core dispute touched on landed property and not on heirship. Even if for a moment the court assumed to be with the appellant, section 14 of the laws of Lerotholi enacts the procedure to be followed if there is a dispute about who the appropriate heir is, which was not followed in this case.

¹⁰ CIV/APN/119/93 (23rd March 1994).

[36] From the foregoing it is patently clear that prayer No.1 cannot be reconciled with the decision in *Theko Letsie and Moteane* supra. The core dispute touched on the appellant and respondents interest in land and not heirship. In any event there was no heirship dispute to be determined. Section 14 of Lerotholi lays down the procedure where heirship is contested. The core issues raised in the Notice of Motion predominantly deal with the interest in land. The appellant was seeking to derogate the 1st Respondent's interest in land.

[37] The context in which unlimited jurisdiction of the High Court should be understood is that the High Court should not be compared with inferior courts and other tribunals which as creatures of statute have only so much competence as specifically granted under the empowering statute. That does not mean that by specific legislation the High Court's jurisdiction may not be excluded and be conferred on another forum. Land disputes are a case in point. In regard to land matters it had only transitional jurisdiction, under section 89 which has since been supplanted by the Land Court under the *Land Act 2010* in matter involving an interest in land. The High Court therefore had no jurisdiction in the present matter.

DISPOSITION

We make the following orders:

- (i) The appeal is dismissed
- (ii) Costs will follow the event.

DR. P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

P.T. DAMASEB
ACTING JUSTICE OF APPEAL

I agree

DR. J. VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

For the Appellant: Adv. M.V. Khesane

For the Respondents: Adv. L. Masoeu