IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 55/2019

LC/APN 28/17

In the matter between:

TAELO MICHEAL KOLISANG	**APPELLANT**
And	
THABISO VICTOR MAHASE	**1ST RESPONDENT**
FILL THE GAP HEALING MINISTRIES	**2ND RESPONDENT**
LAND ADMINISTRATION AUTHORITY	**3RD RESPONDENT**
CHIEF HLATHE MAJARA (N.O)	**4TH RESPONDENT**
LESOTHO BANK IN LIQUIDATION	**5TH RESPONDENT**

CORAM: DR. MUSONDA AJA

DR. VAN DER WESTUIZEN AJA

MTSHIYA AJA

SUMMARY

Land law-Seller having no title-Seller selling mortgaged property-Buyer aware of the encumbrance- Mortgaged property title is conveyed to the mortgagee by the mortgagor, the conveyance becomes void upon payment of the debt-Mortgaged property cannot validly be sold before redemption- Whether purchaser of mortgaged property is innocent possessor or purchaser-No compensation flows from such a transaction, though loss regrettable-Transaction is null and void.

JUDGMENT

DR. MUSONDA AJA

[1] This is an appeal against judgment and orders made by Sakoane, J, in the Land court, in a matter concerning competing claims to a piece of land brought by the 1st Respondent in the court a quo.

Introduction

The 1st respondent, brought an application in the Court a quo against the appellant, seeking the following reliefs:

> (a) That any transaction entered into between the applicant's late mother and the 1st Respondent in respect of Plot No. 13272-672 be declared null and void *ab initio*;
>
> (b) That the "Form C" certificate and any other certificate allegedly issued to the 1st Respondent in respect of Plot No. 13272-62, be declared null and void, *ab initio;*

(c) That the applicant be declared as the lawful title holder of plot No. 13272-62;

(d) That the 1st respondent and the 2nd Respondent be evicted from Plot No. 13272-62;

(e) That the 1st Respondent be ordered to demolish all the structures he had erected on the site in dispute;

(f) That the 1st and 2nd Respondent be ordered to pay costs on attorney and client scale on in the event of opposition; and

(g) That the applicant be granted further and/or alternative relief.

Factual matrix

[2] The first respondent was the undisputed heir of his mother's estate Lillian Manthakoana and his brother Kelly Mahase, who was the holder of Form "C" and a registered Certificate. His heirship was upheld by both the High Court and this Court in the case of **Mahase v Kh'ubeka and Others Lac (2005-2006) 426.**

[3] The first respondent's parents were owners of three sites, of which two were residential and one was business in the mid 1960's. The sites were all developed. Sometime in 1979, the applicant's mother permitted his late elder brother Kelly Mahase, to apply for a certificate of immovable property and the property was registered as number 14285 on the 5th of June, 1979. This was received in evidence in the court below as TVM 3.

[4] The deceased, Kelly Mahase, executed a Deed of Hypothecation, TVM 4 with the Lesotho Bank to secure the sum of Twenty Thousand

Maloti (M20, 000). His mother, who was later to become the seller of this very property, executed a surety bond on the same date as a Deed of Hypothecation, which was received in evidence as TVM 4. The surety bond was in respect of commercial site No. 13272-1172, TVM 5.

[5] The 1st respondent was informed by his mother, that she wanted to sell the site now in dispute, sometime in 1997/1998. He advised her against doing so as the site was encumbered as security for a mortgage. When he made inquiries, he discovered that it was the appellant who was the intending purchaser. He approached him and informed him that he could not buy bonded property. However, in 2000, he was dismayed to discover that the appellant had taken occupation of the site and had demolished the then existing structures and he had built new structures which he used as a school.

[6] After inquiries, the applicant discovered that the 1st Respondent had fraudulently obtained a Form "C", which was backdated to September 1997, TVM 6, which had never been registered in terms of the Deeds and Registry Act, 1967.

[7] The 1st respondent exhibited the Form "C" in the name of his brother, Kelly Mahase, issued on the 19th of July, 1969, and a registered Certificate of title executed before the Registrar of Deeds on the 5th of June, 1979. The appellant produced Form "C" in his name dated 3rd June, 1978, and a letter calling for the submission of

a surveyors report dated 8th August, 1991, and a letter in support of his application, dated 19th March, 1994.

Proceedings in the court a quo

[8] It was common cause in the Court a quo after hearing the evidence from both parties that Lillian Manthakoana Mahase, the late mother of the applicant never had any title to the disputed site. The title holder was her late eldest son, Kelly Mahase. Indeed, when Kelly Mahase hypothecated the site to Lesotho Bank in March 1980, it was on the strength of his registered Certificate to occupy, issued pursuant to a Form "C" in his name dated, July 1969.

[9] Lillian executed a surety bond on the hypothecated property as a "surety and co-principal debtor," for the payment of the debt. She then entered into a contract with the Bank that she would be liable as a co-principal debtor for payment of the loan in respect of which the site was hypothecated. The late Kelly Mahase was the principal debtor as he was the title-holder to the land.

[10] The learned Judge went on to say that, Lillian could not in law pass any title to the appellant, as the land belonged to Kelly and not the children, who purportedly consented, such consent was irrelevant. The appellant could claim damages from Lillian's estate not assert to the title, the case of **Shuping v Abuballer**[1] was cited in support of that proposition.

[1] LAC (1985-89) 186 at 189. ET.

[11] Any document of title such as the Form "C" issued in the names of the appellant were not legally valid in that the Form "C" was issued after that issued to Kelly Mahase in 1969. What was brought out in evidence was that the Form "C" in possession of the appellant was issued as if the appellant was the original allottee, whereas Lillian purported to sell the site as the original title allottee. The process followed in issuing the appellant's Form "C" is legally suspect. There is no proof of an application for allocation of the site that was necessary in terms of Section 12 of the Land Act No. 20 OF 1973.

The appellants' case

[12] The upshot of the appellant's case is that, Lillian was from 1972 until 1977, in occupation or in use of the land and therefore the legal owner of the land. Advocate Hlaele relied on section 10(1) of the Land Act, 2010, couched in these terms.

> "Where persons who are married in community of property either under civil, customary or any other law, and irrespective of the date in which the marriage was entered into, any title to the immovable property allocated to or acquired by anyone of them shall be deemed to be allocated to or acquired by both partners, and any title to such property shall be held jointly by both."

The position is retrospective, so it was submitted.

[13] In the second ground, the learned Judge was faulted for ordering eviction, basing his decision on the evidence or belief that Kelly Mahase had a Form "C" dated 1969. Such a finding was erroneous, because, Kelly asked his mother between 1979 and 1980 to lend him

the site to use a security for a loan. If he was the holder of a Form "C" in 1969, he could not have asked his mother to lend him the site in 1979-1980.

[14] the registered certificate of title to occupy and the certificate of registered title to immovable property in favour of Kelly Mahase, discloses the dates of the 5th of June 1979, as at 1979, a new land Act, had been promulgated and as such, the forms used would not be as the 1973 format.

[15] The fact that the applicant's father was alive and the title deed bear a different date, the logical and legal conclusion to be drawn from the facts and the evidence ought to have been that Kelly did not own the land. It therefore follows that the rights of the applicant having been hereditary, he could only inherit that which belonged to Kelly.

[16] The learned Judge's finding that influenced his decision to order eviction of the respondent was that, the land was hypothecated and the instrument was registered on the 21st of April, 1980. The Form "C" in possession of the respondent is dated 3rd June, 1978, it logically follows that the allocation to the appellant preceded the Hypothecation. It follows that at the time Lillian executed the surety bond, the land did not belong to her. Consequently, the deed of hypothecation could not have negated the transfer or sale of land, as hypothecation was after the appellant had gotten a Form "C".

[17] The appellant was characterized as a bona fide possessor. He genuinely believed that he was the owner of the land. The case of **Steyen v Lebona**[2] was cited in support of that proposition.

[18] Advocate Hlaele, canvassed for the right of compensation as the appellant was a bona fide possessor. Voet's statement on the subject is stated in these terms:

> "As regards useful expenses, the bon fide possessor recovers that whole of them in so far as the property has in reality been enhanced in value, provided the cost was greater that is the utility or the improvement actually in existence, which most often happens in the case of building, unless these useful expenses are too heavy, and the owner himself would not have incurred them, in which case, he either only removes them so far as he can, or recovers from the owner only so much a she would have had if they had been left to the discretion of the judge, who is directed in this matter to decide each case on its merits, having regard to the persons and circumstances."

[19] The distinction between a *bona fide* possessor and a *mala fide* possessor was made in the case of **Noi Kuleile v Lydia Mohloboli**[3] where Sakoane J, said that, a person who is doubtful as to his rights to possess and fears an adverse claim is not a *bona fide* possessor.

[20] The Judge ought to have held the appellant as a bona fide possessor, entitled to compensation for the buildings erected on the disputed site. The respondent, had an undisturbed occupation nor

[2] CIV/T/143 [1988] LSCA-186.
[3] LC/APN/76/2014.

was he interfered with during the construction phase. He was aided by Lillian, with the provision of water.

The Respondent's case

[21] The respondent valiantly argues that prior to 1978, when the respondent in the court a quo was issued with a From "C" the land belonged to the applicant's parents, Mr. and Mrs. Mahase. Later, the applicant's mother ceded her right to the late Kelly Mahase in June 1979. Kelly used the land as security for a mortgage with Lesotho Bank, with the concurrence of Lillian, which is still in force. The applicable laws were the Land Act 1973 and the Deeds Registry Act, 1967.

[22] Indeed, there is a Form "C" indicating that Kelly was allocated the site on the 7th of July, 1969. The said Form "C" is dated 17th April, 1979, and was issued in terms of section 15(1) of the Land Act, 1973, which provides as follows:

> 15. (1). A chief who makes an allocation of land or grant of an interest or right in or over land to any person shall issue or cause to be issued a certificate which shall-
>
> (a) in the case of land in rural area be substantially in accordance with Form
>
> "C" of the Schedule

[23] Furthermore, section 15(2) of the Deeds Registry Act 1967, provides as follows:

> "Every person or body holding a certificate issued by the proper authority authorizing 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."

It was submitted that Kelly's certificate had never been cancelled pursuant to section 7 (1) of the Deeds Registry Act.

[24] There was no valid sale as the seller Lillian had not transferred or attempted to transfer land to the appellant. Section 16(1) and (2) and (6) of the Deeds Registry Act, 1967 provides as follows:

> 16. (1). Every deed or agreement transferring rights in or to immovable property shall be registered in the deeds registry.
>
> (2). Such registration shall only be effected after the proper authority has consented in writing to the allocation to the transferee of the right to occupy and use the land in which that immovable property is situated, which consent shall not be unreasonably withheld.
>
> (6). Any deed or agreement executed attested or registered contrary to the provisions of this section shall be null and void and of no force and effect.

[25] Lillian would not validly transfer land to the appellant, as the land was already hypothecated, and the hypothecation is still in force. **Section 34 of the Deeds Registry Act** was cited, which is couched in these terms:

> 34. (1). No transfer of mortgaged immovable property shall be attested or executed by the registrar, and no cession of a mortgaged lease or immovable property, or of any mortgaged real right in immovable property,

shall be registered until the bond has been cancelled or the immovable property, lease or right has been released from the operation of the bond with the consent in writing of the holder thereof, or unless, in the case of such mortgaged bonds which has been lost or destroyed, the registrar has an application by the registered holder thereof, cancelled entry in his register in respect of such bond.

[26] The appellant dismally failed to prove that deed of sale and failed to register his title in terms of section 15 of the Deeds Registry Act. He dealt with Lillian, who is those years was considered a perpetual minor, he never applied and got a building permit.

[27] In conclusion, the compensation was not pleaded as there was no counter-claim. Lastly, it was prayed that the appeal be dismissed with costs on attorney and client scale.

[28] **THE ISSUES**

1. There was a virulent attack on the learned Judge's findings of fact;

2. The seller had no title and the property was hypothecated with her consent;

3. The buyer had notice of the encumbrance; and

4. Whether compensation payable in those circumstances?

[29] **CONSIDERATION OF THE APPEAL**

The appellate Court will not interfere with the findings of fact as the trial Court had an opportunity to assess the credibility of the witnesses, save and

except in the following circumstances enunciated by the Zambian Court of Appeal in **Nkata and 4 others v Attorney General**[4].

1. The Judge erred in accepting evidence;

2. The judge erred in assessing and evaluating the evidence, taking into account some matters which he should have ignored or failing to take into account something which he should have considered;

3. The judge did not take proper advantage of having seen and heard the witnesses; and

4. External evidence demonstrates that the Judge erred in assessing the manner and demeanour of the witnesses.

We find no such circumstance to warrant this Court to interfere with the findings of fact, by the trial Court.

[30] The seller cannot give that which she did not have. According to the maxim, *Nemo dat quod non habet* (No one gives what he does not have, no one transfers (a right) that he does not possess. According to this maxim, no one gives a better title to property than he himself possess. A variation of this maxim is *Nemo dat qui non habet* (No one gives who does not have). The 1st respondent having become heir of his brother's estate, who was the title-holder walked in his brother's shoes, subject to undischarged or unredeemed mortgage with the Lesotho Bank. Given the prohibition in section 34(1) of the Deeds Registry Act, 1967, mortgaged property cannot be sold during the currency of the mortgage. For the foregoing, Lillian had no title to the

[4] [1996] ZR 124 CA.

property, as the property had been conveyed to the Bank, until the mortgage was redeemed.

The title- holder was her son and not herself. In this case, the buyer had notice of the mortgage and also the deceased, Kelly's title, which was inherited by the 1st respondent whom this court had declared heir to Kelly's estate. Compensation is payable to an innocent possessor or purchaser of whom the appellant was not. In any event, he did not pedantically and timely comply with the land acquisition and registration regime, whose violation renders the transaction null and void. Section 16(6) of the Deeds Registry Act, is instructive.

Kelly's title which was anchored on Form "C" dated 1969, while the From "C" in the name of the appellant was procured in 1978, almost Nine (9) years later. Kelly was a registered title-holder when the appellant was not.

[31] With the greatest respect to Advocate Hlaele, section 10(1) of the Land Act, 2010, is quoted out of context, as the dispute is not between spouses.

[32] Mosito AJ, as he then was in **Mamoshe Limena v Shalane Shale and Others**[5], following this Court's decision in **Haroon Adulla Mahomed v KPMG Harley and Morris Joint Venture N. O. (Liquidators of Lesotho Bank) and others**[6], in which case, this court adopted the principle expressed in the maxim "*qui prior est tempore, potier est jure*" which translates that one who is prior in time

[5] LC/APN/126/14 [2015] 5.
[6] C OF A (CIV) 24/2013.

has a superior right in law. In other jurisdictions, this is expressed as “the earlier in time, the stronger in law”.

Mosito AJ, went on to cite **Christie**[7], the learned author writes that, it can now be taken as settled law that the possessor of the earlier right is entitled to specific performance, unless the other (later possessor) can show a balance of equities in his favour. The 1st respondent was aware of the applicant’s interest and the Bank’s interest; he therefore did not go to equity with clean hands.

[33] **CONCLUSION**

The appeal is dismissed with costs and it is so ordered

DR. PHILLIP MUSONDA

ACTING COURT OF APPEAL JUDGE

[7] The law of Contract in South Africa, 3rd edition at 582.

I agree

DR. J VAN DER WESTHUIZEN

ACTING COURT OF APPEAL JUDGE

I agree

N.T MTSHIYA AJA

ACTING COURT OF APPEAL JUDGE

FOR THE APPELLANT: **ADVOCATE M.G. HLAELE**

FOR THE RESPONDENTS: **ADVOCATE M.V. KHESUOE**